OPINIONS

OF THE

CORPORATION COUNSEL and ASSISTANTS

JANUARY 1, 1949 to DECEMBER 31, 1953

Compiled and Edited under the Supervision of
JOHN J. MORTIMER
Corporation Counsel

CITY OF CHICAGO
DEPARTMENT OF LAW

VOLUME XXIII

PUBLISHED BY AUTHORITY OF THE CITY COUNCIL

1953

CHAMPLIN-SHEALY COMPANY, CHICAGO

PRINTERS

365

PREFACE

This volume is Number 23 in a series of printed editions of the opinions of the Corporation Counsel and Assistants of the City of Chicago. The series started with the year 1871 and this current volume covers opinions written in the period from January 1, 1949 through December 31, 1953.

Volume 20 of the series contains a cumulative index to all previous volumes. This volume contains a supplemental cumulative index covering Volumes 21, 22 and 23. Thus the index in this volume and that contained in Volume 20 provide a complete guide to all previous opinions of this Department back to 1871.

The opinions themselves cover a wide field of Municipal Law and related subjects. Each one has a history of research and discussion before it reached its final approved form. The amount of research and discussion behind each opinion in this volume is reflected in the end product. The depth and magnitude of the legal work involved in the routine management of a municipal corporation as large as the City of Chicago also becomes apparent.

Appointment to the office of Corporation Counsel is a distinct honor to a member of the legal profession. I have been privileged to serve as Corporation Counsel since 1950 and have therefore been given the opportunity of joining Mayor Martin H. Kennelly and his administration in the dedicated goal of providing the City of Chicago and its citizens with the finest possible government.

To the employees and members of my staff belongs the real credit for the work produced in this volume. Their assignments have not been easy. For their loyalty and industry I extend to them my own grateful appreciation.

JOHN J. MORTIMER,
Corporation Counsel.

December 31, 1953.

TABLE OF CONTENTS

PAGE

PREFACE iii
AUTHORS OF OPINIONS vii
EXPLANATORY NOTES AND DATA viii

SECTION I

Municipal Organization and Intergovermental Relations

CHAPTER I. POWERS AND DUTIES OF CITY COUNCIL AND CITY OFFICERS
- A. City Council 1
- B. Police Department 31
- C. Board of Health 44
- D. Municipal Tuberculosis Sanitarium 57
- E. Other Departments and Offices 89

CHAPTER II. RIGHTS AND DUTIES OF CITY EMPLOYEES
- A. Civil Service 122
- B. Salaries 189

CHAPTER III. ANNUITIES AND BENEFITS FOR CITY EMPLOYEES
- A. Municipal Employees' Annuity and Benefit Fund 202
- B. Firemen's Annuity and Benefit Fund 209
- C. Policemen's Annuity and Benefit Fund 222
- D. Laborer's and Retirement Board Employees' Annuity and Benefit Fund 245
- E. House of Correction Employees' Annuity and Benefit Fund 259
- F. Municipal Court and Law Department Annuity and Benefit Fund 272
- G. Public Library Annuity and Benefit Fund 288

CHAPTER IV. RELATIONS OF CITY WITH OTHER GOVERNMENTS
- A. Chicago Housing Authority 289
- B. Federal Relationships 298
- C. Chicago Park District 316

SECTION II

Police Powers of the City

CHAPTER V. REGULATION OF PUBLIC HEALTH, SAFETY AND WELFARE
- A. Foods and Dairy Products 319
- B. Liquor 349
- C. Weapons 356
- D. Gambling and Lotteries 359
- E. Other Health and Welfare Regulations 377

PAGE

CHAPTER VI. LICENSES AND PERMITS
A. Liquor Licenses 422
B. State Vehicle and Driver's Licenses 445
C. Amusement License and Tax 457
D. Undertaker's Licenses 488
E. Public Vehicle Licenses 500
F. Refund of License and Permit Fees 539
G. Other Licenses and Permits 541

CHAPTER VII. BUILDINGS AND ZONING
A. Buildings 594
B. Frontage Consents 628
C. Zoning 638

CHAPTER VIII. RELIEF AND WELFARE 649

CHAPTER IX. PUBLIC WAYS
A. Dedication and Vacation 660
B. Use of Streets, Alleys and Sidewalks 668
C. Advertising and Handbills 689
D. Traffic and Parking Regulations 696

CHAPTER X. PUBLIC UTILITIES
A. Railroads 722
B. Chicago Transit Authority 728

SECTION III

Management of the Municipal Corporation

CHAPTER XI. FINANCE
A. Appropriations and Taxes 752
B. Management of City Funds 762
C. Judgments and Claims 777
D. Bonds 790

CHAPTER XII. CITY PROPERTY
A. Real Estate 807
B. Waterworks and Sewers 817
C. Taxation of City Property 831

CHAPTER XIII. CONTRACTS
A. Bids and Awards 833
B. Execution and Interpretation 842
C. Purchasing Agent 866

CHAPTER XIV. PUBLIC IMPROVEMENTS
A. Construction 873
B. Airports 882

AUTHORS OF THE OPINIONS

Authors of the opinions recorded in this volume are indicated by their initials. The following is a list of the initials and the corresponding full names arranged in the alphabetical order of the initials.

A. A. P.	A. A. Pantelis
A. F. G.	Al F. Gorman
A. M.	Arthur Magid
B. O'H.	Barrett O'Hara
B. S. A.	Benjamin S. Adamowski
C. B. C.	Charles B. Collins
C. H. L.	Carl H. Lundquist
C. N.	Casper Nathan
C. P. B.	Caryl P. Bonotto
C. P. H.	Charles P. Horan
E. L. W.	Eugene L. Wachowski
E. R. D.	Earle R. Downes
E. R. H.	Edward R. Hartigan
E. W. P.	Edward W. Parlee
F. C. F.	Fred C. Fahndrich
F. P. K.	Frank P. Kennedy
F. T. M.	Francis T. Moran
F. V. M.	Fred V. Maguire
G. D. W.	Gabriel D. Wellner
G. F. M., Jr.	George F. Mulligan, Jr.
G. M. C.	Gerald M. Chapman
H. A. C.	Harry A. Cooper
H. A. I.	Harry A. Iseberg
H. H. P.	Harry H. Pollack
H. S.	Harry Sampson
J. B. P.	James B. Parsons
J. C. M.	John C. Melaniphy
J. D.	Jack DeMichaels
J. E. C.	Joseph E. Carmody
J. F. G.	Joseph F. Grossman
J. F. O.	John F. O'Malley
J. G. O.	John G. O'Donohue
J. G. S.	James G. Skinner
J. J. M.	John J. Mortimer
J. J. S.	John J. Sullivan
J. L. F.	J. Lester Fink
J. L. S.	John L. Steffens
J. W. G.	Joseph W. Grigal
L. A. W.	Louis A. Wexler
L. H. G.	Louis H. Geiman
L. L. K.	L. Louis Karton

L. V. R. .....Leo V. Roeder
M. H. F. .....Martin H. Foss
M. I. W. .....Maynard I. Wishner
M. J. N. .....Maurice J. Nathanson
P. H. C. .....Philip H. Corboy
P. W. D. .....Patrick W. Dunne
R. G. S. .....Robert G. Sampson
R. J. N. .....Robert J. Nolan
R. N. .....Ruth Nelson
S. A. .....Samuel Allen
S. R. D. .....Sydney R. Drebin
W. H. S. .....William H. Sexton
W. J. K. .....William J. Kafka
W. V. L. .....Walter V. Lesak

EXPLANATORY NOTES AND DATA

KEY TO CITATION ABBREVIATIONS

The City Code has been cited as in the following examples:

Code '11: 1541	refers to section 1541 of the *Chicago Code of 1911.*
Code '22: 2063, 2064	refers to sections 2063 and 2064 of the *Chicago Municipal Code of 1922.*
Code '31: 4194	refers to section 4194 of the *Revised Chicago Code of 1931.*
Mun. Code: 25-8	refers to chapter 25, section 8 of the *Municipal Code of Chicago,* adopted on August 30, 1939 and subsequently amended.

The revised Illinois statutes have been cited as in the following examples:

IRS '39, 98: 18	refers to chapter 98, section 18 of the Illinois State Bar Association's *Illinois Revised Statutes of 1939.*
ISBS '37, 24½:12	refers to chapter 24½, section 12 of the Illinois State Bar Association's *Illinois Revised Statutes of 1937.*

Opinions of the Corporation Counsel of Chicago and Assistants have been cited as in the following examples:

Op. Corp. Coun. (1920-23) p. 42	refers to *Opinions of the Corporation Counsel of Chicago and Assistants* rendered from January 1920 to April 1923 inclusive, page 42.
19 Op. Corp. Coun. 409 (No. 9245)	refers to *Opinions of the Corporation Counsel of Chicago and Assistants* volume 19, page 409, opinion number 9245.

* * * * * *

ALR	*American Law Reports.*
Coun. J.	*Journal of the Proceedings of the City Council of Chicago.*
CJ	*Corpus Juris.*
Ill. Laws	*Laws of the State of Illinois.*
Ill. Stat. (Jones Ann.)	*Jones Illinois Statutes Annotated.*
Ill. Stat. Ann. (Smith-Hurd)	*Smith-Hurd Illinois Annotated Statutes.*
Op. Ill. Atty. Gen.	*Opinions of the Attorney General of Illinois.*
Op. Atty. Gen. of US	*Opinions of the Attorney General of the United States.*
RCL	*Ruling Case Law.*
USCA	*United States Code Annotated.*
USHA	*United States Housing Authority.*
US Stat.	*United States Statutes at Large.*

DATA GIVEN WITH REPORTED OPINIONS

Above each opinion reported in this volume there is printed in italics the number of the opinion, the office or officer to whom the opinion was written, the initials of the person who prepared the opinion and the date of the opinion.

When the office or officer to whom the opinion was written is not indicated, the opinion was addressed to a person who was not a municipal official, having public business with the city.

NUMBERING OF OPINIONS

The numbering of opinions is a continuation of the chronological sequence of Volume XXII of the *Opinions of the Corporation Counsel and Assistants;* the arrangement of the opinions is according to their subject matter.

For reference convenience, a table of the opinion numbers with corresponding page numbers is given in this volume at page 889.

SECTION I

MUNICIPAL ORGANIZATION AND INTERGOVERNMENTAL RELATIONS

CHAPTER I—POWERS AND DUTIES OF CITY COUNCIL AND CITY OFFICERS

A. CITY COUNCIL

LAKE FRONT ORDINANCE

(No. 11107—I—Alderman, 5th Ward—J. F. G.—April 2, 1948.)

Reference is made to your letter of March 8, 1948 requesting our advice as to the present legal obligation of the Illinois Central and the Michigan Central railroad companies to construct the north half of the E. Randolph Street viaduct; also, if the companies are now obligated to do this construction will it "interfere in any legal way with the execution of other portions of relevant ordinances, or with decisions of other public bodies with reference to the location of the proposed passenger terminal, electrification or Dieselization of certain types of services, and so forth."

At the outset, we are not aware of any official decisions of public bodies upon the subject matter of your inquiry except such as are covered by the so-called Lake Front Improvement Ordinance. This consists of:

Original ordinance passed July 21, 1919 (C. J. 969-1001)

Amendatory ordinance passed January 14, 1920 (C. J. 1838)

Amendatory ordinance passed February 5, 1920 (C. J. 1922-1924)

Amendatory ordinance passed October 24, 1929 (C. J. 1321-1350)

Amendatory ordinance passed November 26, 1935 (C. J. 915-916)

Amendatory ordinance passed February 7, 1940 (C. J. 1809)

Amendatory ordinance passed March 25, 1942 (C. J. 6849-6850)

The original ordinance and each of the amendments were accepted by the South Park Commissioners, or its successor Chicago Park District, and by all of the railroads involved pursuant to authority of the Public Utilities Commission of the State of Illinois, or its successor Illinois Commerce Commission. The ordinances, together with the acceptances, constitute a contract between all the parties involved.

The subject matter of the construction of the E. Randolph Street viaduct is referred to in Sections 5g and 10 of the original ordinance. Illinois Central and Michigan Central were required to reconstruct an existing viaduct, but if the Park Commissioners proceeded to construct a viaduct south and parallel with the existing viaduct the railroad companies were required to perform their part of the work of reconstruction contemporaneously with the construction work of the Park Commissioners. That part of the viaduct west of the boundary line of the Michigan Central railroad property was to be constructed within the time fixed for the electrification of the suburban service of the Illinois Central railroad, which was seven years from the effective date of the ordinance of 1919.

By the ordinance of October 24, 1929, a new E. Randolph Street viaduct was provided for as a substitute for that provided in the original

ordinance. The width of the new viaduct was fixed at 128 feet, instead of 64 feet, extending from the east curb line of N. Michigan Avenue to Field Boulevard (Section 8). Illinois Central and Michigan Central were to furnish the labor and materials and to pay for the cost of construction of the north half of the viaduct and the Park Commissioners were to assume the obligation of constructing the south half of the viaduct. The entire new viaduct, between N. Michigan Avenue and Field Boulevard, was to be completed within one year after the effective date of the ordinance, but it was provided that if the Park Commissioners desired to commence construction of the south half the railroad companies should construct their corresponding portion at the same time, and the railroad companies had the privilege of constructing the north half without contemporaneous construction of the south half by the Park Commissioners. (Section 9).

By the ordinance of November 26, 1935, the Park Commissioners were authorized to construct the south 58 feet of the south half of the new E. Randolph Street viaduct before January 1, 1938, and were required to construct the remaining portion of the south half of said viaduct (8 feet) at the same time and contemporaneously with the construction of the north half of the viaduct by the railroad companies. The time fixed for the completion of the north half was January 1, 1938 (Section 3). The Park Commissioners completed construction of the south 56 feet of the new viaduct and both the railroad companies and the Park Commissioners have been in default since January 1, 1938 for failure to construct the remaining part of the viaduct.

If Chicago Park District has funds available for construction of eight feet of the south half of the viaduct and are ready and willing to proceed, the railroad companies may be compelled to perform their part of the work at the same time. We have been advised that the estimated cost of an eight foot addition to the viaduct is approximately $200,000.

Article III of the ordinance of 1919 covers the subject of the construction of new stations and terminals at E. Roosevelt Road and E. Randolph Street. Section 8 provides for the construction of a station and office building conforming in general architectural character to the Field Museum at E. Roosevelt Road. Clause (c) of Section 10 provides for the construction and operation of a Randolph Street suburban station without specifications as to the type, size or character of construction. Section 7 grants to Illinois Central and Michigan Central authority to improve, utilize and develop their respective real estate known as the Randolph Street Terminal Property described in Clause (d) of Section 10 (east of Beaubien Court and north of the north line of E. Randolph Street) for other than railroad purposes, to erect buildings not in excess of the height permitted by the zoning ordinances of the city and to construct elevated public streets and walks and private alleys for such development. This is usually referred to as the development of air rights over the railroad property north of E. Randolph Street.

By Section 19 of the ordinance of October 24, 1929, Illinois Central and Michigan Central each have the right and privilege of using the subsurface space under the new E. Randolph Street viaduct adjoining their respective properties to the north for the construction and maintenance of an approach to the Randolph Street Suburban Station, with all accessories suitable to accommodate the proper operation of a railroad passenger station and the traveling public.

We have found no provision for the location of a passenger terminal at E. Randolph Street other than the suburban passenger station. If at any time any other passenger terminal is contemplated, provision will have to be made for approach thereto from the new E. Randolph Street viaduct. Our study fails to disclose that the immediate construction of the new viaduct will legally impair or interfere with the future location of such terminal at E. Randolph Street.

Article V of the ordinance of 1919 relates to electrification of railroads. Section 14 fixes the time and plan of electrification by Illinois Central as follows:

The entire suburban service within seven years;

The entire freight service north of E. Roosevelt Road within ten years;

The entire freight service south of E. Roosevelt Road to the city limits within fifteen years;

The entire through passenger service within twenty years.

Section 15 requires the Michigan Central to coordinate electrical operation of certain of its services within the same time as is required of the Illinois Central. There is, however, a provision for extension of time for electrification of through passenger service of both railroads until such time as other tenant lines, if any, cease operating their through passenger service by steam over the Illinois Central tracks entering the new central passenger station, with this limitation — that no such extension shall be effective beyond a time when the number of through passenger trains operated by steam by the tenant lines is less than 20 percent of the total number of through passenger trains using the station.

Illinois Central's suburban service was electrified within the time provided by the original ordinance. By ordinance passed February 7, 1940 (C. J. 1809) the time for electrification of the through passenger service was extended to February 20, 1941. By ordinance passed March 25, 1942 (C. J. 6849) the operation by electric motive power of through passenger service was extended to such time as the city council shall, by ordinance, find that such operation is feasible and practical in light of technological improvements in the art of railroad operation and in regard to economical operation thereof. It was also declared to be the intent of this ordinance that the through passenger service and the entire freight service north and south of E. Roosevelt Road may be operated by Diesel electric power.

Section 33 of the ordinance of 1919 provides that in case of default on the part of railroads to do or complete any of the construction or electrification work the city shall have the option and privilege of itself doing such work and charging the cost plus 10 percent added for superintendence to the railroad companies.

In our view, upon consideration of all of the ordinances herein referred to, each obligation of the railroads is independent of all their other obligations and we have no reason to conclude that the completion of the E. Randolph Street viaduct by Chicago Park District, Illinois Central Railroad Company and Michigan Central Railroad Company will in any way affect any other obligation under the Lake Front Improvement ordinances.

APPROVAL OF BOARD OF EDUCATION BUDGET

(No. 11115—Alderman, 50th Ward—A. F. G.—January 14, 1949.)

In your letter of January 10, 1949 you refer to some statements incorporated in a document issued by the Citizens School Committee over the signature of its president, Dr. John A. Lapp, copy of which is attached to your letter.

You quote certain excerpts from the document and request our views as to the correctness of the statements. The first excerpt is:

"The City Council is not authorized to approve or disapprove the budget."

The authority of the Board of Education to adopt a budget and make appropriations for school purposes are found in sections 34-46 to 34-55 of the School Code. Section 34-47 is as follows:

"34-47. Adoption of budget and resolution.)
The board shall, within the first sixty days of each fiscal year, adopt a budget and pass a resolution to be termed the "annual school budget", hereinafter called the "budget", in and by which the board, subject to the limitations hereinafter contained, shall appropriate such sums of money as may be required to defray all of its necessary expenses and liabilities to be paid or incurred during the fiscal year." Section 34-16 of the same Act provides:

"No power vested in the board or in any of its officers, agents or employees shall be exercised by the city council."

The power to adopt a budget having been expressly granted to the board by section 34-47, and the city council having been expressly prohibited from exercising any power vested in the board, it follows the city council has no authority to approve or disapprove the school budget.

Your second quotation is "The City Council is performing a ministerial act." Webster defines the word "ministerial" as, "designating, or pertaining to, the act that a person performs in a given state of facts in a prescribed manner, in obedience to the mandate of legal authority without regard to, or without the exercise of his own judgment upon the propriety of the act done; — opposed to judicial. Acting or active as an agent, instrument or means."

Section 34-59 of the School Code, contains this language "This article does not authorize the board to levy or collect any tax, but the city council shall, upon the demand and under the direction of the board, annually levy all school taxes."

This duty is purely ministerial under the definition above cited. The council is given no discretion nor exercises any judgment in the matter, but performs the duty in a prescribed manner and in obedience to the legislative mandate.

The next excerpt referred to is: "Members of the City Council are free to disclaim responsibility"; As the school law makes it the sole duty of the board to pass the annual budget within the statutory limits, and the city council is expressly prohibited from exercising any power vested in the board, the members of the city council can very properly disclaim responsibility for a budget it had no voice in making nor any power to amend. The sole duty of the city council is the ministerial act of levying a tax in the amount fixed by the board in the annual budget.

The last statement is: "The Council could refuse to levy a tax which exceeds the authorization by state law." Section 34-57 of the school code fixes the maximum rate of taxes which may be levied for the various school purposes. If the board were to present to the council a budget which would require a tax levy in excess of that prescribed by law, we are of the opinion the city council could refuse to levy such illegal tax. No body, not even the legislature with its almost unlimited power, could require the city council to levy a tax expressly prohibited by law.

PROHIBITING SALE OF AUTOMOBILES ON SUNDAYS

(No. 11136—Finance Committee—B. S. A.—April 5, 1949.)

Your communication of April 5, 1949, to which you attached copy of an ordinance prohibiting buying, bartering, selling or exchanging new or used automobiles on Sunday with certain limitations therein contained, has been examined to determine whether the city has power to enact such an ordinance.

On October 4, 1937 our office forwarded an opinion to the Committee on Judiciary and State Legislation of the City Council which appears in Volume XIX page 85, Opinions of the Corporation Counsel. Study of the opinion indicates that an identical ordinance was then under consideration. We gave as our opinion that such an ordinance would be invalid, citing *McPherson* v. *Village of Chebanse,* 114 Ill. 46, *City of Clinton* v. *Wilson,* 257 Ill. 580, *City of Springfield* v. *Richter,* 257 Ill. 578, *Eden* v. *People,* 161 Ill. 296 and *City of Marengo* v. *Rowland,* 263 Ill. 531, which cases hold that, while the city has general police power to enact an ordinance prohibiting anyone from engaging in the business of vending goods, wares and merchandise on Sunday, it has no power to single out one class of labor harmless in itself and prohibit its operation. We there concluded that there was no substantial difference between the business done by automobile salesmen and that done by the sellers of any other kinds of property.

There has been no change in the power of the City Council since that time and it is our opinion that the ordinance submitted by you is invalid.

FEDERAL HOUSING FUNDS

(No. 11190—Chicago Plan Commission—J. F. G.—October 19, 1949.)

By your letter of July 28, 1949 our opinion was requested with respect to the disbursement of funds under Title III of the Housing Act of 1949 passed by Congress, the supervisory powers of the City Council over the activities of Chicago Housing Authority, the limitations upon the borrowing power of Chicago Housing Authority, and the obligations of the Federal Government in connection with bonds or other forms of indebtedness issued by Chicago Housing Authority.

We regret that prior commitments have engaged our attention to prevent study of this subject matter in time for an earlier reply.

1. Title III of the Housing Act of 1949 is an amendment to the United States Housing Act of 1937, which grants authority to the Public Housing Administration to engage in financial transactions such as loans, annual contributions, and capital grants to State and local governmental agencies for low rent public housing. Section 1406 of the 1937 Act, which is applicable to the 1949 amendment, provides that vouchers approved by the Public Housing Commissioner in connection with such financial transactions shall be final and conclusive upon all officers of the government subject, however, to audit under the direction of the Comptroller General.

2. Your question as to the supervisory powers of the City Council over the activities of Chicago Housing Authority is answered in our opinion to Alderman Merriam dated November 19, 1947, copy of which is enclosed for your examination. Since the rendition of that opinion the General Assembly of Illinois amended Section 8 of the Housing Authority Act by

eliminating the provision that the annual budget of the Housing Authority shall be approved by the City Council. The amendment was passed to reconcile conflicting provisions in the Housing Authority Act referred to in our opinion. However, further comment in regard to the relationship between the City Council and Chicago Housing Authority is necessary since the enactment of the Housing Act of 1949 by Congress.

Under Title I of the Housing Act of 1949, slum clearance, community development and redevelopment project plans must be approved, on the basis of preliminary findings, by the governing body of the locality involved before federal aid may be granted. Under Title III of the Act it is provided that the Administration shall not make any contract with a local public housing agency for preliminary loans for surveys and planning in respect to any law rent housing project unless the local governing body has approved the application for such preliminary loans. The Administration cannot make contracts for loans other than of a preliminary nature or for annual contributions unless the local governing body has entered into an agreement with the local public housing agency providing for local cooperation as required by the Administration.

In our opinion the City Council is the local governing body which is required to express by resolution its findings and approval of project plans proposed by any public agency, under Title I, to express by resolution its approval of any application by Chicago Housing Authority for a preliminary loan under Title III, and to enter into an agreement with Chicago Housing Authority for local cooperation as required by the federal Public Housing Administration before federal aid may be granted for any low rent housing project.

3. Housing Authorities have power to borrow money on their bonds, notes, debentures or other evidences of indebtedness and to secure the same by pledge of revenue, or in any other manner. There is no limit in the amount that each Authority may borrow except as dictated by the practical consideration of its ability to pay such indebtedness from its funds and properties. *Krause* v. *Peoria Housing Authority,* 370 Ill. 356, 370.

4. The Federal Government does not assume any obligation in connection with bonds or other forms of indebtedness issued by Chicago Housing Authority excepting:

(a) If at any time during the life of a federal loan contract for slum clearance, community development or redevelopment, under Title I, the Housing Authority can obtain loan funds from sources other than the Federal Government at interest rates lower than provided in the federal loan contract it may do so with the consent of the Housing and Home Finance Administrator without waiving or surrendering any rights to loan funds under the federal loan contract for the remainder of the life of that contract, and in such case the Administrator is authorized to consent to a pledge by the Housing Authority of the federal loan contract as security for the repayment of the loan funds obtained from such other sources;

(b) Whenever a contract has been entered into by the United States Government for annual contributions to the Housing Authority in connection with low rent public housing projects, under Title III, which includes provision that in case of default in the performance of its contract the Housing Authority shall be obligated to convey or deliver possession of the housing project to the federal authority and the stipulated annual contributions have been pledged by the Housing Authority as security for the payment of its indebtedness, the federal authority shall continue to make such annual contributions for the project so long as any of the Housing Authority's obligations remain outstanding.

We believe that for your purposes the foregoing is a fair summary of the Federal and State legislation governing the subject matter. If and as you should submit to us a proposed specific transaction we shall give consideration to the requirements in detail of the applicable statutory and contractual provisions.

OGDEN GAS COMPANY OPTION

(No. 11226—Mayor—J. F. G.—December 20, 1949.)

You have referred to us a request from Peoples Gas Light & Coke Company which, for brevity, we shall hereafter call the "Peoples Company", to determine whether the City has relinquished its right to purchase the public utility properties of Universal Gas Company and of Ogden Gas Company, respectively referred to in this letter as "Universal" and "Ogden".

Universal acquired the right to construct, maintain and operate gas works within the city of Chicago by franchise ordinance passed July 23, 1894 and accepted August 22, 1894 (Hoover's Special Ordinances, p. 299). Ogden acquired rights similar to Universal by franchise ordinance passed February 25, 1895 and accepted March 4, 1895 (Hoover's Special Ordinances, p. 234). Each of said ordinances was for a term of fifty years and provided, "that at the end of said term of fifty years from and after the acceptance of this ordinance, the said City of Chicago shall have the right to purchase the entire plant of the said company, and all its property and effects of every kind and description within said City of Chicago, at an appraised value which shall be ascertained and determined by three competent and disinterested appraisers, * * *" (Universal Ordinance, Sec. 13, Ogden Ordinance, Sec. 14).

The Peoples Company owns all of the stock of Universal and Ogden. All of the property of Universal and Ogden was leased to the Peoples Company in 1907 for the duration of the respective franchise ordinances which expired July 1, 1944 and March 4, 1945. The leased property was integrated with the property of the Peoples Company for use in the production and distribution of gas in the city of Chicago. It is now the desire of the Peoples Company to acquire the property of Universal and Ogden, to dissolve the Universal and Ogden corporations, and to eliminate accounting and corporate organization expenses, which ultimately must inure to the benefit of the consumers of gas in the city.

Whether the City had the legal right to purchase the public utility properties of Universal and Ogden at the end of the term of their respective franchise ordinances, or within a reasonable time thereafter, is a question which it is unnecessary to resolve in the light of existing facts.

We have been informed that at the present time Universal has title to 4.10 acres of vacant land located on the Chicago River at Archer avenue and 31st street, formerly occupied by a gas producing plant known as Pitney Court station. It also has 5.7 miles of mains extending from the location of the Pitney Court station east and south to Cottage Grove avenue and 40th street. Ogden has title to 3.8 acres adjacent to the Chicago River a short distance north of Goose Island. That parcel of land was the site of the Willow Street gas producing plant, and there is still a gas holder of 2,400,000 cu. ft. capacity on that land. Ogden also has sixty-six miles of gas mains extending from the location of the Willow Street plant south to Chicago avenue and north to the vicinity of Irving Park Boulevard. The aggregate mileage of gas mains held in the names of

Universal and Ogden is approximately 72 miles compared with total mileage of gas mains in the city owned by the Peoples Company of 3,555 miles.

For many years both Pitney Court station and Willow Street plant were obsolete water gas plants maintained by the Peoples Company as stand-by plants to be used in case of emergency. Our information from the Peoples Company which is supported by sworn testimony in the gas rate case of 1931 and 1932 indicates that neither plant has been used for manufacturing gas since 1921. The annual reports of Universal and Ogden to the Illinois Commerce Commission for the year 1936 show that those plants were abandoned and the cost thereof was written off the books of the companies.

Since 1931 the Peoples Company has supplied the City of Chicago with mixed gas of approximately 800 B.T.U. per cu. ft., which, in the early years of that operation, consisted of 55 per cent by volume of natural gas drawn from Texas and transmitted to the Chicago area by pipe line. Forty-five per cent by volume was manufactured gas produced in the main at the Crawford avenue coke oven plant of the Peoples Company. At present the percentage of natural gas supplied to Chicago is 65 per cent.

The Peoples Company was organized by special act of the Illinois State legislature passed February 12, 1855, as amended by special act of February 7, 1865, and is now a consolidation of a number of gas companies incorporated to do business in the city of Chicago or in one or more of the Chicago suburbs now part of the city. The original State charter of the Peoples Company authorized it to manufacture and sell illuminating gas in the city and "with the consent of the common council of said city, to lay down and use all necessary pipes for the conducting of gas in and along any of the streets, alleys, avenues or public squares of said city." On August 30, 1858 the City Council passed an ordinance granting permission and authority to the Peoples Company without any time limitation "to lay their gas mains, pipes, feeders and service pipes in any of the streets, alleys, avenues, highways, public parks or squares throughout said city, subject at all times, however, to the resolutions and ordinances of the Common Council of said city."

By virtue of its State charter and said license or permit ordinance the Peoples Company claims perpetual rights to manufacture and sell gas in the city and to use any of the public ways of the city for its gas distribution system. Without conceding the claim of the Peoples Company to perpetual and irrevocable rights in the streets and other public ways of the city the facts are that upon the expiration of the Universal and Ogden franchise ordinances the Peoples Company was the only public utility furnishing illuminating and fuel [1] gas to the inhabitants of the city and that it has continued such operations to the present time, with the consent and permission of the City by authority of the State which has never been revoked by State legislation.[2]

As heretofore indicated, Universal and Ogden constructed their respective plants and distribution systems in separate sections of the city and each was operated independently until their properties were leased to the Peoples Company by authority of an ordinance passed February 14, 1906

---

[1] By the Gas Consolidation Act of Illinois, approved June 5, 1897, all gas companies authorized to manufacture and distribute illuminating gas have power to manufacture and distribute gas for fuel purposes and to distribute natural gas. (Ill. Rev. Stat. 1947, p. 958; held valid, *The People* v. *Peoples Gas Light Co.*, 205 Ill. 482.)

[2] When the Gas Consolidation Act became effective the Bill of Rights in the Constitution of Illinois provided in part, (Art. II, sec. 14) "No * * * law * * * making any irrevocable grant of special privileges or immunities, shall be passed."

and accepted by the Peoples Company February 26, 1906 (Hoover's Special Ordinance, p. 290). At the present time the total mileage of mains owned by Universal and Ogden is not more than 2 per cent of the total mileage of the Peoples gas mains in Chicago.

Without a source of supply of gas it would have been futile, if not sheer folly, for the City to purchase a gas holder, some vacant land, and gas mains within limited areas of the city. Had Universal's Pitney Court station and Ogden's Willow Street plant been maintained in good order and condition for the manufacture of gas, as was the duty of Universal and Ogden under their franchise ordinances until their expiration, the City certainly would not have ventured to compete with the Peoples Company in the limited areas of the Universal and Ogden operations with obsolete manufacturing plants such as the Pitney Court and Willow Street water gas plants.

Besides, since the year 1913 the right of the City to purchase the plants and distribution systems at the expiration of the Universal and Ogden franchise ordinances became unavailable until the City complied with the Municipal Ownership Act incorporated in Article 49 of the Revised Cities and Villages Act of 1941. Under that law no municipality can proceed to acquire a public utility until an ordinance providing therefor has been passed and submitted to the electors of the City and approved by a majority of those voting thereon. And, having so acquired the public utility no municipality may operate any public utility for the use or benefit of private consumers unless the proposition to operate has first been submitted to the electors of the municipality and approved by a majority of those voting thereon. These provisions are controlling notwithstanding the contractual obligations of Universal and Ogden to sell, at the option of the City, under the franchise ordinances of 1894 and 1895.

With knowledge of the foregoing facts failure of the City to take any steps since abandonment of the use of Pitney Court station and the Willow Street plant in preparation for the ultimate purchase of the Universal and Ogden properties at the end of the term of their franchise ordinances, or within a reasonable time thereafter, must now be treated as a deliberate relinquishment of all rights under the City's options to purchase the properties.

FIXED BRIDGES ON NORTH BRANCH

(No. 11235—Committee on Harbors—C. B. C.—January 13, 1950.)

We are advised by resolution recently adopted by the City Council that the Committee on harbors, wharves and bridges has gone on record in favor of the establishment of a policy for fixed bridges in the North branch of the Chicago River, North of North Avenue and that the Corporation Counsel is in said resolution directed to examine into the legal aspect of said proposed policy with a view to procedures which will safeguard the City's interest and permit the Committee recommendations to be exercised in the future.

We are also advised by said resolution that it is now the recommendation of the War Department that future traffic on said portion of the North branch of the river be handled by barges and for that purpose, it has adopted for federal maintenance a project depth of 9 feet whereas the continuation of the movable bridge policy would demand the restoration of the 21 foot project depth required for masted vessel traffic and the

expenditure of large sums of public monies in dredging which would entail further guarantees on the part of the City in the matter of safeguarding existing docks and other structures as well as the river banks.

We assume from the resolution and the reference to the recommendation of the Secretary of War referred to therein that the fixed bridges intended to be constructed will permit the free passage thereunder of barges, excluding the passage of lake vessels and masted boats whose masts are not movable.

In considering the adoption by the City of a policy for the construction of fixed bridges in the North branch of the Chicago River the first question to be definitely determined is, "Has the City of Chicago the power or authority to construct or erect fixed bridges in the area in question?"

All navigable waters in the United States by virtue of the commerce clause in the Constitution are under the control of Congress which has power to legislate in regard thereto as far as commerce is concerned. This power is supreme within its appropriate sphere and when and to the extent exercised by Congress is exclusive of State authority. It is for Congress to determine when and to what extent it shall be brought into activity and it may be exercised through general or special laws. (45 C. J. 419)

Subject to the paramount authority of Congress over commerce and the navigable waters of the United States and to private property rights, the State of Illinois has full power to legislate concerning the use of navigable waters which are within the territorial limits of the State.

The City of Chicago insofar as the construction or erection of bridges over navigable waters is concerned, has only such power as is conferred upon it by the State. By paragraph 1 of Section 27-2 of the Revised Cities and Villages Act power and authority is granted to the City to build or acquire by purchase, lease, gift or condemnation * * * ferries and bridges, the necessary land therefor and the approaches thereto whenever the ferry, bridge, land or approaches are within the corporate limits * * *.

The State also, by an act of the legislature of the State of Illinois entitled "An Act Giving the Assent of the State of Illinois to the Construction of Bridges Across Navigable Rivers in this State and Upon the Boundaries thereof" as amended (Par. 192, Chap. 121, Ill. Rev. Stats. 1949) has assented to the erection by the City of Chicago of bridges across the Chicago River whenever authorized by the Congress of the United States under such conditions and restrictions as Congress may impose. Neither of these statutory provisions authorize or empower the City to erect or construct fixed bridges over the Chicago River unless authorized to do so by Congress.

Congress in Section 9 of the Rivers and Harbors Appropriation Act of 1899 (Title 33 USCA, Chapter 9, 401) has declared,

> "It shall not be lawful to construct or commence the construction of any bridge, dam, dike, or causeway over or in any port, roadstead, haven, harbor, canal, navigable river, or other navigable water of the United States until the consent of Congress to the building of such structures shall have been obtained and until the plans for the same shall have been submitted to and approved by the Chief of Engineers and by the Secretary of War: *Provided,* That such structures may be built under authority of the legislature of a State across rivers and other waterways the navigable portions of which lie wholly within the limits of a single State, provided the location and plans thereof are submitted to and approved by the Chief of Engineers and by the Secretary of War before construction is commenced: *And provided further,* That when plans for any bridge or other structure have been approved by the Chief of Engineers and by the Secretary of War, it shall not be lawful to deviate from such plans either before or after completion of the structure unless the modification of said plans has

previously been submitted to and received the approval of the Chief of Engineers and of the Secretary of War. (Mar. 3, 1899, c. 425 Sec. 9, 30 Stat. 1151.)"

The first step, therefore, in establishing any procedure for fixed bridges in the proposed area would be the submission of the location and plans of the proposed bridge to the Chief of Engineers and the Secretary of the Army (who is now substituted for the Secretary of War in these matters) for approval before construction is commenced and request the issuance of a permit by the Secretary of the Army.

In the event the plans for fixed bridges are approved and the Secretary of the Army issues permits for same, the next question for determination is the liability of the City, if any, to those who may suffer an injury by reason of the erection of said bridges.

These possible claimants would include: (1) owners of ships which by reason of their size would be excluded from the use of the portion of the river North of the proposed bridges; (2) shippers of goods and merchandise making use of the ships aforesaid; (3) owners of lands on the banks of the portion of the Chicago River North of the proposed fixed bridges.

It is a well settled proposition that Congress has complete dominion over the navigable waters of the United States whether wholly within the boundaries of a State or otherwise and has authority to undertake and prosecute such work as may be thought necessary to improve their navigability. This authority includes the power to obstruct and when Congress gives its consent to the creation of an obstruction to navigation, it ceases to be a nuisance and the courts are powerless to interfere. *Sewel* v. *Arundel Corporation,* 20 Fed. (2d. 503); *Wisconsin* v. *Duluth,* 96 U. S. 379.

We are therefore of the opinion that fixed bridges over the Chicago River when erected with the consent of the State and under a permit issued by the Secretary of the Army and in conformity with plans approved by the Chief of Engineers and the Secretary of the Army are lawful structures and ship owners who may be injured by the erection of said bridges cannot maintain an action for damages against the City. *Chicago Transportation Co., et al.,* v. *Pennsylvania Co., et al.,* 246 Fed. 190; *Wilmington Railway Bridge Co., et al.,* v. *Franco Ottoman Shipping Co., LTD. et al.,* 259, 166.

As to shippers who ship goods and merchandise by ships excluded from the portion of the River North of the proposed fixed bridges, their right to ship such goods and merchandise by River transportation is not a private right but is a public right which they are entitled to only in common with the whole public. The damages resulting to them may be greater in degree, but are not different in kind from those suffered by other persons who may desire to ship goods in the same manner. We are of the opinion that they would be unable to show any element of special damage other than that suffered by the general public and would not be entitled to maintain an action for damages against the City. *Davis* v. *City,* 290 Ill. App. 244.

The right of owners of property on the banks of the Chicago River North of the proposed fixed bridges to damages against the City of Chicago, is based on Article 2, Section 13 of the Constitution of Illinois which provides that private property shall not be taken or damaged for public use without compensation. While it has been held by our courts that a recovery may not be had by a property owner for damages to his property unless such damage is different in kind and not merely in degree from that suffered by the general public, we are of the opinion that the exclusion of certain larger types of ships from the use of the portion of the River North of the proposed fixed bridges will physically disturb said properties in their highest and best use which the owners enjoy in

connection with these properties which give them additional values and by reason of such disturbances the owners sustain a special damage to the properties in excess of that sustained by the public generally and they might be entitled to recover such damages from the City. *Rigney* v. *City of Chicago,* 102 Ill. 64; *Davis* v. *City of Chicago,* 290 Ill. App. 244.

We suggest that in formulating a procedure for fixed bridges that before any action be taken for their erection, releases be obtained from the owners of the properties involved and in the event that this cannot be done, that an appropriation be made to pay possible judgments that may be obtained by said property owners so as not to impair the corporate fund.

PUBLICATION OF BUILDING CODE

(No. 11241—City Clerk—R. N.—January 24, 1950.)

You ask whether the ordinance passed by the City Council on December 30, 1949 known as the Revised Building Ordinance requires publication in a newspaper before becoming effective. You state that the ordinance was printed in full in the Journal of Proceedings of the City Council for December 30, 1949, which journal is published by authority of the City Council in accordance with section 5-5 of the Municipal Code of Chicago.

Section 10-3 of the Revised Cities and Villages Act reads, in part:

> "All ordinance of cities and villages imposing any fine, penalty, imprisonment, or forfeiture, * * * shall, (1) be printed in book or pamphlet form, published by authority of the corporate authorities, or (2) be published at least once, within 10 days after passage, in one or more newspapers published in the municipality, * * *
>
> All other ordinances, resolutions, and motions, shall take effect upon their passage unless they otherwise provide."

While the ordinance itself contains no penalty provisions, section 39-1.1 of the Code provides for the imposing of penalties for violation of any of the provisions thereof. The ordinance itself (section 6) recites:

> "This ordinance shall become effective upon its passage and due publication."

For both of these reasons, publication is required under the Statute, which by its terms directs that compliance may be made in either alternative; printing in pamphlet form published by authority of the corporate authorities *or* publishing in one or more newspapers.

Publication in the Journal of Proceedings of the City Council meets the specific requirements of the statute.

TIDELANDS CASE

(No. 11278—J. F. G.—March 29, 1950.)

Reference is made to your letter of February 14, 1950 relating to the so-called "Tidelands Case" decided by the United States Supreme Court June 23, 1947 (*United States* v. *California,* 332 U.S. 19-46; 91 L. ed. 1889). Enclosed with your letter is copy of a statement by John D. McCall of Dallas, Texas to the Water Code Committee on the subject of "Effect of Adverse Decision in Tidelands Case on Inland Water Rights."

There is a general misapprehension of the nature of the case referred to. The term "Tidelands Case" in my opinion is a misnomer. The case did not involve title to submerged lands under "tide waters." It involved a controversy between the United States and the State of California as to the ownership of the three mile belt of land under the ocean seaward of low water mark.

The realistic controversy did not involve so much the legal title to the submerged land as the right to exploit the ocean bottom for oil and other resources deemed essential to the security of the nation. There is no inference in that opinion which denies to the States the ownership of lands covered by tide waters, or by fresh waters in the Great Lakes, with the consequent right to use or dispose of any portion thereof, when that can be done without substantial impairment of the interest of the public in the lands and waters remaining, as that right was established in *Illinois Central Railroad* v. *Illinois,* 146 U.S. 387, 435, 453.

On the contrary, the Supreme Court in its decision of June 23, 1947 distinguished that case from earlier cases holding that the States owned in trust for their people the navigable tide waters between high and low water mark and navigable inland waters. Our own research discloses that the title of the States to such waters and the underlying lands never was considered as absolute as the title to uplands intended for sale or other disposition. "It is a title held in trust for the people of the State that they may enjoy the navigation of the waters, carry on commerce over them, and have liberty of fishing therein freed from the obstruction or interference of private parties." (*Illinois Central Railroad* v. *Illinois, supra,* p. 452.)

The Secretary of the Army, as successor to the Secretary of War, acting under authority conferred by Congress, may assent to the erection of structures, such as wharves, piers, breakwaters, bridges and dams, in navigable waters wholly within the territorial limits of a State which may interfere to a limited extent with navigation, but not without assent of the State. (*Cummings* v. *Chicago,* 188 U.S. 410.)

The statement of Mr. McCall, together with other propaganda to influence Congress in the enactment of legislation is not for the purpose of "depriving the States of title to underwater land," as you say in your letter, but the propaganda is designed to free the States bordering upon the oceans and the Gulf of Mexico from interference by the United States in the exploitation of the oil resources under those waters.

We have been importuned before by the Attorney General of California and others to join with them in the litigation involving the so-called "Tidelands Case" and in sponsoring legislation in Congress to confirm title in the States to submerged lands, but we have always refrained from participating in these activities in the firm belief that the title to tidelands and submerged lands in the Great Lakes, as well as the right to reclaim such lands by authority of the States and Congress or the Secretary of War, is not in jeopardy by the "Tidelands Case."

As to the filtration plant in Lake Michigan, we secured power by State legislation to reclaim submerged land for water purification plants by amendment to Section 49-11 of the Revised Cities & Villages Act (Laws of Illinois 1949, p. 568) and by the terms of that amendment the absolute title in fee simple to the land so reclaimed will become vested in the City of Chicago. We do not anticipate any great difficulty in securing a permit from the Secretary of the Army for such reasonable obstruction to navigation, in the public interest, affecting only the port of Chicago and, if necessary, the Congress can authorize the erection of a filtration plant in Lake Michigan. (*Wisconsin* v. *Illinois,* 278 U.S. 367; 73 L. ed. 426, 432.) However authority or consent from the United States may be obtained, it will create no problem for prospective investors in revenue bonds which may be issued by the City of Chicago for the improvement of its waterworks system since the bonds will not be a lien upon the property but will be payable solely from revenues of the waterworks system.

We appreciate receipt of your communication for our consideration but, as you will note from this, we have given this subject considerable study for a number of years.

LEGISLATIVE INQUIRIES AND SUBPEONA POWERS

(No. 11318—Alderman, 47th Ward—J. F. G.—July 19, 1950.)

We have your letter of March 15, 1950, requesting our opinion on the question whether the City Council has the inherent power (1) to conduct legislative inquiries on matters pertinent to city business; (2) to issue subpoenas to compel the attendance of witnesses and the production of books and records at such hearings; and (3) to compel the testimony of witnesses under oath.

Although some courts in other states have sometimes spoken of inherent powers of municipal corporations, the courts of Illinois are unanimous in their repeated declarations that municipal corporations have no inherent powers. In one of the latest cases upon the subject the Supreme Court of Illinois spoke emphatically as follows:

> "It is well settled that a city, like all other municipal corporations, derives its existence and its powers from the General Assembly; that it possesses no inherent power; that in order to legislate upon, or with reference to, a particular subject or occupation, it must be able to point to the statute which gives it the power to do so; that statutes granting powers to municipal corporations are strictly construed, and any fair or reasonable doubt of the existence of an asserted power is resolved against the municipality which claims the right to exercise it; that the only implied powers which a municipal corporation possesses and can exercise are those which are necessarily incident to powers expressly granted; * * *. (*Fr. Basil's Lodge* v. *City of Chicago,* 393 Ill. 246, p. 252)

(1) *Power to Conduct Hearings, Investigations or Inquiries.*

The only express statutory authority for such hearings are found in Section 73-8 of the Revised Cities and Villages Act relating to public hearings before a committee designated by the City Council to consider amendments to the zoning ordinance and in Section 22-1 of the same act providing for public hearing by the City Council or the Finance Committee before passage of the Annual Appropriation Ordinance.

Section 9-40 of the Revised Cities and Villages Act provides that the City Council shall be the sole judge whether under Section 9-35 aldermen are eligible to their offices, and although not so expressed a hearing or investigation by the City Council or some committee thereof would be necessary in such case. Likewise a hearing or investigaton would be necessary under Secton 23-51 of the same act to establish reasonable rates of compensation for public carriers, such as hackmen, draymen, omnibus drivers, expressmen and others pursuing like occupations.

It can be assumed that the City Council has implied power to conduct investigations and hearings on matters pertinent to all city business from its express statutory powers in the Revised Cities and Villages Act.

23-2) "To control the finances and property of the corporation."

23-5) "To fix the amount, terms, and manner of issuing and revoking licenses."

23-10) "To regulate the use of the streets and other municipal property."

23-98) "To provide by ordinance in regard to the relation between all municipal officers and employees in respect to each other, the municipality, and the people."

23-106) "To pass all ordinances and make all rules and regulations, proper or necessary, to carry into effect the powers granted to municipalities, * * *."

(2) & (3) *Power to Compel Attendance of Witnesses, Production of Books and Records and to Administer Oaths.*

The power to issue subpoenas and compel the testimony of witnesses under oath are usually companion powers when authorized. The statutes of Illinois are replete with specific powers to administer oaths and compel the attendance of witnesses before administrative bodies and the corporate authorities of some municipal corporations. Section 73-3 of the Revised Cities and Villages Act grants such power to the chairman, or in his absence, the acting chairman of the Zoning Board of Appeals. Section 14 of the Civil Service Act relating to cities grants such power to each of the Civil Service Commissioners. Section 12 of Article 3 of the Illinois Liquor Control Act grants such power to the State Liquor Control Commission and Section 8 of Article 7 of the same act grants such powers to the License Appeal Commission of the City of Chicago. The Illinois Commerce Commission, its assistant commissioners and other officers of the commission are given express power to administer oaths, issue subpoenas, compel the attendance and testimony of witnesses and the production of books and papers (Sec. 60 of the Public Utilities Act). Each member of the Chicago Transit Board has power to administer oaths and the secretary by order of the Board may issue subpoenas to compel the attendance of testimony and production of books and papers relevant to investigations and hearings before the Board (Sec. 42 of the Metropolitan Transit Authority Act).

The foregoing are sufficient to indicate that whenever the State legislature provided for hearings and investigations by any public agency which might affect personal or property rights, it was careful to make specific provision for administering oaths, compelling the attendance of witnesses and the production of books and papers. There is even express statutory provision for investigations and hearings before the General Assembly, or any committee thereof (Chap. 63 of the Ill. Rev. Stat. 1949, Sec. 4, et seq.).

Section 9-90 of the Revised Cities and Villages Act empowers the mayor and city clerk "to administer oaths and affirmations upon all lawful occasions," but there is no express provision authorizing the City Council to compel or to provide for compulsory attendance of witnesses or the production of books and records at council or committee proceedings. Under the laws of Illinois such powers are not inherent in the corporate authorities of municipalities and are not implied or incident to any power to investigate or conduct hearings relating to the city's business which is itself implied from express powers delegated to the City Council by the State legislature. All implied or incidental powers of governing bodies created by authority of the State legislature must be based directly upon express powers specifically granted to such bodies by State law, as indicated in the *Fr. Basil's Lodge Case,* from which we have quoted.

Notwithstanding statements by courts in other jurisdictions that the power of inquiry carries with it the power to compel the attendance of witnesses, etc., by the issuance of subpoenas, it will be found upon investigation that in nearly all cases the power referred to is the inherent power of a constitutional legislative assembly and not the power of a subordinate governing body with limited powers under statutory authority. It is a necessary incident to the sovereign power of making laws. *McGrain* v. *Dougherty,* 273 U. S. 135; 71 L. Ed. 580. In cases involving investigative powers of municipalities there were always express warrant for compelling the attendance of witnesses and administering oaths in the statutes of the State.

Conclusions.

We are of the opinion (1) that public hearings and investigations by the council or its committees on matters pertinent to city business are authorized by implication as a necessary incident to express powers delegated by the State legslature, that such hearings and investigations are conducted to secure pertinent information for the council necessary in the consideration of any subject within its corporate functions and to afford citizens the opportunity of giving information to the corporate authorities, expressing their protests, grievances and opinions, in the democratic way, upon any subject under consideration by the council in which such citizens have an interest; (2) that the City Council does not possess the power to issue or to authorize, by ordinance, the issuance of subpoenas to compel the attendance of witnesses or the production of books and records or to compel the testimony of witnesses under oath at any hearing which the City Council, or any committee thereof, is authorized to conduct.

JUNK DEALERS ORDINANCE

(No. 11430—Alderman, 32nd Ward—A. F. G.—October 1, 1951.)

We have your letter of September 20, 1951, to which was attached a letter from the Waste Trade Industry of Chicago in which they ask you to request an opinion of this office as to the feasibility of amending Chapter 143—Junk Dealers and Peddlers, of the Municipal Code of Chicago, the amendment to contain a provision specifically limiting the number of junk yards which might be licensed within the city.

The authority of the city council to legislate with reference to junk yards is found in section 23-94 of the Revised Cities and Villages Act, and is as follows:

"To license, tax, locate and regulate all places of business of dealers in junk, rags and any second-hand article whatsoever. * * *"

Under this grant of power the city council by ordinance may license, tax and regulate junk yards and junk stores and may fix the locations where such yards and stores may or may not be located. It may fix other locations where such businesses may be established with the consent of property owners in the block where the proposed business is to be established. No power is granted to prohibit generally the establishment of such business, nor has the city been given power to limit the number of such establishments.

A city can exercise only such powers as has been expressly granted to it by the State and when exercised must be reasonable and apply uniformly on all citizens.

In an early case an ordinance of the City of Chicago provided, that after a certain date "no distillery, slaughter house, rendering establishment or soap factory shall be erected or put in operation in any building not now used for such purpose" in a certain described area of the city.

In passing on this provision the Supreme Court in *Tugman* v. *City of Chicago,* 78 Ill. 405 (1875) said:

"It will be observed, that the regulation, to enforce which this suit was instituted, prohibits the use and operating of slaughter houses which should be erected after the first day of January, 1872, while those that were erected prior to that time are left perfectly free to be operated as the owners thereof may desire.

If the health or comfort of the city required the prohibition of new slaughter houses within a designated part of the city, the same reason would surely demand that old ones should be discontinued.

If one of the citizens of Chicago is permitted to engage in the business of slaughtering animals in a certain locality, an ordinance which would prevent, under a penalty, another from engaging in the same business, would not only be unreasonable, and, for that reason, void, but its direct tendency would be to create a monopoly, which the law will not tolerate.

The fact that certain persons were engaged in the business within the district designated in the ordinance at the time of its adoption, gave them no right to monopolize the business, nor would such fact authorize the board of health to provide that such persons might continue the avocation, while others should be deprived of a like privilege who should engage in the business at a later perriod.

If the board of health had any power to adopt an ordinance on the subject, the ordinance, to be valid, should not discriminate in favor of any citizen. If it prohibited one from carrying on the business, that prohibition should extend to all, regardless of the time the business may have been commenced."

In a later case, an ordinance of the village of Forest Park prohibited the erection of factories in a certain area of the village, but did not interfere with the operation of factories already established and in operation within the restricted area. In this case the court in *People* v. *Kaul,* 302 Ill. 317 (1922) said:

"Ordinances with provisions substantially similar to those in paragraph 82, which were not intended to apply to a business or enterprise already established but to prohibit the establishment of other similar enterprises in the same territory, have been held invalid. (*Tugman* v. *City of Chicago,* 78 Ill. 405; *City of Cairo* v. *Feuchter,* 159 id. 155; *City of Chicago* v. *Rumpff,* 45 id. 90; *Mayor*

v. *Thorne,* 7 Paige, 261.) In *Meyers* v. *Baker,* 120 Ill. 567, the court considered a proviso to a statute which it was contended discriminated between businesses already established and those that might thereafter attempt to become established. The court cited with approval *Tugman* v. *City of Chicago, supra,* and said the same rule which would control in the construction of an ordinance would apply to an act of the legislature. The cases above referred to, and many others which might be cited, hold an ordinance which prohibits one citizen from conducting a particular kind of business in a certain locality and permits another to engage in the same character of business in the same locality is void."

In view of the foregoing citations, it is our opinion that an ordinance such as suggested by the Waste Trade Industry, which would limit the number of junk yards which might be licensed in the future and still permit existing junk yards to continue to operate, would be held invalid.

REGULATING PEDDLERS

(No. 11436—Alderman, 36th Ward—J. L. S.—October 23, 1951.)

We acknowledge receipt of your letter of August 23, 1951 in which you request an opinion regarding the validity of a proposed ordinance you introduced in the City Council which is now pending before the committee on judiciary and state legislation, and you asked to be advised of other ordinances dealing with peddlers.

Section 1 of the proposed ordinance has been taken verbatim from an ordinance of the City of Alexandria, Louisiana, which was upheld by the Supreme Court of the United States in *Breard* v. *City of Alexandria,* decided June 4, 1951. The Court held (1) that a municipal ordinance prohibiting canvassers or peddlers from calling at private residences unless requested or invited by the occupant to do so does not violate the due process clause of the 14th amendment by imposing an unreasonable restraint on the right to engage in a legitimate occupation; (2) that said ordinance, as applied to persons soliciting orders in interstate commerce, does not unreasonably burden or interfere with such commerce; (3) that said ordinance does not, as applied to solicitors of magazine subscriptions, unconstitutionally abridge freedom of speech and press. Therefore, from a federal constitutional basis, section 1 of your proposed ordinance is sound.

However, the penalty imposed in sections 1 and 2 making violation of said ordinance a misdemeanor is contrary to the law of the State of Illinois. Violation of an ordinance is quasi-criminal and a suit to recover for violation of an ordinance is a civil suit. Ruling Case Law, volume 8, section 4 analyses this problem (p. 53):

> "At common law and independent of statutory enactments, punishments for the violation of municipal ordinances were treated as civil actions, the imprisonment, after the non-compliance with the order of the court imposing the payment of a fine, being looked on not in the light of a punishment, but as a means of compelling a compliance with the order of the court and of enforcing payment, and such is the general view at the present time. Whether or not they are to be so regarded depends to a great extent on whether such offenses are made punishable by the general law as crimes or

misdemeanors. If such violations are not made crimes by the general law the proceedings to enforce or for a violation of such ordinances are *civil in their nature.* If such offenses are made crimes or misdemeanors by the general law of the state, the proceedings must be considered as criminal in their nature."

There are innumerable cases in this jurisdiction which indicate that the court has never considered a proceeding to recover a penalty for the violation of an ordinance a criminal proceeding. The Court in *City of Chicago* v. *Knovel,* (1907) 232 Ill. 112, said (p. 112):

"A proceedings by a city to recover a penalty for violation of an ordinance is not a criminal proceeding but a civil suit."

To the same effect are *City of Chicago* v. *Streeter,* (1910) 152 Ill. App. 463; *City of Chicago* v. *Schreffer,* (1912) 175 Ill. App. 547; *City of Kewanee* v. *Puskar,* (1923) 300 Ill. 167; and *City of Chicago* v. *Terminiello,* (1948) 400 Ill. 23.

It would be well to note regarding an ordinance of this sort, that similar ordinances have been upheld in five states: Colorado, Louisiana, New Mexico, New York and Wyoming. On the other hand, eleven states have held such ordinances invalid: Georgia, Florida, Iowa, Kentucky, Maryland, Nebraska, Oklahoma, South Carolina, Texas, Virginia and New Jersey. No state court, in voiding the ordinance, reached the due process clause, the commerce clause or the first amendment but simply held that such prohibited conduct amounted at most only to a private nuisance and not a public one.

Regarding section 3 of this proposed ordinance, which has also been taken verbatim from the *Alexandria* ordinance, the court in *Breard* v. *Alexandria, supra,* did not touch upon its validity, as the appellant made no point against that ordinance on the ground of invalid classification. However, Chief Justice Vinson with whom Justice Douglas joined in his dissent pointed out that that section of the ordinance did constitute classification.

Regarding your request for advice as to existing ordinances pertaining to peddlers, section 160 of the Municipal Code of Chicago is as follows:

"160-1. The word 'peddler' is hereby defined to mean any individual who, going from place to place shall sell, offer for sale, sell and deliver, barter, or exchange any goods, wares, merchandise, wood, oil, fish, fruits, vegetables, or country produce from a vehicle or otherwise.

160-2. For the purpose of this chapter peddlers are divided into three classes as follows:

Class I. *Wagon or cart peddlers.* This class shall include peddlers selling from wagons, pushcarts, handcarts, or other vehicles who handle commodities other than wood.

Class II. *Pack or basket peddlers.* This class shall include peddlers selling and delivering only from packs, baskets, or similar containers.

Class III. *Wagon or cart peddlers selling wood only.* This class shall include peddlers who sell wood only from wagons, pushcarts, handcarts, or other vehicles.

160-3. It shall be unlawful for any person to engage in the business of a peddler without a license so to do; provided, however, that the classes of peddlers specifically defined and licensed by other chapters of this code shall be exempt from the provisions of this chapter.

Any person violating this section shall be fined not less than one dollar nor more than fifty dollars for each offense.

160-4. Every individual who desires a license as a peddler shall make application therefor in conformity with the general requirements of this code relating to applications for licenses, and shall state whether the applicant desires to be licensed as a class I, class II, or class III peddler. Such application shall also state in what commodity or article of merchandise such peddler desires or intends to deal.

160-5. Each applicant for a class I peddler's license who desires to engage in the business of peddling oil, solely, shall so state in his application, and shall specify the number of vehicles he desires or intends to employ in and about such business, and such application shall be accompanied by a certificate from the commissioner of public works certifying that each vehicle to be used by such oil peddler in and about his business is equipped and provided with drip-pans or other devices which will effectually prevent the spilling or dripping upon the pavement or street of any of the oil or products thereof to be conveyed in such vehicle, and that such drip-pans or other devices are of a type approved by the said commissioner.

The issuance of a license authorizing an individual to engage in the business of peddling oil shall not be construed as authorizing such individual to conduct or operate a filling station or engage in the business of fuel oil dealer without obtaining licenses therefor.

Vehicles used for conveying oil or other flammable liquids shall not be used for the conveying of ice or any article of food or food products.

160-6. The annual fee for a class I peddler's license shall be twenty-five dollars for each vehicle.

The annual fee for a class II peddler's license shall be fifteen dollars.

The annual fee for a class III peddler's license shall be twelve dollars for each vehicle.

160-7. Peddlers' licenses under class I and class II as defined in this chapter shall be issued for semi-annual periods beginning respectively on the first days of January and July of each year, and no such licenses shall be issued except for the full license period and for the full license fee; provided, however, that licenses to peddle oil and other flammable liquids from a vehicle under class I shall be issued for an annual period beginning on the first day of January of each year.

Peddlers' licenses under class III as defined in this chapter shall be issued for an annual period beginning on the first day of January of each year.

No license shall be issued under this chapter except for the full license period and the full license fee.

160-8. Every wagon, cart, or other vehicle used by a licensed peddler in or about his business shall have the name of the owner and his address plainly, distinctly, and legibly painted in letters and figures at least two inches in height in a conspicuous place on the outside of each side of every such wagon, cart, or other vehicle, and such name and address shall be kept so painted plainly and distinctly at all times while such wagon, cart, or other vehicle is in use during the continuance of the license covering the use of such wagon, cart, or other vehicle.

160-9. Every peddler whose license entitles him to use a wagon, motor vehicle, handcart, pushcart, or other vehicle shall obtain from the city clerk, at the time his license is issued, a metal plate or other suitable emblem for each such vehicle to be used by him in or about his business. Such plate or emblem shall have stamped or imprinted thereon the words "Chicago Wagon or Cart Peddler", "Chicago Oil Peddler", "Chicago Pack or Basket Peddler", or "Chicago Wood Peddler", as the case may be. Such plate or emblem shall be of a different color and design for every license period and shall have stamped thereon a number corresponding to the number of such peddler's license.

160-10. Every individual having a license as a peddler, while engaged in the business of peddling, shall wear conspicuously on the outside of his outside coat a metal badge or shield. If such peddler be licensed to peddle from a wagon, pushcart, or other like vehicle, the badge to be worn by him shall have stamped thereon the words "Wagon or Cart Peddlers." If such peddler be licensed as a pack or basket peddler, such badge shall have stamped thereon the words "Pack or Basket Peddler." If such peddler be licensed as an oil peddler or as a wood peddler, solely, such badge shall have stamped thereon the words "Oil Peddler" or "Wood Peddler", as the case may be.

160-11. Upon each wagon or other vehicle drawn or propelled by animal or mehcanical power, licensed under the provisions of this chapter, there shall be permitted but one helper or assistant to the driver or operator of such wagon or vehicle.

160-12. No one shall peddle any article or thing on Sundays in the city, under a penalty of not less than five dollars nor more than fifty dollars for each offense.

160-13. No one having a peddler's license shall peddle any merchandise or any other article or thing whatsoever, at any time, within districts which have been or shall be hereafter so designated by the city council*.

160-13.1. No person licensed hereunder shall have the privilege of peddling flowers, growing plants, or floral bouquets or designs.

160-14. Any peddler who shall be guilty of any fraud, cheat, misrepresentation, or imposition, or who shall violate any of the provisions of this chapter, shall be fined not less than five dollars nor more than two hundred dollars for each offense, where no other penalty is provided in this chapter."

In addition to section 160 there are sections 141, 142 and 143 which deal with itinerant merchants, wholesale produce dealers, and junk dealers and peddlers.

* Ordinances specifying such districts are on file with the city clerk.

CHICAGO PORT AUTHORITY

(No. 11451—Committee on Harbors—J. D. M.—November 26, 1951.)

Your letter of October 19, 1951, requests our opinion as to whether or not the City should issue a permit to the Calumet Boat and Gun Club and to the Edison Company for the installation of electric light poles to

service said Club. You also request our opinion as to what effect the creation of the Chicago Port Authority has on the City of Chicago's title in and to the riparian lands surrounding Lake Calumet.

The City's title to the riparian lands surrounding Lake Calumet is the outgrowth of fifteen individual boundary line suits, all filed in the Circuit Court of Cook County and all of which were disposed of by the entry of a decree in 1925. In the boundary line suits a permanent boundary was established around Lake Calumet, the middle line of said boundary being the middle line of Doty Avenue on the west and Stony Island Avenue on the east and south. All of the land which lies seaward of said permanent boundary line was deeded to the City by different owners and occupants of said land except for three exceptions, which were exhaustively covered in the opinion of this office written by James G. Skinner, addressed to the Commissioner of Public Works and dated July 18, 1931. This opinion may be found in Volume 18, Opinions Corporation Counsel, No. 7017, page 696. The exceptions noted in that opinion have no effect on the use of the land being made by squatters and the Calumet Boat and Gun Club which lie on the west side and south side of Lake Calumet.

There is available a survey of the west and south side of Lake Calumet made by our City Engineering Department which shows in detail all of the squatters who are now along the west side of Lake Calumet. All of the people occupying space on the west side of Lake Calumet are definitely within the permanent line established and therefore on City property. Each and every one of them attorned to the City of Chicago on the basis of $10.00 per year for several years prior to 1949, at which time the City Real Estate Department served notice on each of the tenants that their leases were terminated. It is our understanding that none of the squatters have attorned to the City in any manner since the serving of the notices. The Calumet Boat and Gun Club was originally given a permit dated March 8, 1940 (C. J. page 2119), to moor a wooden barge in the waters of Lake Calumet east of south Doty Avenue at or near 126th Street. The Club has never paid any rent to the City of Chicago. None has ever been assessed by the City of Chicago. The Calumet Boat and Gun Club, as have all of the squatters on the west side of Lake Calumet, over the years added to their houseboats, shore installations, some of which, just as those established by the Calumet Boat and Gun Club, are quite imposing. No permits for buildings were ever asked for of the City Building Department.

In the last session of the legislature an act to create a Chicago Port District and to define its powers and duties was passed and approved June 6, 1944. (Chapter 19, Sections 152 to 178, inclusive). A study of the Act does not in any way indicate that the City is divested of any of its title to the riparian lands surrounding Lake Calumet. The Act does establish a port authority with powers to investigate, study and recommend to any interested party changes which would benefit and aid in the establishment of a Calumet deep-sea water port. The Port District does have the right to acquire and accept by lease, gift or otherwise any property and rights useful in its purpose to aid in the planning and developing of adequate channels, ports, harbors or terminal or port facilities. Nowhere in the Act is the City divested of its title to land surrounding the area of Lake Calumet and same given to the Port Authority which is established.

On the east side of Lake Calumet, where Stony Island Avenue was supposed to have been put in, there is a permanent boundary line established, which to the lay eye is nonexistent, although a surveyor viewing one of the available surveys could locate said boundary line. There are quite a few homes and installations on the said east side of the Lake but there are no available plats or surveys which show the exact posi-

tion of the homes and installations on the east side of the Lake and their relationship to the peramnent boundary line.

It is our opinion that the survey, which is now available, should be completed to show the location in relationship to the permanent boundary line of all of the homes which lie on the east side of Lake Calumet.

It is our further opinion that each and every squatter, including the Calumet Boat and Gun Club, ought to enter into a lease recognizing the City's title to the land which they now occupy and to agree to pay a reasonable rent for the use of said land. It is also suggested that each lease be made terminable at thirty days' notice in writing by either party, with a further provision that the lessees, upon notice from the lessor, shall remove all installations both from the shore and the lake. This is to protect the City in case the Calumet Harbor becomes a reality and work commences in said area.

If and when the City enters into a lease with the Calumet Boat and Gun Club for the space they now occupy, then and in that event we are of the opinion that a permit could be granted to the Commonwealth Edison Company for the installation of electric service to the Club.

We are also of the opinion that this permit should provide for the removal of said electrical installations when the City proceeds with the development of the Port area into a deep-sea harbor.

POWERS OF EMERGENCY COMMITTEE ON CRIME

(No. 11478—Emergency Committee on Crime—J. C. M.—L. L. K.—February 18, 1952.)

In your letter of February 15, 1952, you request an opinion as to the scope of power of the City Council Emergency Committee on Crime under terms of the Ordinance passed by the City Council February 14, 1952.

Section 1 of the Ordinance provides:

> "Section 1. The City Council is authorized and directed to appoint an Emergency Committee on Crime to consist of nine members of the City Council of the City of Chicago to investigate the alliance between crime and politics in Chicago; to determine a course of action to drive the hoodlum element out of Chicago; and to recommend such improvements as it deems necessary to restore the confidence of the people of Chicago in the Chicago Police Department and in the administration of justice at Chicago."

The language of the Ordinance is so broad in scope that care must be exercised in the conduct of the investigation committed to your control to avoid infringement upon the constitutional rights of private persons and exploration into fields of political and governmental agencies in which the City Council has no proper function.

In the land-mark case of *Greenfield* v. *Russell,* 292 Ill. 392 (1920), the General Assembly adopted a joint resolution providing for the creation of a committee to investigate the Christian Catholic Apostolic Church

of Zion, other institutions and pretended organizations soliciting funds, deceiving the people, and preying upon the public, of a like and similar nature. Under the resolution, the committee proceeded to hear evidence in accordance therewith and incurred expenses in carrying out said resolution and presented vouchers for such expenses. A petition was filed in the Circuit Court of Sangamon County against the Auditor of Public Accounts and State Treasurer for a restraining order as to the paying of any warrants for such expenses. In holding that the General Assembly had exceeded its authority and that public funds could not be used for the purposes described in the resolution, the Supreme Court said (p. 400):

> "It must also be conceded that a State legislature has power to obtain information upon any subject upon which it has power to legislate, with a view to its enlightenment and guidance. This is essential to the performance of its legislative functions, and it has long been exercised without question. (*Ex parte Parker,* (S. C.) 7 Ann. Cas. 874, and note.) While this is true, it cannot violate the constitutional rights of any institution or of any individual by conducting a public and judicial investigation of any charges made against such person or institution under the pretense or cloak of its power to investigate for the purpose of legislation. This is true no matter whether the investigation be for the purpose of instituting prosecutions, for the aid and benefit of a grand jury in finding indictments, or for the purpose of intentionally injuring or vindicating any institution or individual. All such investigations, when judicial in character, made by the General Assembly are absolutely without authority and in violation of the constitutional rights of the parties whose conduct is so publicly investigated. *Kilbourn* v. *Thompson,* 103 U. S. 168; *State* v. *Guilbert,* 75 Ohio St. 1. * * * The declared purpose of the resolution was to investigate charges that had been made against this institution and its overseer, and it was an investigation of all past conduct with reference to the matters heretofore stated. The investigation was not of a character that the legislature could undertake under the provisions of the constitution. All criminal charges, if any there were, against these parties, and all invasions by them of the private rights of others, could only be investigated legally by a grand jury or a court legally constituted for the purpose. If the rights of private individuals and private institutions could be invaded by the legislature in that manner, their reputation and their character and their business would be greatly endangered if not entirely destroyed, and they would not have or enjoy in such public investigations their constitutional right of answering and making a defense to such charges, however false they might be. This whole investigation may have been started with the very best of motives on the part of the members of the legislature, and it may have been carried out by the committee, so far as it did conduct the investigation, with the utmost fairness possible. Nevertheless, the act of the General Assembly in question was not only an invasion of the private rights of the individual and institution investigated but it was also an invasion of the province of the judiciary. Under such circumstances it is the duty of the courts to protect the rights of individuals by refusing to permit the legislature to thus invade the jurisdiction of the court. A judicial investigation should at all times proceed in an orderly manner before a tribunal legally constituted to make such investigation and in such a manner as to give all parties thereby affected a complete and full hearing and an adjudication that will determine and settle the rights of the parties. An investigtion by the legislature that can in no way be serviceable to it in future legislation and that must necessarily endanger the constitutional rights of private individuals ought never to be made, and such an investigation is prohibited by the constitution of Illinois."

This decision was cited with approval in *Ex Parte Hague,* 147 Atl. 220 at 222 (1929). The principle stated in the *Greenfield* case is in line with the opinion rendered in *Kilbourn* v. *Thompson,* 103 U. S. 168, (1880) and *Annenberg* v. *Roberts,* 2 Atl. (2) 612, 617, (1938).

Obviously the purposes expressed in the Ordinance authorizing the investigation cannot be too literally construed or applied. They must be limited to the statutory powers of the City Council in respect to possible local legislation affecting the organization of the departments of the city government and the control of its officers and employees; local legislation relating to the enforcement of the ordinances of the city and the preservation of law and order within the corporate limits of Chicago; and local legislation which may be proposed within the corporate powers of the city.

The Ordinance cannot be construed to authorize the Committee to embark upon a general inquisition of the relation between crime and politics which is properly the function of the judicial branch of the government including the Attorney General of the State and the State's Attorney.

The language of Section 23-111 of the Revised Cities and Villages Act which was added by an act approved July 2, 1951 supports the foregoing limitations upon the powers of investigation of the City Council. The section reads:

> "In municipalities of more than 500,000, to investigate the enforcement of the municipal ordinances, rules and regulations and the actions, conduct and efficiency of all officers, agents and employees of the municipality."

The language following the quotation implements the power of the City Council to conduct investigations by authorizing members of the City Council to administer oaths and gives power to the City Council to order subpoenas to be issued and to compel testimony of witnesses under oath.

In Section 1 of the Ordinance, the committee is authorized and directed "to determine a course of action to drive the hoodlum element out of Chicago." It is within the province of the City Council to determine the propriety and necessity of enacting or strengthening City Ordinances under the police power to maintain the peace and order of the community.

Said Section further provides that the committee is authorized "to recommend such improvements as it deems necessary to restore the confidence of the people of Chicago in the Chicago Police Department * * *." We are of the opinion that any such recommendation is within the power of the City Council.

In said Section, it is further provided that the Committee is authorized and directed to recommend such improvements as it deems necessary to restore the confidence of the people of Chicago "in the administration of justice at Chicago." In this regard, it is our opinion that the City Council does not have the power and authority to investigate the Municipal Court of Chicago or any other Court. As hereinabove indicated, the Supreme Court of Illinois in the *Greenfield* case points out that the constitutional separation of powers between the legislative and judicial branches of our Government precludes the legislative branch from interfering with or infringing upon the judicial branch. The administration of justice under our constitution is exclusively a judicial function. The City Council has no power to enact legislation which would control the operations of the Municipal Court of Chicago or of any other Court. The power of the City Council to investigate is predicated upon its power to legislate and where the City Council has no power to legislate, it has no power to investigate.

In Section 2, the committee is empowered to employ counsel. Chapter 24, Par. 21-11, Ill. Rev. Stats. 1951, provides that the Corporation Counsel is the head of the Law Department of the City and that he shall be and act as a legal adviser of the City Council and of the several officers, boards, and departments of the city. In an opinion rendered December 18, 1916, Vol. 10, Corporation Counsel Opinions, p. 183-184, the following principle was stated: "Assistants appointed for special work, commonly denominated 'special counsel,' when necessary must be members of the Law Department and appointed by the Corporation Counsel. Any other appointment of special counsel is void. When appointed, they are under the direct superintendence of the Corporation Counsel and must conform to the direction imposed by him. The Corporation Counsel is the attorney for the municipal corporation, its various officials, the City Council and its committees." See also *People ex rel.* v. *Faherty,* 306 Ill. 119, (1922). It has been the policy of this office to cooperate with Council Committees in the appointment of suitable special counsel to serve such committees.

Said Section 2 also provides that the committee is empowered to employ "such technical experts as it considers necessary and the committee shall hold public hearings as it deems essential upon its own motion." It is our opinion that the committee has such power.

Said Section 2 further provides that "each member of the committee shall have the power to administer oaths, and the City Clerk, by order of the committee shall issue subpoenas to secure the attendance and testimony of witnesses, and the production of books and papers relative to such investigations and to any hearing before the committee or any member thereof." The grant of authority to administer oaths and issue subpoenas is pursuant to Chapter 24, Paragraph 23-111, Ill. Rev. Stats., 1951, enacted by the General Assembly and approved July 2, 1951. Said section contains the following language:

> "Each member of the corporate authorities shall have power to administer oaths, and the clerk of the municipality, by order of the corporate authorities, shall issue subpoenas to secure the attendance and testimony of witnesses and the production of books and papers relative to such investigations and to any hearings before the corporate authorities or any member thereof."

In the State of New York it was held that statutes relating to compelling the attendance of witnesses before committees of city council or of the legislature must be strictly construed, *Peo. ex rel. Webster* v. *Van Tassel,* 135 N. Y. 638, 32 N. E. 646), and that such authority is purely statutory and lacks the inherent power which legislative committees have under the common law. In *In Re Investigations of Contracts, etc.,* 184 N. Y. S. 518 (1920) the Court pointed out (p. 524):

> "The power to investigate is given primarily to the council itself, but no doubt can be conferred upon a committee of that body. * * * While the committee may take testimony, it is the common council which is given the power to compel the attendance of witnesses and the production of books and papers. No such power is granted to the committee itself."

The courts of Illinois have not passed upon this question. Until such time as our statute is judicially construed and all doubts as to its interpretation finally determined, it is our opinion that it may be construed to authorize the City Council to empower a committee to direct the City Clerk to issue subpoenas. However, it would be safer to obtain specific authority from the City Council for the clerk to issue subpoenas to designated persons and for such books and records as you may desire to have produced before your committee.

CRIME COMMITTEE SUBPEONAS

(No. 11537—Emergency Committee on Crime—L. L. K.—May 19, 1952.)

This will acknowledge receipt of your letter of May 16, 1952, in which you request a form of order or ordinance to be passed by the City Council authorizing and directing the City Clerk to serve subpoenas on individuals to be named in the order or ordinance to appear as witnesses before the City Council Emergency Committee on Crime.

We suggest the following form:

ORDERED, that the City Clerk is directed to issue subpoenas for the attendance, for the purpose of giving testimony, of the following witnesses: (name them)

and for the production of the following books, papers, records and documents: (describe them)

before the City Council Emergency Committee on Crime at a hearing to be held on ..... (date) at ..... (place Chicago, Illinois, at ..... (time).

You also inquire whether the Committee has the power to order the service of the so-called "John Doe" type of subpoena.

We have heretofore, in the opinion rendered to you February 18, 1952, indicated our views as to the Committee's power to order the service of any subpoenas. The City Council has power under paragraph 23-111, chapter 24, Ill. Rev. Stats. 1951, to order the City Clerk to issue subpoenas "to secure the attendance and testimony of witnesses * * *". A "John Doe" subpoena lacks definiteness as to the individual sought to be summoned. The only provision which we have been able to find in the Illinois statutes which authorizes the issuance of process except to definitely named persons is paragraph 691, chapter 38, Ill. Rev. Stats. 1951, which provides, in applications for search warrants, for a written complaint verified by affidavit and permits the individual whose premises are to be searched to be named "according to any name or names by which he is commonly known". In other jurisdictions, search warrants have been held good where the premises have been specifically described, but the name of the owner, being unknown, was stated to be "John Doe." *Quick* v. *State,* 129 P.(2) 604 (Okla.) 1942. We find no statutory authorization for what is commonly called a "John Doe" warrant, summons, or subpoena.

MICROFILMING CITY RECORDS

(No. 11544—Budget Director—L. L. K.—May 23, 1952.)

This will acknowledge receipt of your letters of May 1 and May 2, 1952. In your letter of May 1, 1952 you ask the following questions:

(1) Will a microfilm have the same legal status as an original document?

(2) What are the legal requirements upon various City departments as to the length of time they must maintain their records?

(3) What steps should be taken by the City Council toward enactment of an ordinance based on the enabling legislation passed by the State Legislature in 1949 permitting local governments to microfilm records and dispose of original documents?

The statute which you refer to appears as pars. 31 to 34 inclusive, chap. 116 Ill. Rev. Stats. 1951. It provides that any elected officer of any municipality may cause any or all public records, papers or documents in his custody or under his supervision to be photographed, microfilmed or otherwise reproduced on film and that any such reproduction shall be deemed to be an original record for all purposes, including introduction in evidence in all courts or administrative agencies; that a transcript, exemplification or certified copy thereof shall be deemed to be a transcript, exemplification, or certified copy of the original. The answer to your first question, therefore, is that a microfilm, when exemplified or certified, has the same legal status as an original document. The answer to your second question, in the absence of this statute, is that no city official has authority to destroy public records except upon specific authority and direction by the City Council. This statute, however, provides that after reproductions are made by photograph or microfilm, original records, papers or documents which have been on file for ten years, may be destroyed, except original records, papers or documents created prior to 1870, which may not be destroyed.

The answer to your third question is contained in paragraph 34 of the Statute which provides as follows:

> "34. *List of documents copied to be filed.*) §4. Any such officer or clerk of court before causing any records, papers or documents to be photographed, microphotographed or reproduced on film, as provided in Section 1 hereof, shall file with the county board of this county or with the city council, board of trustees or other governing body of the municipal corporation or political subdivision, as the case may be, a statement signed by him listing the records, papers and documents he desires to cause to be so photographed, microphotographed or otherwise reproduced on film and stating that, subject to the prior approval of the County board, or the city council or board of trustees, or other governing body of the municipal corporation or political subdivision, as the case may be, he proposes to cause the records, papers and documents so listed to be reproduced on film and subsequently destroyed. A copy of such statement shall be posted, in a public place in the office of the county, city or village clerk, or in the office of the governing body of the municipal corporation or political subdivision, as the case may be, and in the office of the officer or clerk of court signing such statement. The county board, or the city council or board of trustees or other governing body of the municipal corporation or politcial subdivision, as the case may be, at any regular or special meeting held not less than thirty days after the filing and posting of such statement, shall consider said proposal and any objections thereto and may authorize the officer or clerk of court signing such statement to cause any of the records, papers and documents listed in the statement to be photographed, microphotographed or otherwise reproduced on film and to cause such records, papers and documents when so reproduced on film to be destroyed in accordance with the provisions of Section 3 hereof."

From this you will note that no ordinance need be enacted by the City Council until a municipal officer files with it a list of the records, papers and documents he desires to be reproduced on film and requests permission to destroy such records, papers and documents so listed; that after posting a copy of the list of City Council shall, at a regular or special meeting held not less than thirty days after such posting, consider the proposal and any objections thereto. Not until then, is there any occasion for the City Council to enact an ordinance authorizing the officer to re-

produce such records, papers and documents and thereafter to destroy them.

In your letter of May 2, 1952, you ask what records in our department are considered irreplaceable or of such value that departmental operations would be seriously affected by their loss and you further inquire whether any of our records have been miscrofilmed.

The records which we would consider irreplaceable or of such value that our operations would be seriously affected by their loss, would include the following:

1. Statutory notices of personal injury suits to be instituted.
2. The records of pending and disposed of litigation contained in our docket division files.
3. Bound opinions rendered by this office.
4. Records dealing with traction, utility, and public improvements.
5. Records involving franchises.
6. Liquor license revocation files containing original licenses revoked and original police reports.
7. Investigation records and reports prepared for purposes of litigation.
8. Such other records and documents as from time to time are of particular importance so as to warrant microfilming.

INCREASING CRIME COMMITTEE MEMBERSHIP

(No. 11694—City Council—J. C. M.—May 28, 1953.)

Request has been made for an opinion as to whether the City Council may increase the membership of the Emergency Committee on Crime created by ordinance passed by the City Council February 14, 1952 by adding thereto non-members of the City Council.

Under Chapter 24, Section 23-1 of the Illinois Revised Statutes (1951), the corporate authorities of a municipality shall have the power enumerated in Sections 23-2 to 23-111 inclusive. Section 23-111 confers upon municipalities of more than 500,000 power to investigate (1) the enforcement of the municipal ordinances, rules and regulations, and (2) the action, conduct and efficiency of all officers, agents and employees of the municipality, and (3) the power to issue subpoenas.

Throughout the pertinent parts of the statute, the legislature clothes "the corporate authorities" with the power. In Section 23-111 we find the words "corporate authorities" six times. As to the subpoena power the section provides:

> "Each member of the corporate authorities shall have power to administer oaths, and the clerk of the municipality, by order of the corporate authorities, shall issue subpoenas to secure the attendance and testimony of witnesses and the production of books and papers relevant to such investigations and to any hearings before the corporate authorities or any member thereof."

It further appears in said section that the proceedings that may be taken in the Circuit or Superior Courts originate "upon application of the corporate authorities or any member thereof" and the judge thereof may compel the attendance of witnesses, the production of books and papers and the giving of testimony "before the corporate authorities or any member thereof."

"Corporate authorities" is defined under section 1-2 of that Act to mean the City Council.

Statutes conferring powers on municipalities are strictly construed and any fair or reasonable doubt that an asserted power exists is resolved against the municipalities. The City Council has no inherent power and can exercise only such power as is expressly granted it. When the legislature grants to municipalities power to do any acts and prescribes the manner in which the power shall be exercised, the power must be exercised in manner stated in the grant and not otherwise. Enumeration of the powers operates to exclude such as are not enumerated.

It is evident from these provisions of the Act and the law applicable thereto that the legislature has conferred authority soly upon the City Council or any member thereof the right to exercise the powers enumerated and it is our opinion that the City Council has no authority to provide that the Committee in question may be composed, in part, of persons not duly elected as aldermen.

It follows that any committee of the City Council composed of persons other than aldermen could not legally exercise any of the powers enumerated in Section 23-111.

USE OF CITY SEAL

(No. 11754—A. F. G.—October 16, 1953.)

In your letter of October 13, 1953 you state that you are publishing a book concerning the early history of the city of Chicago and requesting permission to use the seal of Chicago on the cover of the book. On January, 17, 1933 in answer to a similar inquiry we expressed the following opinion:

> "We are in receipt of your letter of January 15, 1933, inquiring if it is possible to use the seal of the city of Chicago on a song which you are about to publish, and requesting our opinion about this matter.
>
> In Cahill's Revised Statutes 1931, chapter 38, paragraph 270, section 114, is this provision:
>
> > 'Every person who shall fraudulently forge, deface, corrupt or counterfeit the seal of this State,—or the seal of any public, municipal or private corporation, *or shall make use of the same,*— shall be imprisoned in the penitentiary not less than one nor more than twenty years.'
>
> The city clerk who is the official keeper of the seal has never permitted its use, or facsimiles of it, for private purposes. The city of Chicago in addition to its seal has also adopted a municipal flag, standard, pennant, device and badge.
>
> The use by private parties of all of these emblems is prohibited by ordinance, except the municipal device. The latter was adopted in

paragraph 696, chapter 10, Revised Chicago Code of 1931, in this language:

'696. The municipal device). The municipal device, for use by the varied unofficial interests of Chicago and its people, shall show a Y-shaped figure in a circle, colored and designed to suit individual tastes and needs.'

This device is in use on many of our public bridges and buildings, and has been adopted as an emblem by many organizations more or less associated with the city of Chicago, and in our opinion is better known to the public, and more generally identified as the official emblem of Chicago than is the city seal itself.

For the purpose stated in your letter we are of the opinion that the use of the said municipal device would be more effective than the use of the seal.

We are attaching hereto a copy of the device as used by an employes' society, but which may be used by you with or without appropriate words or lettering.

Therefore in answer to your specific question we are of the opinion that the use of the city seal for your purpose is not legally possible."

From the foregoing it is clear that neither the corportion counsel nor any other city official has power to authorize the use for private purposes of the city seal, a use which is prohibited both by statute and ordinance. We enclose a card showing facsimiles of the "municipal device" referred to in the above opinion, which you may use with or without appropriate words or lettering.

B. POLICE DEPARTMENT

REMOVAL OF ARREST RECORD

(No. 11177—Police Commissioner—J. W. G.—September 19, 1949.)

We have your letter of September 12, 1949 requesting our opinion as to whether your department should remove an arrest record in accordance with chapter 38, paragraph 780c, Illinois Revised Statutes, 1947 Edition. You enclose a report from Andrew Aitken, Chief of Detectives, which report is as follows:

"1. With reference to the attached request please be informed that the following record is in our files:

"As May 9, 1929, sent. to 1 yr. and 1 day, Alderson, W. Va. Refr. for Women No. ....., Vio. Harrison Narc. Act. Off. Bowler and Co., DB.

"D-68358 July 1st, 1949, discharged, V. S. 162, Chap. 38 and Sec. 193-3, Judge Caplan. Off. Hoey and Co., C.O.

"2. We understand that what the attorney wants, is the destruction of fingerprints and photographs taken by us in the case of July 1st, 1949. It is my opinion that the record was established May 9, 1929,

when the defendant was sentenced to the Reformatory for Women at Alderson, W. Va., and that all subsequent record is a part of this record and therefore, cannot be destroyed.

"3. We do not have an opinion from the Corporation Counsel covering this point and would suggest that an opinion be requested." We believe that the attorney was referring to chapter 38, paragraph 780e, Illinois Revised Statutes, 1947 Edition, which is as follows:

"780e. Sheriffs and police officers to furnish fingerprints to bureau.) Sec. 5. It is hereby made the duty of the sheriffs of the several counties of this state and of the chief police officers of all cities, villages and incorporated towns in this State to furnish to the bureau, daily, copies of fingerprints on standardized eight by eight inch cards, and descriptions, of all persons who are convicted of felonies; and of all persons in whose possession at the time of arrest are found goods or property reasonably believed by such sheriffs or chief police officers to have been stolen; and of all persons in whose possession are found burglar outfits or burglar tools or burglar keys or who have in their possession high power explosives intended to be used for unlawful purposes or who are in possession of infernal machines, bombs or other contrivances, in whole or in part, intended to be used for unlawful purposes; and of all persons who, at the time of arrest, are in possession of firearms or other deadly weapons, intended to be used for unlawful purposes; and of all persons who have in their possession, inks, dye, paper or other articles necessary in the making of counterfeit notes, or in the alteration of bank notes or dies, molds or other articles used in the making of counterfeit money and intended to be used by them for such unlawful purposes. All photographs, fingerprints or other records of identification so taken shall, upon the acquittal of the person charged with the crime, or upon his being released, without being convicted, be returned to him."

If, from the comparison of the fingerprints of the two parties, you are satisfied that the person mentioned in the above report, is one and the same person, then you are justified in refusing to honor the request of the attorney to remove the record because a sentence under the Harrison Narcotic Act to one year and one day made the offense a felony.

CUSTODIAN'S DUTIES

(No. 11273—Police Commissioner—A. F. G.—March 23, 1950.)

In your letter of March 14, 1950 you submit a report from the Custodian of your department, giving the inventory number of various items of merchandise, guns, etc., in his possession as far back as the year 1915, and prior to March 1, 1950.

You ask to be advised relative to the disposition of these various articles, and ask our opinion as to the legal procedure to follow in disposing of same.

The duty of your department with reference to the custodianship of lost or stolen property, the procedure to be followed for the sale of the same and the disposition of the proceeds of such sale are fully set out in sections 11-16 to 11-20, both inclusive of the Municipal Code of Chicago.

It should not be necessary for the custodian to retain possession of lost or stolen property for a longer period than approximately 70 days, as section 11-17 provides that if property in the hands of the custodian is

not claimed by the rightful owner within 60 days of the date of seizure or is not being held as evidence in some court proceeding, the custodian shall publish in a daily newspaper a description of such property, the date of seizure and shall give notice that if such property is not claimed by the rightful owner within 10 days from the date of such publication, such property will be sold at public auction at the time and place and in the manner provided in such notice. If any such property is deemed by the commissioner of police, to be of use to the department it may be retained for the use of said department.

Section 11-20 provides that the foregoing provisions shall not apply to pistols, revolvers, etc. and other deadly weapons of like character. It provides that the department may retain such of these as the commissioner deems of use to the department and the remainder thrown into the lake as provided therein.

Section 11-19 requires the custodian to pay to the trustees of the policemen's annuity and benefit fund the proceeds after expenses of the sale provided in section 11-17.

Section 11-18 provides for emergency sales in certain cases and with reference to certain property.

A study of the sections of the Code referred to above should fully inform the custodian of his duties with reference to property in his possession.

ARREST WITHOUT WARRANT

(No. 11275—Police Commissioner—A. F. G.—March 27, 1950.)

In your letter of November 2, 1949 to which was attached a report from the Chief of Traffic, you ask our opinion in regard to making arrests in accident investigations on the strength of physical evidence observed and conversations with and statements from principals and witnesses.

In his report the Chief of Traffic asks:

> "Are violations of the Municipal Code of Chicago considered 'criminal offenses' under Illinois law?"

Our courts have repeatedly held that prosecutions for violations of city ordinances are civil proceedings. They do not lose the character of civil porceedings even where the defendent is brought into court on a warrant (*City of Chicago* v. *Williams*, 254 Ill. 360), and the rules applicable to criminal procedure have no application thereto.

Section 657 of the Criminal Code cited in the report, authorizes an arrest to be made without a warrant by an officer when a *criminal offense* has in fact been committed, and he has reasonable ground for believing that the person to be arrested has committed it.

In construing this section our courts have held that a misdemeanor is a crime, and that the words "criminal offense" includes all misdemeanors, however slight, and all felonies, however great. (*Conkling* v. *Whitmore*, 132 Ill. App. 674, *People* v. *Scalise*, 324 Ill. 131.)

The violation of a municipal ordinance not being a crime is not included in the section of the Criminal Code above referred to. However, police officers in Chicago are authorized by statute to arrest any person *on view* for violating within the city any ordinance of said city.

Section 405 of chapter 37 of the Revised Statutes of Illinois reads in part as follows:

> "Any police officer of the City of Chicago may arrest *on view* any person who may be seen by such police officer in the act of violating, within the City of Chicago, any ordinance of said city, or any ordinance of any municipal corporation situated, in whole or in part, within the limits of said city, wherever such violation is by such ordinance, made punishable by fine or otherwise. * * *"

Similar authority is found in section 9-93 of the Revised Cities and Villages Act which outhorizes policemen "to arrest or cause to be arrested, with or without process, all persons who break the peace, or *are found* violating any municipal ordinance or any criminal law of the state.

Section 11-25 of the Municipal Code of Chicago is as follows:

> "11-25. Power of arrest.) The members of the police force shall have power to arrest all persons in the city *found in the act* of violating any law or provision of this code or aiding or abetting in any such violation, and shall arrest any person found under circumstances which would warrant a reasonable man in believing that such person had committed or is about to commit a crime."

From the provisions of the statutes and the ordinances cited above it is our opinion that an arrest for a violation of a city ordinance, can be made only on warrant or without a warrant where the officer sees the violation committed.

ARREST WITHOUT WARRANT

(No. 11297—Police Commissioner—A. F. G.—May 5, 1950.)

In our opinion of March 27, 1950 in answer to your question "Are violations of the Municipal Code considered 'criminal offenses' under Illinois law" we answered this question in the negative, holding that prosecutions for violation of the city ordinances are civil proceedings and the rules applicable to criminal procedure have no application thereto.

We cited several sections of the statutes and of the Municipal Code relative to the power of police officers to make arrests for violations of city ordinances. Each of the sections cited provides that officers may make arrests *on view* of persons who may be seen by the officer in the act of violating, or of persons who *are found* violating such ordinances, or persons *found in the act* of violating. We then express the following opinion:

"From the provisions of the statutes and the ordinances cited above it is our opinion that an arrest for a violation of a city ordinance can be made only on warrant or without warrant where the officer sees the violation committed."

All of the sections cited refer to arrests. The mere issuance of a notice to appear, a citation or a summons does not constitute an arrest and may be issued by an officer, who, though not actually witnessing the violation, from an examination of the scene of the accident, statements of witnesses, etc., has reasonable and probable cause to believe that an offense has been committed by the person notified to appear. Probable cause exists where the facts and circumstances within their (the officers) knowledge and of which they had trustworthy information (are) sufficient in themselves to warrant a man of reasonable caution in the belief that an offense has been or is being committed. *(Seymour* v. *U. S.*, 177 Fed. 2nd 732 (Court of Appeals D. C. 1949).

A complaint for a warrant may be signed by an officer under similar circumstances. Section 10-8 of the Revised Cities and Villages Act, provides:

> "In all actions for the violation of any municipal ordinance the first process shall be a summons or a warrant. A warrant for the arrest of an accused person may issue upon the affidavit of any person that an ordinance has been violated and that the person making the complaint has reasonable grounds to believe that the party charged is guilty thereof. * * *"

We are making this clarification of our opinion at the suggestion of Mr. Franklin M. Kreml and others interested in the more efficient enforcement of traffic regulations.

FINGERPRINTING PRISONERS

(No. 11383—Police Commissioner—J. L. S.—April 27, 1951.)

We acknowledge receipt of your letter of March 20, 1951 with an attached report from the Chief Identification Inspector in which he requests our opinion as to whether the Police Department can finger print a person arrested but not convicted of a crime.

This problem was discussed in a prior opinion written on March 24, 1933. (Vol. XVIII, Opinions of the Corporation Counsel, p. 960) In that opinion it was pointed out that there was no provision in the Illinois statutes specifically authorizing the finger printing of any person accused of crime. House Bill No. 1073, approved July 2, 1931, which is now known as section 5 of "An Act in Relation to a State Bureau of Criminial Identification and Investigation," (Chapter 38, section 780E, Ill. Rev. Stat., 1949) was discussed and set out in full. This act directs sheriffs and Chiefs of Police of various cities and villages to furnish copies of finger prints of all persons convicted of felony and persons who at the time of their arrest were in possession of specific items and goods set out in this act to the Bureau of Criminal Identification and Investigation. However, this act does not authorize local police authorities to finger print a person upon arrest and prior to conviction. The opinion refers to several cases in various states in which finger printing of a suspect upon arrest but before conviction has been upheld. The opinion concluded:

> "In view of the holding of the courts in the above-mentioned cases it is our opinion that it is within the power of Police officers to photograph, take Bertillon measurements and fingerprints, and it may be exercised as well before as after conviction.
>
> However, it is our opinion also that the right must exercise in good faith and strictly confined to the purpose for which it was given, to-wit, for identification, to prevent escape, to facilitate recapture and to furnish evidence at the trial."

At the present time there is still no statutory provision giving local police departments the right to finger print. However it is our opinion that the conclusion reached in the opinion referred to still expresses the law. There is considerable law throughout the country sustaining this view. In the case of *Bartletta* v. *McFeeley*, 107 N. J. Eq. 141, Affirmed 109 N. J. Eq. 241, (1931) the court held:

> "The police are charged with the duty of preventing crime, apprehending criminals, and gathering evidence upon which they may

be brought to trial. In the performance of this duty, they may use any apt and reasonable means which do not invade the rights of the accused, or of other persons. Fanciful rights of accused persons cannot be allowed to prevent the functioning of the police and so to jeopardize the safety of the public.

The right of the police to finger print and photograph is powerfully supported by the argument from convenience and from the public interest in permitting the courts to learn the truth of the questions at issue. This right is also upheld by custom. The police in the large cities of this state and throughout the country for half a century have measured, photographed, or finger printed prisoners before trial; and their authority to do so has been seldom questioned, and, so far as I can learn, only once denied by the judgment of a court.

There is a close analogy between searching the person of a prisoner and finger printing him. Both acts have for their purpose the obtaining of evidence against him; in both is his person subjected to some handling beyond what is required for preventing escape. The right to search a prisoner is generally upheld.

And in the case of *United States* v. *Kelly*, 55 Fed. 2d 67, (1932) the Circuit Court of Appeals, Second Circuit, held (p. 70):

"The appellee argues that many of the statutes and the decisions in common-law states have allowed finger printing only in case of felonies. But, as a means of identification, it is just as useful and important where the offense is a misdemeanor, and we can see no valid basis for a differentiation. In neither case does the interference with the person seem sufficient to warrant a court in holding finger printing unjustifiable. It can really be objected to only because it may furnish strong evidence of a man's guilt. It is no more humiliating than other means of identification that have been universally held to infringe neither constitutional nor common-law rights. Finger printing is used in numerous branches of business and of civil service, and is not in itself a badge of crime. As a physical invasion it amounts to almost nothing, and as a humiliation it can never amount to as much as that caused by the publicity attending a sensational indictment to which innocent men may have to submit."

"* * * We find no ground in reason or authority for interfering with a method of identifying persons charged with crime which has now become widely known and frequently practiced both in jurisdictions where there are statutory provisons regulating it and where it has no sanction other than the common law."

The Indiana court in the case of *State ex rel. Mevity* v. *Tyndall*, 74 N. E. 2d 214, (1931) held that a statute authorizing police officers to finger print a person upon arrest would not violate his constitutional rights pertaining to his person and property, saying (p. 916):

"* * * Granting that the citizen has a property right in his finger prints, and picture and that he has a right to privacy and protection as guaranteed him by the constitutional provision quoted, these rights must be made to harmonize with the rights of the people collectively to life, liberty, safety and the pursuit of happiness likewise guaranteed by the constitution. Between these rights there is sometimes an apparent conflict. It is a duty of government in so far as possible to avoid this conflict and to provide a way of life and safety that will protect both rights. In the accomplishment of this end it is possible that each may have to yield to some extent. The general assembly has a duty to enact laws providing for the general welfare and safety of the people within the state, and such laws, if reasonable, will not be in conflict with guaranteed rights of the individual. Property or property rights may not be taken or destroyed

under the guise of the police power or of a police regulation, unless the taking or destruction has a just relation to the protection of the public health, welfare, morals or safety. Unless it affirmatively appears by the act, or the history of its enactment that it has no just relation, the police power extends even to the taking and destruction of property. It will be presumed that the act is reasonable, unless the contrary appears from facts of which the courts will take notice. *Pittsburgh, etc. R. Co.* v. *State*, 1913, 180 Ind. 245, 250, 251, 102 N. E. 25, L. R. A. 1915D. 458; *State* v. *Barrett*, 1909, 172 Ind. 169, 178. 179, 180, 181, 87 N. E. 7."

It is therefore evident that a statute authorizing finger printing of a person upon arrest violates none of the constitutional guarantees provided in the U. S. Constitution.

The case of *Downs* v. *Swann*, 111 Md. 53, (1909) deals specifically with the right of the local police authorities to finger print, photograph and take Bertillon measurements in the absence of any statute. The court held (pp. 61-62):

"It makes it the duty of the Police commissioners of the city among other things 'to preserve the public peace, prevent crime, arrest offenders and protect the rights of persons and property.' The burden of enforcement brings the Board within the category of the public agencies means of identification of probable wrong-doers and it may be assumed that the Legislature in the imposition of the duties intended also to confer the incidental powers necessary to their discharge."

This is our precise problem. As we have no express statutory authority directing the finger printing of a person arrested but not convicted, it must be implied that the legislature would direct such necessary measures to fulfill the duty imposed upon local police officers to enforce the law and apprehend criminals.

It is, therefore, our opinion that the finger printing of a person arrested but not convicted of a crime does not violate any of his constitutional rights, either federal or state, and may be required by the local police department for the purpose of preventing escape, identification and ascertaining prior convictions.

UNOFFICIAL POLICE DIGESTS

(No. 11404—Police Commissioner—A. M.—July 20, 1951.)

We are in receipt of your letter of June 8, 1951, submitting copies of "The Chicago Police Journal," issue of April-May, 1951, and of the "Chicago Police Digest," issue of October, 1950. Your letter states that these periodicals purport indirectly to represent the Chicago Police Department and its policies, and you request our opinion as to whether these publications are in violation of any law in so far as they subtly convey the impression that they are sanctioned by the Chicago Police Department, through the media of articles, photographs, and other news items appearing therein.

The "Journal" contains, on its cover page, the full name of the publication, to-wit, "The Chicago Police Journal," and directly underneath such name appears the legend "The Voice Of Law Enforcement." The name of the publication appears again on page 5, and thereunder appears the statement: "Official publication, American Police Pistol Association."

The Journal consists of 43 pages, apart from the front cover page, and is made up of 37 pages of advertising and only 6 pages of articles and news items.

The "Digest" consists of 128 pages, exclusive of front and back covers. On the front cover page appear the words "Police Digest," with the word "Chicago" imprinted upon an insignia resembling a police star set between the two words of the quoted phrase. On page one, which is the title and index page, appears the following:

"Police Digest

Published as a magazine of police information and distributed without charge to the police of Chicago and the Chicago metropolitan area."

"Secretaries of police stations, units and organizations in Chicago are invited to send in news, personals, etc."

"Copies of the Police Digest can be obtained by policemen who apply to the secretary of the station or unit to which they are assigned. If for any reason a policeman cannot secure a copy, he should telephone our office. Upon such notification, the Police Digest will mail a copy to the policeman's home without charge."

"While the Police Digest is recognized as Chicago's only police publication, it does not represent that it is official publication of the City Police Department nor of any city governmental agency."

"Service rendered to the Chicago police by the Chicago Police Digest is recognized and endorsed by the following Chicago police organizations:

Chicago Police Captains' Ass'n.

Chicago Police Lieutenants' Ass'n.

Chicago Police Sergeants' Ass'n.

Retired Policemen's Ass'n., Inc.

The contents of the Digest consist of numerous personal items (and photographs) concerning Chicago policemen and their families, as well as various articles of interest to people engaged in police work, plus over 80 pages of advertising.

The first question presented is whether these periodicals, assuming that they do in fact convey the impression that they represent the Chicago Police Department and are sanctioned by it, are violating the law in any particular. Being private publications, they obviously have no right to represent themselves as being official organs of the Chicago Police Department, nor is it proper for them to convey the impression, by implication or otherwise, that they or the contents thereof are sanctioned by the Chicago Police Department.

There is a statute which makes it a crime to falsely assume or pretend to be a justice of the peace, sheriff, deputy sheriff, coroner, constable, police official, watchman or other official, and to act as such (Chapter 38, par. 260, Ill. Rev. Stat.). There are other statutes making it a crime to falsely impersonate another with the intent to receive money or property to which he is not entitled, or to wear various insignia of certain military or veterans' organizations without authority (Chapter 38, pars. 262-272, Ill. Rev. Stat.). In our opinion, these statutes do not cover the facts under consideration here.

There is, however, a State statute prohibiting and penalizing deceptive advertising (Chapter 38, par. 247, Ill. Rev. Stat.). This statute makes it unlawful for any person, with intent to buy, sell, acquire or dis-

pose of any merchandise, credit or service, to publish in any newspaper, magazine or other publication any advertisement, announcement or statement regarding such merchandise, credit or service which shall contain any assertion, representation or statement of fact which is untrue, misleading or deceptive.

In our opinion, any statement or assertion in these periodicals which would convey the impression that they are official organs of the Chicago Police Department, or that they represent or are sanctioned by said Department, might well constitute deceptive advertising within the prohibition of the statute.

There is likewise a city ordinance, patterned after the statute referred to, likewise prohibiting and penalizing deceptive advertising (Section 193-24, Municipal Code of Chicago), but whether the ordinance just mentioned is within the statutory grant of power to municipalities is open to serious doubt. There is no express grant of power to municipalities in the Cities and Villages Act to regulate advertising or to prohibit and penalize deceptive advertising. In an opinion rendered by this Department under date of July 1, 1936, addressed to the Secretary, Committee on Judiciary and State Legislation, it was stated that the City of Chicago "probably" does "not" have the power to enact an ordinance prohibiting deceptive advertising, as no express or implied authority can be found to support the exercise of such a power (Vol. XIX, Op. Corp. Coun., pp. 53-54, No. 9210, July 1, 1936). The express delegation of power by Section 23-105 of the Cities and Villages Act to municipalities "to pass and enforce all necessary police ordinances," has been held not to constitute an independent source of legislative power, but merely to confer the authority to pass and enforce only those police ordinances as are necessary to the effective exercise of the other powers expressly granted (*Father Basil's Lodge, Inc.* v. *City of Chicago,* 393 Ill. 246, 252-253) (1946).

The public deception involved in a false representation that a certain publication represents or is sanctioned by a department or agency of government may, however, be reached and enjoined under the general doctrine that the law will not permit fraud and deception to be practiced upon the public. This is the principle on which the law of unfair competition is based. It is true that a department or agency of government is normally not engaged in competitive enterprise, but it is not essential for redress that business competition exist. The law will afford protection against false representations whereby the public is deceived into believing that a certain product or service is sanctioned or endorsed by another, where such is not the fact. Thus, in leading case of *Edison* v. *Edison Polyform Mfg. Company,* 73 N. J. Eq. 136, 67 Atl. 392 (1907), a drug manufacturing company was enjoined from representing that a medical preparation manufactured by it was in any way sanctioned or endorsed by Thomas A. Edison, the famous inventor, although Mr. Edison was not in the drug manufacturing business and was not in business competition with the drug company. The court declared that it would prevent the unauthorized use of a person's name and prestige to foster the distribution of an item which that person did not endorse or sanction and had no connection with, notwithstanding that there was no business competition between the manufacturer of the product and the person whose name and prestige was attempted to be connected with the item without authority. On the basis of the principle announced in the *Edison* case, and the numerous cases which have followed it, it is our opinion that the publishers and distributors of the publications under consideration here could be enjoined from conveying the false impression that they are the official organs of the City Police Department or that they represent or are sanctioned by that Department.

The remaining question to be determined, however, is whether these publications, or either of them, do in fact convey the impression that they are official organs of the Chicago Police Department, or that they represent or are sanctioned by it. No such express statement of sanction or

representation is contained in either of said periodicals. In the case of the Chicago Police Journal, page 5 expressly states that it is the official publication of the American Police Pistol Association. In the case of the Chicago Police Digest, the title page thereof negates such implication by expressly declaring that it does not represent that it is the official publication of the City Police Department or any city governmental agency. While the cover page of the Journal contains the phrase "The Voice Of Law Enforcement," that is not equivalent to a representation that it is the official organ of the Chicago Police Department, especially since on the next page it is asserted that it is the official publication of the American Police Pistol Association.

Any impression that these publications do represent or are sanctioned by the Chicago Police Department comes not from anything contained in these periodicals, but rather from the peculiar and unexplainable circumstance that these periodicals are able to attract such a large quantity of paid advertising despite so restriced a circulation, and, especially in the case of the Journal, in the face of such a paucity of reading content exclusive of advertising matter. This feature of the case would seem to point to some unusual and untoward methods of advertising solicitation that might well merit investigation, but it has no bearing upon the question here under consideration.

It is our opinion, therefore, based upon an analysis of the contents of these two publications, that they disclose no violation of law.

We are transmitting herewith the copies of the two periodicals submitted with your inquiry.

NATIONAL GUARD PRISONERS

(No. 11504—Police Commissioner—E. R. H.—March 28, 1952.)

We acknowledge your letter of March 24, 1952 in which you state that you have received a request from the Illinois National Guard, 132nd Infantry Regiment, 2653 Madison Street, Captain Alvin G. Stoll, for authority to impound their AWOL personnel at the 27th District Station and ask our opinion as to the status of your department and liability in this situation.

This matter was the subject of an opinion of this office under date of June 24, 1916, Opinions of the Corporation Counsel, Volume IX, page 1050, in which we advised in substance that officers in charge of a police station could lawfully keep in custody an officer or enlisted man of the State Militia pending Court Martial, or until otherwise discharged by due process of law without incurring liability. In that opinion we said:

> "While the prisoner thus arrested is in the custody of the police, he is, in contemplation of law, the prisoner of the military authorities, and not the civil authorities, and the former are responsible for his detention. No liability can attach to the civil officer who, in response to an order of the proper military authorities, keeps the prisoner safely until such time as he is tried by Court Martial, or is otherwise duly discharged by process of law."

Our opinion further stated:

> "It is important in every case that the police officer who detains a person thus arrested should have authority in writing from the

military officer who orders the detention of such person, inasmuch as the police officer is not, under such circumstances, acting in the capacity of an officer of the city, but as the agent of the military authorities for this purpose.

Inasmuch as the statute expressly recognizes the County Jail as a proper place of confinement after trial and a warrant of commitment is issued, it follows that it would be advisable to send all such prisoners to the County Jail as soon as practicable after the arrest."

We still adhere to this opinion.

REMOVAL OF ARREST RECORD

(No. 11584—Police Commissioner—W. J. K.—September 17, 1952.)

We have your communication of September 10, 1952, in which you ask our advice as to what action you should take on a request for the removal from the Bureau of Identification of the arrest record of a person who was arrested on May 8, 1942, and charged with violation of Chapter 38, Section 104 of the Illinois Revised Statutes and who after the expiration of a year was discharged from supervision. You also ask our opinion on a request for the removal of an arrest record taken December 10, 1951.

To the second request you attached a certified copy of the order of the Criminal Court, dismissing the indictment against the defendant and his co-defendant.

In a previous opinion with reference to removal or destruction of fingerprints, photographs and other indentifications of persons arrested and charged with crime, we stated that "public records and documents kept in the manner designated by law cannot be removed or destroyed for any reason by anyone who happens to have them in their custody or possession." (Opinions of the Corporation Counsel and Assistants, Vol. 21 p. 21.) The courts have uniformly held that they will not direct public officials to remove or destroy police records such as those under consideration.

The attorney seems to be of the opinion that the Police Department has the power to request the Department of Public Safety, Bureau of Criminal Identification and Investigation, to return to the Department records furnished by the police to said bureau under the provisions of the statute (Chapter 38, Section 780e, Ill. Rev. Statutes 1951).

In our opinion, the Police Department has no power to make requests on the Department of Public Safety, Bureau of Criminal Identification and Investigation for the return of copies furnished by the Police Department under the provisions of the above mentioned section of the statute.

We further stated in our opinion herein above referred to, that the provisions of the statute (Chapter 38 section 780e, Ill. Rev. Statutes 1951) are in derogation of the common law which prohibits the removal of public records. It has been a cardinal rule in the construction of statutes which are in derogation of the common law that they be strictly construed and any statute which tends to change the common law, its effect is limited to what is expressly stated in the statute.

It is provided by law (Chapter 38, paragraph 401, Ill. Rev. Statutes 1951) that it is a crime for any public official or any person to withdraw, falsify or avoid any records belonging to any public office of the State.

It is, therefore, our opinion that the police have no authority to remove from the files of the Department, any photographs, fingerprints or other records of identification or information taken in connection with arrests of the above persons.

FURNISHING ARREST RECORDS

(No. 11604—Police Commissioner—W. J. K.—October 28, 1952.)

We have your letter of recent date to which you attached the report from the Chief of Detectives, a letter and certain other documents.

The letter is from an inmate of the Illinois State Penitentiary, Menard branch, who is serving a sentence of 99 years for murder committed in Cook County. The document entitled "Subpoena," requests certified copies of records allegedly kept in the Bureau of Identification of the Police Department of the City of Chicago. The document does not state that the requested certified copies of records are to be used in connection with any pending matter.

We see no reason for the furnishing of certified copies of records unless such records are necessary to be used in a court of record. The form adopted in making the request for certified copies does not make the document in question a subpoena. Only clerks of the various courts of record may issue subpoenas and, then only, while it is a pending case involving matters which require the use of documents sought to be obtained in the trial of such a cause.

Therefore, it is our opinion that the Bureau of Identification is under no legal duy to grant the request by an alleged "subpoena" to have certified copies furnished of records that you may have on file pertaining to the inmate's identification and arrest.

TRANSPORTING CORPSES IN SQUADROLS

(No. 11608—Police Commissioner—E. R. H.—November 26, 1952.)

We acknowledge your letter of November 20, 1952, attaching the request of Charles G. O'Regan, Deputy to the Commissioner, for an opinion as to whether the use of police squadrols for the removal and transportation of dead bodies is a violation of Section 93-9 of the Municipal Code of Chicago.

Section 93-9 provides:

> "No person shall move or convey any dead human body within the city in any automobile, ambulance, or other vehicle which is used as a public conveyance. Provided, however, that nothing in this section shall be held to prevent the use of such vehicle for the removal or conveyance of the dead body of a child under eight years of age who shall have died of a non-contagious disease if said body has been properly prepared for burial and encoffined."

In the case of *McDaniel* v. *Glens Falls Indemnity Co.*, 333 Ill. App. 596, Maureene McDaniel sued to recover hospital and surgical expenses

insured by a policy of the Glens Falls Indemnity Co. issued to her. The Indemnity Company disclaimed liability upon the ground that the plaintiff's automobile was used as a *public or livery conveyance* and expressly exempted under the terms of the policy. In affirming the judgment of the trial court in favor of the plaintiff, the Appellate Court said at page 600:

> "It will be observed that the policy in question limits the coverage only while the automobile is used as a public or livery conveyance. In the case of *Pimper* v. *National American Fire Ins. Co.*, 139 Neb. 109, 296 N. W. 465, the Supreme Court of Nebraska wrote the syllabus to this case, and there we find the following: 1. 'The term "public conveyance" means a vehicle used indiscriminately in conveying the public, and not limited to certain persons and particular occasions or governed by special terms. The words "public conveyance" imply the holding out of the vehicle to the general public for carrying passengers for hire. The words "livery conveyance" have about the same meaning.' *Elliott* v. *Behner*, 150 Kan. 876, 96 F. (2d) 852.
>
> "2. Where an automobile was insured against loss or damage in a collision or upset, and the policy provided that the insurer would not be liable for loss or damage while the automobile was used as a 'public or livery conveyance for carrying passengers for compensation,' held, under the facts in this case, the insured automobile was not a 'public or livery conveyance' within the meaning of those terms, nor used as such at the time it was damaged in an upset."

In the case of *City of Oswego* v. *Collins*, N. Y. 38 Hun. 171, 172 it was held that *public conveyance* "as used in an ordinance prohibiting all public conveyances from standing on certain streets, means conveyances which the public are entitled to use for a compensation. A hotel omnibus only used to carry the guests of the hotel is not a 'public conveyance' within the meaning of the act." (Words and Phrases, Vol. 35, p. 72).

The term "public conveyance" refers to a vehicle used indiscriminately in conveying the public and is not limited to the conveyance of certain persons or occasions. The words "public conveyance" usually imply the holding out of the vehicle to the general public for carrying passengers for hire. The squadrol is not such a vehicle.

It is our opinion that the squadrol is not a "public conveyance" within the meaning of Section 93-9 of the Municipal Code and that the use of the squadrol for the removal of dead bodies is not in violation of that section.

ARREST BY CITIZEN

(No. 11776—Alderman, 24th Ward—M. I. W.—December 7, 1953.)

In your letter of November 25, you state a committee of clergymen and business representatives have asked that you inquire as to the rights of a citizen to make an arrest when he witnesses a crime being committed.

Chapter 38, sec. 657, Ill. Rev. Stat. 1953 read as follows:

> "An arrest may be made by an officer or by a private person without warrant, for a criminal offense committed or attempted in his presence, and by an officer, when a criminal offense has in fact been committed, and he has reasonable ground for believing that the person to be arrested has committed it."

The type of offense included in this section has been stated to extend "to all misdemeanors, however slight, and all felonies, however great". *People* v. *Edge*, 406 Ill. 490 (1950). It has also been held that violating the disorderly conduct ordinance of the City of Chicago is a criminal offense, within the meaning of the statute. *City of Chicago* v. *Moretti*, 347 Ill. App. 73 (1952). In *Hitzelberger* v. *Kantar*, 181 Ill. App. 459 (1913), it was held that the owner of a building had a right to arrest a child, where the child was committing a misdemeanor in his presence by picking a piece of colored glass out of a window of the building.

It is, however, an essential element of the right of a private person to make an arrest that a crime must in fact have been committed, and the person arrested must be guilty of the crime. *Gill* v. *Lewin*, 321 Ill. App. 633 (1944). A citizen cannot arrest another person merely on suspicion or even on probable cause. *Lindquist* v. *Friedman's Inc.*, 366 Ill. 233 (1937).

C. BOARD OF HEALTH

PUBLIC HEALTH SERVICE FUNDS

(No. 11202—President, Board of Health—J. F. O.—November 3, 1949.)

In your letter of recent date, you state, "The question has been raised as to the legality of our accepting a portion of these (Public Health Service) monies to supplement salaries of employees whose names now appear on City payrolls." You request an opinion as to such legality.

The City Council (July 8, 1949 C. J. p. 4480) passed an ordinance authorizing the Board of Health to accept money from the United States of America for venereal disease control and authorizing the City Treasurer to receive said monies and to hold them as ex officio custodian and the City Comptroller and the City Treasurer are authorized to disburse the money so held by the City Treasurer upon the order of the president of the Board of Health of the City of Chicago.

We have been advised that an accounting of these expenditures is made to the Government; the City Council does not appropriate for such expenditures.

We are of the opinion that there could be no objection for expenditures to supplement salaries of parties so long as they are engaged in activities for which the grant is made.

VENEREAL DISEASE LITERATURE

(No. 11295—Police Commissioner—A. F. G.—May 1, 1950.)

In your letter of April 25, 1950 you quote in full a letter from the President of the Board of Health and request our comments thereon. In his letter Dr. Bundesen cites section 192-11 of the code which is as follows:

"192-11. No person shall sell or offer to sell, give away, offer to give away, distribute, or have in his possession with intent to give away, sell or distribute in or upon any public way or other public place of the city, any book, pamphlet, circular, handbill, advertisement, or notice of any kind purporting to treat of, or treating of diseases known as 'venereal diseases,' describing, explaining or purporting to describe or explain the genital organs, giving or purporting to give the nature and remedies of diseases peculiar to females, uterine diseases or the nature of causes of nervous debility, impotency, sterility or barrenness, gonorrhea, gleet, stricture, syphilis, affection of the prostrate gland, or the remedies therefor, or the cause or remedies for abortion or miscarriage, or articles or means of preventing conception, or giving or purporting to give information from whom or where medicine or anything whatever may be obtained for the prevention, treatment, or cure of any of the above mentioned diseases or condition."

He states that his department has developed an outstanding health education program to combat venereal diseases and has used advertisements from time to time, and wonders whether the section quoted above would apply to the information which the health department gives out relative to securing treatment for venereal diseases. He expresses the opinion that venereal diseases can be suppressed only as these conditions are exposed to the cleansing light of publicity.

He suggests if we find the ordinance applicable to the activities of his department, that we prepare an amendment excluding his departmental activities from the provisions of the section.

Under the rules of construction provided in Chapter 131 of the Illinois Revised Statutes, "person" or "persons" as well as all words referring to or importing persons, may extend and be applied to bodies politic and corporate as well as individuals, we are of the opinion the section above quoted is applicable to publications and advertisements issued by the board of health re matters contained in the section.

We do not believe, however, that it was the intention of the council to hamper the board of health in its expressed power "to do all acts and make all regulations which may be necessary or expedient for the promotion of health or the suppression of disease."

In order to give the council an opportunity to express its real intention we have prepared and will have submitted to the city council a draft of a proposed amendment to the said section, excluding from the ordinance, publications of the kind therein described, issued by order of the board of health.

FURNISHING CERTIFIED RECORDS

(No. 11362—President, Board of Health—F. V. M.—February 7, 1951.)

We wish to call your attention to a letter from the Board of Health addressed to this office dated May 10, 1949. In this letter you refer to an opinion giving you by this department under date of January 7, 1949 containing the following statement on page three (3), paragraph three (3):

"It is our opinion that all the organizations set out above except the American Red Cross, Illinois Veterans' Administration and

the Office of Dependency Benefits (Office of Chief of Finance)—which are not organizations of veterans are entitled to receive such certified copies without charge upon their furnishing evidence that such certified copies are to be used for the purpose heretofore referred to."

You state further that you have received a letter from the American Red Cross dated April 28, 1949 setting forth its connection with and responsibility to the veterans and claiming that the American Red Cross is entitled to receive certified copies without charge under certain circumstances.

You asked to be advised whether the American Red Cross is legally entitled to receive free certified copies of birth and death certificates in accordance with the provisions of Illinois 65th General Assembly, Senate Bill No. 260, approved July 21, 1947.

A query pertaining to the same subject matter has recently been directed to us by the American Red Cross, but instead of replying directly thereto, we are preparing an opinion to you and transmitting a copy thereof to the Red Cross.

A fee for certified copies was originally provided for by the following:

Ill. Rev. Statutes, 1949, Volume 2, Chap. 111½, p. 567, Section 20.

55. Certified copies of record of birth or death—Fee.) § 20.

"The Department of Public Health, or any local registrar or any county clerk shall, on request, furnish a certification of the record of any birth, stillbirth or death to any applicant entitled to the same upon the payment by such applicant of a fee of one dollar ($1.00) to the maker of such certification." * * *

You will note as heretofore stated, that our previous opinion of January 7, 1949 was predicated upon Section 29 of "an act to provide for the furnishing of copies of public documents to interested parties," (approved May 17, 1935, L. 1935, p. 1411, in force July 1, 1935), which statute now includes Section 30 heretofore referred to as Senate Bill No. 260, (approved July 21, 1947 and appearing on p. 733, Volume 2, Illinois Revised Statutes, 1949), which we quote in full as follows:

"RECORDS FOR VETERANS ADMINISTRATION AN ACT to

provide for the furnishing of copies of public documents to interested parties. (approved May 17, 1935, L. 1935, p. 1411, in force July, 1, 1935.)

Be it enacted by the People of the State of Illinois, represented in the General Assembly:

29. Copies of records for United States Veterans Administration.) § 1. Whenever a copy of any public records is required by the United States Veterans Administration to be used in determining the eligibility of any person to participate in benefits made available by such administration, the official charged with the custody of such public records shall, without charge, provide the applicant for such benefits, or his agent, or a duly identified service officer of any organization of veterans, or the representative of the United States Veterans Administration, with a certified copy of such record. Such copies shall also be furnished, without charge to the conservator of the estate of any incompetent person entitled to the payment of benefits from the United States Veterans Administration. As amended by act approved July 18, 1941. L. 1941, vol. 1, p. 1036.

30. Certified copies of records to veterans organizations, etc.) § 2. Whenever a copy of any public record is required by any accredited Veterans Organization, the Illinois Veterans Commission,

the Veterans Administration, the Veteran or his dependent in connection with a claim for benefits, the official charged with the custody of such public record shall without charge provide accredited Veterans Organization, the Illinois Veterans Commission, the Veterans Administration, the Veteran or his dependent, with a certified copy of the requested record.

The request for the copy of the record must be in writing with a statement, signed by an authorized official of the accredited veterans organization, the Illinois Veterans Commission, the Veteran Administration, the Veteran of his dependent, to the effect that the requested document is to be used in obtaining benefits and, if the copy of the record is to be mailed must be accompanied by sufficient postage to pay the cost of mailing. When the request is made as provided in this section and, if mailing is necessary, is accompanied by sufficient postage, the furnishing of the certified copy of the record is mandatory upon the official charged with its custody, and shall not be subject to the approval or sanction of any other person, agency, or body politic or corporate whether federal, state or municipal. Added July 21, 1947. L. 1947, p. 1417."

In now determining whether the American Red Cross is entitled to copies of public records without charge, Section 30 must also be taken into consideration.

To support our theory that the American Red Cross generally is not entitled to free copies of such official records, we call attention to the fact that at the time of the session of the State Legislature of 1947 when our opinion of January 7, 1949 was published, Section 30 heretofore quoted was adopted at the request of several organizations, who had expressed dissatisfaction with same, some of whom were made eligible for such free copies by said Section 30, and the inclusion of some and the exclusion among others of the American Red Cross is conclusive proof in our opinion that it was the intention of the legislature not to make such free copies available to this organization.

Therefore, it is our opinion that the American Red Cross may now procure such free copies only as an agent of applicant for benefits made available by the United States Veterans Administration, or as conservator of the estate of any incompetent person, and after full compliance with said Sections 29 and 30 as heretofore set out.

Also for consideration and in support of the claim of the American Red Cross that they are entitled to certified copies free of charge, the following enactment of the United States Congress has been submitted to us.

United States Statutes at large, 74th Congress, January 1935 to January 1936, Volume 49, p. 2031:

"The Administrator of Veterans' Affairs is hereby authorized to recognize representatives of the American National Red Cross, the American Legion, the Disabled American Veterans of the World War, the Grand Army of the Republic, the United Spanish War Veterans, Veterans of Foreign Wars, and such other organizations as he shall approve, in the presentation of claims under statutes administered by the Veterans' Administration. However, no such representative shall be recognized until a certificate has been filed in the Veterans' Administration, under such rules as the Administrator of Veterans' Affairs may prescribe, certifying that no fee or compensation of whatsoever nature shall be charged veterans or the dependents of veterans for service rendered. The rules prescribed by the Administrator of Veterans' Affairs shall contain a provision requiring in each claim the filing of a power of attorney in such manner and form as the Administrator of Veterans' Affairs may prescribe. The Administrator of Veterans' Affairs is further authorized in his discretion,

under such regulations as he may prescribe, to recognize any person for the purpose of a particular claim under the conditions and limitations of this section."

We believe that the foregoing enactment has to do only with the relationship of the parties mentioned therein with the Veterans Administration in their settlement of veterans' claims, and can have no bearing on the authority of a state or a municipality to collect fees for certified copies of their official documents.

We are of the opinion that the American Red Cross is entitled to free certified copies of said public records only under the conditions heretofore set out.

CERTIFIED DEATH CERTIFICATES

(No. 11398—President, Board of Health—E. R. H.—June 26, 1951.)

We acknowledge receipt of your letter of June 13, 1951 requesting our opinion upon the question:

"Who is legally entitled to receive a certified copy of a death certificate from the Local Registrar of Vital Statistics?"

June 26, 1924 this office rendered an opinion to Dr. Bundesen on this subject which is found in volume XIII, Opinions of the Corporation Counsel, page 224. The statute then in effect provided:

"The State Board of Health, any Local Registrar or any County Clerk shall, on request, furnish a certified copy of the record of any birth, stillbirth, or death, to any applicant entitled to the same, upon the payment by such applicant of a fee of fifty cents ($0.50) to the maker of such certified copy. * * *"

it was said in that opinion:

"This is the only provision in the statute which bears upon the right of access to the records and it does not give the public a general, unlimited right of access, but merely prescribes that certified copies of the records may be given to any person 'entitled to the same' upon the payment of fifty cents. The statute does not define what is meant by the words, 'entitled to the same.' In the absence of such a definition it is logical to fall back upon the common law definition, and interpret the statute to mean that any person having a special interest in the subject-matter is entitled to a certified copy upon the payment of fifty cents, and is also entitled to inspect that portion of the records in which he has a special interest.

"Although the decisions are not harmonious with regard to what persons have a special interest and are thereby entitled to examine a public record, it is clear that any relative of the individual concerning whom the record contains information, is beyond doubt entitled to an inspection of the same, or, upon the payment of fifty cents, to a certified copy of the same. We are also of the opinion that an insurance company which is not merely conducting a general fishing expedition to obtain information for the purpose of soliciting business, but which has a special interest to secure information concerning some person whom they have already insured, is entitled to inspect the records. The police department, the state's attorney's office, administrative branches of the Federal Government, and other

public officers are entitled to examine the records or receive a certified copy of any certificate, providing their purpose is to secure information in the line of their official duty. On the other hand, a person who desires to inspect the records merely for the purpose of curiosity or to satisfy a whim or caprice, is not entitled either to access to the records or to a certified copy of any record. There are also decisions to the effect that persons who are motivated only by a desire to solicit business have no special interest which entitles them to an inspection of the records."

The statute now in force upon this subject is paragraph 55, chapter 111½, Illinois Revised Statutes, 1949, volume 2, page 567 which provides:

"The Department of Public Health, or any Local Registrar or any County Clerk shall, on request, furnish a certification of the record of any birth, stillbirth or death to any applicant entitled to the same upon the payment by such applicant of a fee of $1.00 to the maker of such certification. * * *"

Paragraph 93-4, chapter 93 of the Municipal Code of Chicago provides:

"The board of health shall on request furnish a certification of the record of any birth, stillbirth or death on file in the board of health to any applicant entitled to the same upon payment by such applicant of a fee of one dollar for such certification. The board is also authorized to furnish certified copies of the same in such manner and to such persons as is provided in section 20 of 'An Act in relation to births, stillbirths and deaths and to provide for the registration and the establishment of records thereof.' Approved July 24, 1943, upon payment to the city collector by the applicant of a fee of one dollar for such certified copy, except where in said Act such fee is expressly waived."

The statute now in effect, which you will note is very similar to the statute in effect July 26, 1924, the date of our former opinion to Dr. Bundesen and the Chicago Code above quoted provide substantially the same. Both statutes and the ordinance provide that the Registrar

"shall on request furnish a certification of the record of any birth, stillbirth or death * * * to any applicant entitled to the same upon payment by such applicant of a fee. * * *"

May 13, 1931 in an opinion to Dr. Bundesen on this subject, volume XVIII, Opinions of the Corporation Counsel, page 114, we said:

"Birth and death records of the Health Department should be open to the public for legitimate purposes, but the Health Department need not extend the courtesy of its records to mere idle curiosity seekers."

Under the present statute and ordinance now applicable we adhere to our opinions of July 26, 1924 and May 13, 1931 above referred to. The change since made in the statute does not alter those opinions.

PUBLICATION OF RESOLUTIONS

(No. 11425—Secretary, Board of Health—A. F. G.—September 21, 1951.)

With your letter of September 4, 1951 you enclosed copy of a resolution passed by your board July 18, 1951, reinstating a regulation enacted

on December 22, 1941, which regulation was subsequently rescinded on May 2, 1946 after World War II.

You inquire if it is necessary legally that this resolution be published again at this time in view of its having been published at the time of its original enactment in 1941?

Section 9-13 of the Municipal Code of Chicago grants power to the board of health to make such rules and regulations as it may deem necessary or advisable for the prevention and suppression of disease, not inconsistent with the provisions of the code. This section provides that such rules or regulations shall take effect and be in force ten days after publication in a daily newspaper of the city, except in certain cases of emergency.

When the regulation enacted and published in 1941 was rescinded in 1946 it was no longer in effect. Its repassage in 1951 was in effect the enactment of a new regulation and in our opinion requires publication as provided in section 9-13 referred to above.

We are of the opinion the definition of the word "Culture" would be better if the first line of the definition read as follows:

" 'Culture' means any cultivation of disease producing."

DOG POUND CITIZENS COMMITTEE

(No. 11440—President, Board of Health—C. P. H.—November 5, 1951.)

We have your letter of October 9, 1951 transmitting copy of a communication you received from Mrs. Josephine M. Rutson, member of the Dog Pound Citizens Committee. Mrs. Rutson states that she has been denied admission for the purpose of inspection to one of the medical schools receiving dogs from the dog pound, on the ground that not less than three members of the committee may inspect the institution. You request our opinion as to whether or not one member of the advisory committee may inspect the medical school.

Section 98-34 of the Municipal Code of Chicago, which provides for the use of unclaimed impounded animals for the purpose of increasing knowledge relating to the cause, prevention, control and cure of disease, reads in part as follows:

> "In executing the provisions that unclaimed animals may be released from the municipal animal shelter to reputable institutions of learning and hospital laboratories, the following procedures and regulations shall obtain:
>
> (A) The president of the board of health, subject to the approval of the board of health, shall appoint an advisory committee of which he shall be chairman consisting of the dean or chief executive officer of each school of medicine and surgery in the city of Chicago licensed by the State of Illinois to give the degree of Doctor of Medicine or Doctor of Osteopathy and whose degrees are accredited by the department of registration and education of the state of Illinois, the director of Cook County Hospital, one person residing or doing business in the city of Chicago who shall be appointed for a term of two years and shall be regularly licensed to practice veterinary medicine and surgery, and two citizens of the City of Chicago who shall

be appointed for a term of two years and shall not be affiliated with or a member of any group or profession whose members are licensed by the state of Illinois to practice the arts of healing and treating the diseases of human beings and animals. * * *

(C) The advisory committee shall inspect annually, or oftener, all institutions obtaining animals under the ordinance and shall promulgate the following regulations: * * *"

The above quoted provisions expressly provide that the advisory committee shall inspect all institutions obtaining animals under the ordinance. The ordinance is silent as to the number of members of the advisory committee required to be present to perform an official act. However, it is a well established principle of law that where boards, commissions and committees are vested with authority to do an act of a public nature, a majority at least must concur and unite in the performance of the act. This rule is well stated in *McQuillin*, on Municipal Corporations, 3rd edition, Volume 4, section 13.30, which reads as follows:

"In the absence of law to the contrary, where authority to do an act of a public nature is given by law to more persons than one, which act is merely ministerial in character, a majority at least must concur and unite in the performance of it; but they may act separately and need not be convened in a body or notified so to convene for that purpose. However, if the act is one which requires the exercise of discretion and judgment, in which case it is usually termed a judicial act, unless provision is otherwise made by law, the persons to whom the authority is given must meet and confer and be present when the act is performed, in which case the majority of them may perform the act; or, after all of them have been notified to meet, a majority having met will constitute a quorum of sufficient number to perform the act. This is the common-law rule. And although vacancies occur by death or resignation, if a majority survives or remains there is a sufficient number to constitute a quorum. However, where the law requires a certain number to constitute a board, as for example three members, and only two are appointed or qualify, it has been held that they cannot legally do an act authorized to be done by a majority of the board because no official board exists of which they would be a majority."

This principle has been followed by the Supreme court of Illinois in a number of cases. In the case of *Village of Bellwood* v. *Galt*, 321 Ill. 504 (1926), the court in passing on the number of members of the Board of Local Improvements of the Village required to be present at a meeting in order to take official action, stated at page 508:

"Official action of such a body can be taken only by a majority of its members meeting together and acting officially. (*People* v. *Chicago and Eastern Illinois Railway Co.*, 306 Ill. 402; *McKeown* v. *Moore*, 303 id. 448; *McManus v. McDonough*, 107 id. 95.)"

In the case of the *People* v. *C. & E. I. Ry. Co.*, 306 Ill. 402, (1923) the court in holding that a majority of the members of the board of auditors of the Township of Fountain Creek in the County of Iroquois may levy a tax, stated at page 412:

"Where a collection of individuals designated in a manner provided by law is created a body to whose care public affairs are committed, the body so created is powerless to act except together and as a body."

In the case of *Brown, et al., Commissioners of Highways of the Town of Lancaster, etc.*, v. *Baumgarten*, 41 Ill. 254 (1886) the validity of a contract signed by the commissioner of highways was attacked for

the reason that only two of the three commissioners executed it. The court upheld the validity of the contract and stated, at page 259:

> "The answer to this is, that commissioners of highways are a *quasi* corporation, and all such bodies act by a vote of the majority, unless there be some provision in the law of their creation to the contrary. Angel and Ames on Corp., 459; 2 Kent Com., 293. The law giving commissioners of highways power to act in a specified case, the authority is to them in their corporate capacity, and the decision of a majority is the decision of the body. If this was not so, acts of great importance to the public could not be done, if the consent of all was necessary. One obstinate man might defeat important public measures.
>
> "But, if they were not a corporation, then, the act by which they are appointed being silent as to how many should constitute a quorum, a majority may act. *Dennis* v. *Maynard*, 15 Ill., 479. So, where a number of persons are intrusted with powers, in matters of public concern, and all of them are assembled and consulting, the majority may act and determine, if their authority is not otherwise limited and restricted."

From the authorities cited above, it is clear that where the law creating a public body fails to designate the number of its members required to be present in order to perform an official act, a majority at least must concur and unite in the performance of the act. As previously stated, section 98-34 of the Code which creates the advisory committee does not provide for the number of the members of the committee required to be present to inspect the institutions enumerated in the ordinance. It is therefore our opinion that Mrs. Rutson as an individual member of the committee has no authority to make such inspection and that at least a majority of the members of the committee must conduct the inspections required by the ordinance.

DOG POUND CITIZENS COMMITTEE

(No. 11495—President, Board of Health—C. P. H.—March 7, 1952.)

Miss Mildred Fitz-Hugh, president of the Illinois Citizens' Animal Welfare League located at 6224 S. Wabash Avenue, Chicago, has addressed a letter to this department under date of February 8, 1952, enclosing copy of her communication to the president of the board of health dated February 8, 1952, together with a copy of the rules and regulations adopted by the board of health pertaining to the inspection of institutions of learning and hospitals receiving unclaimed dogs from the municipal animal shelter for the purpose of increasing knowledge relating to the cause, prevention, control and cure of disease. Miss Fitz-Hugh contends that these rules and regulations are in conflict with section 98-34 of the Municipal Code of Chicago as construed in a comprehensive opinion rendered by this department to the president of the board of health under date of November 5, 1951.

Section 98-34 provides in part as follows:

> "In executing the provisions that unclaimed animals may be released from the municipal animal shelter to reputable institutions of learning and hospital laboratories, the following procedures and regulations shall obtain:

(A) The president of the board of health, subject to the approval of the board of health, shall appoint an advisory committee * * *.

(C) The advisory committee shall inspect annually, or oftener, all institutions obtaining animals under the ordinance * * *."

In the opinion we held that where a law creating a public body fails to designate the number of its members required to be present in order to perform an official act as in the case of the above quoted provisions of section 98-34, a majority must at least concur and units in the performance of the act and concluded that:

"* * * an individual member of the committee has no authority to make inspections and that at least a majority of the members of the committee must conduct the inspections required by the ordinance."

Section 98-34 further provides as follows:

"The president of the board of health shall make and publish rules and orders carrying out the duties imposed upon him by law for the purpose of carrying out the intent of this ordinance, which rules and orders shall be deemed prima facie reasonable and valid."

Pursuant to the above provisions of the code, rules and regulations were adopted which read in part as follows:

"The committee members or their representative shall be permitted at any time without advance notice to inspect the laboratories and kennels of these institutions receiving animals from the municipal animal shelter."

"The president of the board of health shall refuse further allotments of animals from the municipal animal shelter to any institution refusing immediate admittance to any member of the committee or his representative."

Obviously a conflict exists between the provisions of section 98-34 which we held in our opinion requires at least a majority of the members of the advisory committee to make inspections and the above quoted provisions of the rules and regulations which authorize any member of the committee or his representative to make inspections. These rules and regulations in effect amend the ordinance. It is well established that an ordinance can only be amended, or repealed or suspended by an ordinance passed by the City Council. (*Hibbard & Co.* v. *City of Chicago,* 173 Ill. 91 (1898); *People* v. *Mount,* 188 Ill. 560 (1900); *C. & N. P. R. R. Co.* v. *City of Chicago,* 174 Ill. 439 (1898); *People* v. *Thompson,* 209 Ill. App. 573 (1918); Opinions of the Corporation Counsel, vol. XVIII, pages 87, 90, 91 and 456).

It therefore necessarily follows that neither the president of the board of health nor the board of health has power to adopt the above quoted provisions of the rules and regulations and that the said provisions are null and void.

In view of the foregoing we suggest that the above quoted provisions of the rules and regulations be amended to provide that at least a majority of the members of the advisory committee inspect the institutions enumerated in section 98-34 that receive unclaimed dogs from the municipal animal shelter.

ACCEPTING DONATIONS

(No. 11510—Acting President, Board of Health—C. P. H.—April 3, 1952.)

We acknowledge receipt of your letter of December 13, 1951, in which you ask our opinion if it is "permissible for the Municipal Contagious Disease Hospital to accept funds from individuals, residents of Chicago, or insurance companies who volunteer to pay for services to Chicago patients who have been hospitalized there" and in which you cite two cases of patients whose insurance companies had offered reimbursement to the hospital for their care.

Section 22 of Chapter 24, Illinois Revised Statutes, 1951, after authorizing municipalities with a population of 500,000 or more to establish contagious hospitals provides:

> § 22-38. Charge for use.) Every specified municipality which establishes such a hospital has the power to charge to and collect from any person, who is able to pay, reasonable compensation for occupancy, nursing, care, medicines, or attendance, and may extend these privileges free of charge to persons who are unable to pay for them."
>
> § 22-39. Donations.) Every specified municipality has the power to accept donations of money, personal property, or real estate for the benefit of such a hospital, to be held, when accepted, according to the terms of the deed, gift, devise, or bequest of the property."

Section 9-21 of the Municipal Code of the City of Chicago provides, among other things:

> "Municipal contagious disease hospitals. A fee of twenty-five dollars per week shall be charged and collected from non-resident patients given hospital care at the municipal contagious disease hospitals, and from patients, residents of the city, willing to pay such fee."

It is our opinion that the only charge you can make is a charge of $25.00 per week for the hospital's services to "patients, residents of the city, willing to pay such fee," and you are authorized to bill such patients for such fee. However, you are authorized, as provided in paragraph 22-39 of the Illinois Revised Statutes above quoted, to accept donations of money so that while you are limited by the Code provisions above quoted, to a charge of $25.00 to patients residents of the city, willing to pay such fee, you are authorized by the Statute to accept any donation the patient or his insurer sees fit to make. However, any donation accepted must be earmarked for the benefit of the contagious hospital, as the statute provides.

PUBLICATION OF RESOLUTIONS

(No. 11540—Secretary, Board of Health—E. R. H.—May 20, 1952.)

We have your letter of April 1, 1952, transmitting copies of three resolutions adopted by the Board of Health on March 18, 1952. You request us to approve these resolutions before publication.

The resolutions relate to the following subjects:

1. Appointment of a medical officer of health;
2. Appointment of an acting president of the board of health; and
3. Amendment to rules and regulations pertaining to the inspection, by the advisory committee, of medical institutions receiving dogs from the municipal animal shelter.

We have examined the resolutions referred to above and find that they are proper as to form and legality. We therefore return herewith these resolutions with our approval.

With reference to publication of these resolutions, section 9-13 of the Municipal Code of Chicago requires that all rules and regulations adopted by the board of health be published in a daily newspaper of the city. There are no provisions in this or any other section of the code requiring publication of resolutions of the board of health which do not promulgate rules and regulations.

It is therefore our opinion that the board of health is required to publish the resolution amending the rules and regulations relating to the inspection of medical institutions receiving dogs from the municipal animal shelter; but that the board of health is under no legal duty to publish the resolutions relating to the appointment of a medical officer of health and the appointment of an acting president of the board of health.

We wish to call to your attention that the Chicago Journal of Commerce, now known as the Wall Street Journal, is no longer the legal publication for the City of Chicago. By an order passed by the City Council on December 28, 1951, appearing in the Journal of Proceedings of the City Council of that date at page 1611, the Purchasing Agent was authorized by the City Council to enter into a contract with the Hearst Publishing Company, Inc., publisher of the Chicago Herald-American, for furnishing to the City services necessary for the printing and publication of official newspaper advertisements required by various departments and agencies of the city. We therefore suggest that the board of health publish the rules and regulations referred to herein in the Chicago Hearld-American.

TEMPORARY REVOCATION OF PERMIT

(No. 11573—President, Board of Health—E. R. H.—August 6, 1952.)

We acknowledge your letter of July 17, 1952, attaching a copy of "Notice of Temporary Revocation of Permit", which you state has been used by your department for a number of years, asking our opinion as to its legality and continued use.

We have made some changes in the document and we attach hereto a copy of the notice in question upon which we have made alterations in ink which is approved by us as to form and legality as so altered. Our reasons for the suggested changes are:

Section 154-1 of the Municipal Code of Chicago defines the term Milk Producer to mean "any person who owns or controls one or more cows, from which a part or all of the milk or milk products is sold."

The term Distributor is defined to mean "any person who offers for sale, or sells, or delivers to another any milk or milk products for human consumption."

With reference to permits, Section 154-8 provides in part:

> "* * *. Such permit may be revoked by the board of health upon violation by the permittee of any of the provisions of this chapter or of any of the rules and regulations of the board of health, or in any emergency when, in the judgment of the board of health, the milk or milk products handled by the permittee has or may become a public health menace, or in any case in which the permittee refuses the board of health the right of entrance to any dairy farm, milk plant, or vehicle, or any other place where milk or milk products are kept or stored, for the purpose of inspection or the collection or examination of samples; provided that the permittee shall, after abiding by such revocation, upon request have the right of a hearing before the board of health."

With reference to dairy farms and milk plants, Section 154-17 of the Code provides:

> "At least once during each inspection period, the board of health shall inspect all dairy farms and all milk plants whose milk or milk products are intended for consumption within the city. In case the board of health discovers the violation of any item of sanitation, it shall make a second inspection after a lapse of such time as it deems necessary for the defect to be remedied, and the second inspection shall be used in determining compliance with this chapter. Any violation of any provision of this chapter on two consecutive inspections shall be cause for immediate revocation of the permit."

The term "hauler" although not specifically defined in the Code is included in the definition of "distributor". We are of the opinion that the term "hauler" should be retained in the notice for the clear and ready understanding of the industry.

We suggest the addition in the notice of the term "distributor" because that term is specifically defined in the Code embracing the term "hauler" and should, therefore, be a part of the notice.

We have deleted the word "temporary" from the notice because Chapter 154 of the Chicago Code on Milk and Milk Products nowhere refers to a "temporary" revocation. The Code provisions above quoted provide only for unqualified revocation and, in our opinion, your notice of revocation should follow the terms of the Code.

MUTUAL CARE HOME

(No. 11607—E. R. H.—November 13, 1952.)

We acknowledge receipt of your letter of October 24, 1952, in which you state that a woman has four children all under the age of eight years in her place of residence. You further state that both mothers and four children live in this home on a permanent status and you ask our opinion as to whether the woman's place of residence constitutes a mutual care home or a boarding house. We have confirmed by telephone conversation with your office the fact that the woman in question is not related to the children or their parents.

Section 136.1-1 of the Municipal Code of Chicago defines the term "mutual care home" as meaning:

> "Any place for the reception or care of three or more persons, under sixteen years of age, who are not related to the keeper and whose parents or guardian are also resident in the same place and share daily care of such persons with the keeper."

The facts set forth in your letter fit the above definition of "mutual care home." The "place for the reception or care", is 5418 Magnolia, the "three or more persons under sixteen years of age" are the four children born November 9, 1945, February 28, 1948, February 22, 1949, and December 13, 1951, "who are not related to the keeper". The children's parents "are also residents in the same place."

Telephone conversation with your office also confirms the fact that the mothers are employed, and when absent from the home, at work or otherwise they hire sitters to care for the children. The keeper seemingly has no responsibility with reference to the children. When their mothers are not caring for them, sitters are employed by the mothers for that purpose. The implication is that, inasmuch as the keeper has nothing to do with reference to the children, their mothers, do not "share daily care of such persons with the keeper" as required by the above definition and, therefore her place does not come within the definition of a mutual care home.

That definition refers to "any place for the reception *or* care" etc. The language is in the disjunctive, referring to either the "reception" or "care." However, the keeper does furnish the place which is the shelter for the children. Presumably she is paid for it, and, being the recipient of the compensation (benefit) the law places upon her the burden of at least some degree of care and responsibility toward the children. The function of the sitters does not change the character of the place.

It is our opinion that the residence is a mutual care home within the above definition of Section 136.1-1 of the Municipal Code of Chicago.

D. MUNICIPAL TUBERCULOSIS SANITARIUM

ARTICLES FORBIDDEN TO PATIENTS

(No. 11159—Tuberculosis Control Officer, M. T. S.—E. R. H.—July 13, 1949.)

This will acknowledge receipt of your letter of July 7, 1949, asking an opinion as to what action should be taken for the disposal of quantities of whiskey, gin, wine, beer and cigarettes which are forbidden to patients in the Sanitarium.

Section 72-6, chapter 24 of the Illinois Revised Statutes (1947) provides among other things:

> "Immediately after their appointment the directors * * * shall adopt such by-laws, rules and regulations for their own guidance and for the government of the Sanitarium, branches, dispensaries, and

auxiliary institutions and activities connected therewith as may be expedient, not inconsistent with this article and the ordinances of the city * * *."

The above statute is the authority to your Board of Directors to pass a rule prohibiting such articles within the Sanitarium. If the records of the Sanitarium do not now contain a formal resolution prohibiting such articles and providing for their seizure when found, such a resolution should be passed by the Board of Directors and publicly posted so that your patients and others may have notice of it.

Such property taken in violation of such rule should be returned to the patient upon leaving the Sanitarium, and in the event of the death of the patient, returned to his or her administrator or executor. Should the patient have no other estate to probate, upon proper affidavit furnished the Sanitarium, such property should be turned over to his or her next of kin under the statute of descent and distribution of the State of Illinois. The distribution of the property in case the patient has no other estate should be referred to this office for the proper affidavit. In case the patient, or his, or her next of kin, abandons such property it should, after a lapse of time or upon other facts tending to show abandonment, be turned over to the Purchasing Agent of the City for final disposition.

RETURN OF FEDERAL FUNDS

(No. 11199—President, Board of Directors, M. T. S.—R. J. N.—October 28, 1949.)

Your letter of October 4, 1949 enclosing a demand from the Division Engineer of the United States Government for the return of $42,800.00 requests our opinion as to the duties of the Board of Directors of the Municipal Tuberculosis Sanitarium in connection with this demand and further requests the proper steps to be taken in order to comply with the Federal Government's demand.

Your letter informs us that the money was procured upon the application of the then Board of Directors of the Municipal Tuberculosis Sanitarium on or about May 1, 1946; that at the time application was made the Board signed an application for such sum under the terms of which they agreed to abide by the regulations of the Federal Works Agency and the Federal laws creating that agency. Your letter further discloses that subsequent to the receipt of this money an architect was hired for the purpose of drawing plans for an addition to the Municipal Tuberculosis Sanitarium to provide 500 additional beds, kitchens, appurtenant rooms and facilities of the sanitarium located at 5601 North Pulaski Road, Chicago, Illinois; that subsequent to the hiring of the architect and after some of his work had been completed the Board determined that it would not be feasible to complete the project and therefore abandoned the same paying the architect the sum of $19,290.00 for his services and expenses to the date of abandonment of the project.

The letter of September 9, 1949 from the Division Engineer demands return of the full sum of $42,800.00, based on his interpretation of the application and the regulations which he contends formed a contract between the Municipal Tuberculosis Sanitarium and the Federal Works Agency. His letter calls attention to Section 10a of those regulations which read in part as follows:

"*Section 10. PLAN PREPARATION* (a) The applicant * * * upon the receipt of initial payment shall take prompt steps to initiate and prosecute the plan preparation to completion."

We are unable to agree completely with the conclusions of the Division Engineer for the Federal Government that there is a duty upon this Board to return the full amount because of the abandonment of the project after you have in good faith expended a portion of the monies. We are of the opinion that if the money has not been used for the purpose for which it was advanced it cannot be applied to any other purpose and since the project has now been abandoned the unexpended funds in the advance should be returned to the Federal Government. The expended portion however need not be repaid from other funds. Our conclusion in this matter is based upon the law creating the Federal Works Agency (Title V of the War Mobilization and Reconversion Act of 1944, Public Laws 458, 78th Congress).

Section C of that Act provides as follows:

"Advances under this section to any public agency shall be repaid by such agency if and when the *construction* of the public works so planned is undertaken. * * *" (Emphasis added.)

The regulations under which the advance was made include in addition to Section 10a referred to above the following:

Section 3 "(d) An advance shall *not* be required to be repaid until the construction of the public work for which the advance is made is undertaken or started as provided in Section 12 hereof. Until such construction is undertaken or started the advance shall *not* be deemed by the United States to be a debt or obligation within the meaning of any constitutional or statutory limitation." (Emphasis added.)

Information received from the City Comptroller discloses that the account into which this advance was deposited has a present balance of $23,510.00. We are of the opinion that only this balance should be repaid to the Federal Government.

We recommend therefore that your Board draw a voucher payable to the Treasurer of the United States in the sum of $23,510.00 and forward the same together with a copy of this opinion to the City Comptroller for payment.

REMOVAL OF EMPLOYEES

(No. 11211—Medical Superintendent, M. T. S.—E. R. H.—November 25, 1949.)

We acknowledge your letter of November 17, 1949, requesting an opinion as to the discontinuance of salary of a former chauffeur at the Sanitarium, who was admitted to the Infirmary of the Sanitarium on November 8, 1948, and has been a patient there continuously since and who has been on the payroll of the Sanitarium receiving $3,030.83 in salary since November 15, 1948.

We are advised that he is not a Civil Service Employee.

In our opinion this employee should have been stricken from the Sanitarium payroll long ago. The Board of Directors of the Sanitarium

have full power to deal with this matter. Section 72-6, Chapter 24 of the Illinois Revised Statutes, 1949 in part provides:

> The Board of Directors "shall adopt such by-laws, rules and regulations for their own guidance and for the government of the Sanitarium and the branches, dispensaries, and auxiliary institutions and activities connected therewith as may be expedient, not inconsistent with this article and the ordinances of the city or village. * * * The Board has power to appoint suitable superintendents or matrons or both and all necessary assistants and other employees, to fix all compensation, and to remove such appointees. The Board in general shall carry out the spirit and intent of this article in establishing and maintaining a public sanitarium. * * *
>
> All officers and employees of such public Tuberculosis Sanitarium shall be deemed officers or employees, as the case may be, of the city or village which established the Sanitarium."

Section 25-4, Chapter 25 of the Municipal Code of Chicago provides:

> "The head of a department, board or other agency, of the city government shall have the power to appoint and remove all subordinate officers and employees of his department, board or agency according to law."

The Board has the power to establish rules governing such situations arising with Sanitarium employees, but if no such rule exists the Board has ample power, by its resolution recorded in its minutes, to deal with the matter.

PERSONAL PROPERTY OF PATIENTS

(No. 11253—Medical Director, M. T. S.—E. R. H.—February 24, 1950.)

We have your letter of February 17, asking our opinion as to the responsibility of the Municipal Tuberculosis Sanitarium in case of loss of patients' wearing apparel, radios, etc., located in their living quarters of the Sanitarium.

The rule of law applicable is stated in 41 Corpus Juris Secundum, page 341:

> "A hospital created and existing for purely governmental purposes and under the exclusive ownership and control of the State or a governmental subdivision is not liable for the negligence or misconduct of its employees."

It is our opinion that maintenance of the Sanitarium is an exercise of a governmental function and that the Sanitarium is not liable in case of a patient's loss of personal property.

REPAYMENT OF FEDERAL FUNDS

(No. 11260—Board of Directors, M. T. S.—R. J. N.—March 2, 1950.)

Your letter of January 25, 1950, requests this office to review an opinion written October 28, 1949* concerning the question of repayment of monies advanced by the United States government for the purpose of drawing plans for an addition to the Municipal Tuberculosis Sanitarium.

That opinion held that money advanced in 1946 by the Federal Government and not used for the purpose for which it was advanced should be returned to the Federal Government, but that where the Municipal Tuberculosis Sanitarium had in good faith commenced plans for the completion of a project which it later deemed inadvisable to construct, the monies expended need not be recouped from other local tax sources in order to repay the full advance to the Federal Government.

Your letter transmits a communication from the Division Engineer of the General Service Administration of the Federal Government which directs our attention to various provisions of the War Mobilization and Reconversion Act and gives the interpretation placed upon those provisions by the Federal Government. The sections to which our attention is directed are as follows:

> "Section 2. Purpose of the Act. The Act authorizes the Federal Works Administrator to make loans or advances to public agencies in order to encourage and to assist them in completing the plan preparation of useful public works, thereby developing a reserve of non-Federal public works which can be placed upon construction with a minimum of delay as circumstances warrant."
>
> "Section 10 (a). The applicant shall be responsible for the character, adequacy and method of plan preparation, in accordance with acceptable professional practices, and upon the receipt of the initial payment shall take prompt steps to initiate and prosecute the plan preparation to completion."
>
> "(b). The applicant agrees that it will use the funds advanced only for the plan preparation for the public work for which the advance is made and that such plan preparation will be adequate and suitable for the purpose intended to be served by the advance."

We are unable to agree with the conclusions of the Division Engineer as to the proper construction to be placed upon the statutory provisions quoted by him.

We are of the opinion that Sections 2 and 10 (a) referred to above indicate congressional intention to have the Federal Government encourage local public works but does not indicate an intention to have the Federal Government require local agencies to either expend large sums for completion of projects which those local agencies do not deem advisable under circumstances arising after the project has been applied for or in the alternative be required to levy local taxes in order to repay the Federal advances.

Section 10 (b) referred to above indicates only a congressional intent to restrict the use of the funds to the project for which appli-

---

* Opinion No. 11199, Page 58.

cation was made and accordingly our opinion of October 28, 1949, is in complete agreement with this intention.

We regret that we are unable to concur in the opinion of the Division Engineer but feel that the whole intent of the War Mobilization and Reconversion Act would be thwarted if the harsh construction placed upon it by the Division Engineer were allowed to prevail. We are of the opinion that this construction of the Act would force municipalities to refuse Federal grants which would in effect become Federal mortgages on the future of the local taxing bodies.

We are therefore of the opinion that your office should inform the Division Engineer that until such time as a judicial interpretation of the provisions of the act relied on construes the act as he contends you should not attempt to repay the $19,000.00 from funds presently in your possession and earmarked for the maintenance and operation of the Municipal Tuberculosis Sanitarium of the City of Chicago.

RESIDENCE REQUIREMENT

(No. 11263—Medical Director, M. T. S.—E. R. H.—March 8, 1950.)

We have your letter of February 24, 1950, enclosing copy of a letter to you from Dr. Dan Morse, Medical Director and Superintendent of the Municipal Tuberculosis Sanitarium of Peoria, Illinois, regarding the question of residence of a woman and asking our opinion thereon.

Dr. Morse, in his letter to you, gives the following history of the woman's residence:

> "Resident of Peoria, Illinois, from 1918 to June, 1942, when she moved to 6045 S. Harper Street. In October 1942 she returned to Peoria and stayed until February 1943 when she again went to Chicago living at 6045 S. Harper Street until May 1944 when she moved to 6500 Kimbark, Chicago. In October 1944 she moved to 6434 Kimbark and lived there until March 1946 when she returned to Peoria. While in Chicago she worked at the American Canning Company—Plant 68-A-6005 South Western Avenue. She started working there in September 1943 and left in January 1946 when she quit because she was ill.
>
> "After returning to Peoria in March 1946, she lived with her mother at 122-4th Street and on April 24th she had quite a severe hemoptysis and was sent to Proctor Hospital, but she said a diagnosis of tuberculosis was not made until June 1946."

The letter is silent on her present residence or as to her residence since the year 1946. From our telephone conversation yesterday, we understand that she is now in a Peoria sanitarium and has been there for some time prior to the present. Presumably, from Dr. Morse's letter, she has resided in Peoria since 1946.

Section 72-7, chapter 24 Illinois Revised Statutes of 1949, under which the Municipal Tuberculosis Sanitarium of the City of Chicago operates, provides:

> "Every sanitarium established under this article shall be free for the benefit of the inhabitants of the city or village which established it, if they are afflicted with tuberculosis. They shall be en-

titled to occupancy, nursing, care, medicines, and attendance according to the rules and regulations prescribed by the board of directors of the sanitarium. * * *.

"The board may extend the privileges and use of the sanitarium and treatment to afflicted persons who reside outside the city or village but in this State, upon such terms and conditions as the board may prescribe by its rules and regulations."

We are of the opinion from the facts presented that the woman is an inhabitant or resident of Peoria, Illinois, and would not be entitled to the benefits and treatment of the Municipal Tuberculosis Sanitarium of the City of Chicago without charge. Your board of directors "may extend the privileges and use of the sanitarium and treatment to afflicted persons who reside outside the city * * * but in this State, upon such terms and conditions as the board may prescribe by its rules and regulations.

SURGERY CONSENTS

(No. 11274—Medical Director, M. T. S.—E. R. H.—March 23, 1950.)

We have your letter of March 16, 1950, asking our advice as to what legal age you should use for accepting written permission to carry out surgical procedures, etc., and in which you state:

"We have been using age twenty-one for the males but in the case of females, the use of twenty-one has been somewhat distracting since some of these ladies are married, etc. We are also confronted with the problem of, for example, a 19-year old married man who is about to have some type of surgical treatment."

Section 283, Chapter 3 of the Illinois Revised Statutes 1949 provides:

"Males of the age of twenty-one and females of the age of eighteen years shall be considered of legal age for all purposes; and until these ages are attained, they shall be considered minors."

We call your attention to the provision of Section 72-7, Chapter 24, of the Illinois Revised Statutes 1949 under which your Sanitarium operates:

"* * * No person so afflicted may enter the Sanitarium or any of its branches, dispensaries, or other auxiliary institutions without first giving his written consent, or in case of a minor or one under a disability, the written consent of the parents, guardian, or conservator, as the case may be."

The marriage of the minor does not remove the legal disabilities of infancy. The rule of law applicable is stated in 43 Corpus Juris Secundum as follows:

"Marriage does not remove the disabilities of infancy unless it is so provided for by statute and the extent to which such disabilities are removed is dependent on the statutes."

We find no exceptions in the Illinois Statutes in which the age limits established by law are changed by the marriage of the minor. It is our opinion that you should be guided by the age limit provided for in the statute above quoted, age twenty-one for the male and age eighteen for the female.

PATIENTS ON PAYROLL

(No. 11314—Chairman, Finance Committee—C. N.—June 26, 1950.)

We have your communication of June 14, 1950, to which you attach the request of Dr. Ernest E. Irons, President of the Municipal Tuberculosis Sanitarium's Board of Directors for approval of the directors' desire to compensate certain patients for work therapy performed during 1949. The total contemplated expenditure amounts to $65.00, to be paid to five named patients, who performed part time work in the institution's post office, consisting of the sorting, weighing and forwarding of many thousands of parcels and letters comprising the annual workload of the post office. Dr. Irons suggests that this disbursement be charged against Budget Account 700-B for Personal Services or 700-L for Impersonal Services including petty cash disbursements.

We are advised that this work therapy was originally devised with the two-fold objective of improving the morale of convalescent patients volunteering for the services and saving the cost of hiring extra employees for work in the Sanitarium's post office. Through several years it was compensated for in the form of a Christmas bonus, the amounts never exceeding $85.00 per year, charged to the petty cash account.

Section 72-6, Chapter 24 Ill. Rev. Stat. 1949 relating to the powers and duties of the directors of a Municipal Tuberculosis Sanitarium provides that

> "They shall have exclusive control of all monies collected to the credit of the 'Tuberculosis Sanitarium Fund.'"

Succeeding paragraphs of this section give broad powers to the directors in cities of more than 500,000 population in the disbursement of funds which, of course, applies only to the directors of the Chicago Municipal Tuberculosis Sanitarium, as this is the only city in the State of Illinois to which the description applies.

The amount involved, averaging $13.00 per year for each of the patients selected is too small to be deemed a pay roll expenditure. Surely it is within the province of the Board of Directors to determine the expediency and institutional value of maintaining the established practice of limited reward for work therapy, kept within proper bounds, which may be charge as other miscellaneous expenditures.

For the reasons hereinabove clearly indicated, we see no objection to making this disbursement as desired by the Board of Directors, and charging it to Account 700-B or 700-L.

PAYMENT BY STATE FOR TUBERCULOSIS CARE

(No. 11333—Medical Director, M. T. S.—L. L. K.—August 31, 1950.)

This will acknowledge receipt of your letter of August 12, 1950, in which you ask for a legal opinion based upon your anticipated receipt of a check from the Illinois Department of Public Health, pursuant to Senate Bill No. 360 (ch. 23, par. 177y, Ill. Rev. Stat. 1949), representing

three dollars per day for hospitalization of persons suffering from tuberculosis and cared for in accommodations other than those maintained by you. You state that the Illinois Department of Public Health has approved the Cook County Department of Welfare's application to the Municipal Tuberculosis Sanitarium Board for aid for Chicago residents suffering from tuberculosis hospitalized at Oak Forest Hospital and Cook County Hospital. This check, you further state, will be payable to the Municipal Tuberculosis Sanitarium Board.

You request our opinion as to how you are to endorse this check over to Cook County, and ask whether it is to be endorsed to the County Treasurer, the Cook County Department of Public Welfare or the Board of Commissioners of Cook County.

The statute (ch. 24, par. 72-6, Ill. Rev. Stat. 1949) provides for the appointment of the directors of a municipal tuberculosis sanitarium and states, in the second paragraph thereof, as follows:

> "They shall have the exclusive control of all money collected to the credit of the 'Tuberculosis Sanitarium Fund'. All money received for the sanitarium shall be deposited to the credit of 'Tuberculosis Sanitarium Fund' and shall not be used for any other purpose. * * *"

Pursuant to this statutory requirement, it is clear that you have no authority to endorse the check over to anybody but must deposit the check with the city treasurer to the credit of your account. Any disbursement therefrom must be by duly authorized action of your board of directors.

The authority of Cook County is vested by statute (ch. 34, par. 23, 24, 25.01, Ill. Rev. Stat. 1949) in the Board of County Commissioners. Your check in payment of any amount owed by you for hospitalization of patients under the supervision of the Cook County Department of Welfare, should be made payable to the Board of Commissioners of Cook County.

PERSONAL FUNDS FOR INDIGENT PATIENTS

(No. 11336—Medical Director, M. T. S.—E. R. H.—September 13, 1950.)

We acknowledge your recent letter regarding the problem of providing funds for the incidental, personal needs of the indigent patient hospitalized at the Municipal Tuberculosis Sanitarium and requesting our opinion as to which community agency has the legal responsibility to provide funds for the indigent tuberculosis patient hospitalized at the Municipal Tuberculosis Sanitarium.

Since our opinion of March 11, 1949, to the Honorable A. E. Rose, Commissioner of Welfare referred to in your letter, the Legislature of the State of Illinois passed an Act revising and codifying the public assistance laws of Illinois. This Act is known as the "Public Assistance Code of Illinois", Chapter 23, Illinois Revised Statutes 1949.

> "Article 1, paragraph 436-1. Public responsibility—Aims in providing assistance.) Assistance and services for persons who are unable to provide themselves with a minimum standard of living compatible with decency and health is hereby declared to be a spe-

cial matter of public concern and a necessity in promoting the public health and welfare. The principal aim in providing assistance and services shall be to aid those persons, who can be so helped, to become self-supporting, and to adopt such standards that those persons who cannot become self-supporting may have the opportunity to maintain a decent and healthful standard of living.

The maintenance of the family unit shall be a principal consideration in the administration of this Code, and all public assistance policies shall be formulated and administered with the purpose of strengthening the family unit."

Defining "General Assistance", Article I, paragraph 436-8 states as follows:

" 'General Assistance' means money payments to or in behalf of needy persons as provided in Article IV of this Code, including assistance to children who require care outside their own home as provided in Section 4-1 thereof, and assistance to the medically indigent as provided in Section 4-14 thereof.

Assistance or general assistance or aid to the medically indigent granted to needy persons may, in addition to direct money payments, include care, support, service, medical or surgical care, nursing, or board and care in a private institution or boarding home or house or in a suitable public institution, burial, and such other aid as the conditions may make necessary for each case."

Article IV, paragraph 439-1 provides:

"The alleviation and prevention of poverty and substandard economic conditions existing in some segments of the State is an essential governmental objective. Persons who for unavoidable causes are unable to maintain a decent and healthful standard of living, or whose families are unable to provide them a reasonable subsistence, are entitled to general assistance. * * *."

Article IV, paragraph 439-3 provides as follows:

"* * *. Cities, Villages, and incorporated towns, having a population of more than 500,000 inhabitants, and all incorporated towns which have superseded civil townships, shall relieve and support all needy persons lawfully resident therein. * * *"

Article IV, paragraph 439-14 provides as follows:

"When any person not otherwise eligible for or receiving general assistance under Article IV or assistance under Articles V, VI, or VII of this Code, shall fall sick or die not having sufficient money, property, or other resources, including income and earnings available to him over a twelve-month period, to meet the cost of necessary medical, dental, hospital, boarding or nursing care, or burial, the supervisor of general assistance charged with the duty of providing general assistance in the governmental unit in which such person may be at the time of his illness or death, shall give, or cause to be given to him, such care as may be necessary and proper, including transportation, and if he should die shall cause him to be decently buried; provided that the amount to be expended for such funeral and burial shall not exceed $150. All expenses incurred under this Section shall be a charge against the relatives of such person, and if such person is a resident of this State, against the governmental unit in which he resides and which is charged by this Article with the duty of providing general assistance to residents therein; *provided, that if such person falls sick*

*or dies in any city, village, or incorporated town of more than 500,000 inhabitants or in an incorporated town which has superseded a civil township, or if he falls sick or dies in any other governmental unit being a resident of such city, village, or incorporated town of more than 500,000 inhabitants or of an incorporated town which has superseded a civil township, the expenses so incurred shall be a charge against the county in which is situated such city, village, or incorporated town of more than 500,000 inhabitants or such incorporated town which has superseded a civil township as the case may be; * * *.*

"Assistance given in accordance with this section shall be known as 'Assistance to the Medically Indigent'. Eligibility for care as a medical indigent shall be determined in accordance with the rules and regulations of the Commission."

It is our opinion, therefore, that it is the responsibility and obligation of the County to furnish assistance to the medically indigent in the Municipal Tuberculosis Sanitarium, and that applications for such aid should be made to Cook County Department of Welfare. Allowance by the Cook County Department of Welfare for the incidental personal expenses of the indigent tuberculosis patient as outlined in your letter will depend upon any rules and regulations established by the Illinois Public Aid Commission as to the eligibility of such medical indigent for such care.

CONTRACT POWER

(No. 11351—Board of Directors, M. T. S.—J. E. C.—January 2, 1951.)

With your letter of December 1, 1950, you attached a photostatic copy of a letter dated November 24, 1950, signed by Paul Gerhardt, Jr., City Architect. You request advice as to whether or not the Board of Directors of the Municipal Tuberculosis Sanitarium is empowered to enter into a contract with the Peoples Gas Light & Coke Company for gas service.

Please be advised that the proviso in paragraph 72-6, Chapter 24 of the Illinois Revised Statutes, 1949, discloses that the Board of Directors, in cities of more than 500,000 population, of any such Municipal Tuberculosis Sanitarium shall be governed by the provisions of Article 22-A of this act in relation to the letting of contracts and purchase orders on behalf of any such sanitarium. Article 22-A of Chapter 24 of the Illinois Revised Statutes is the Municipal Purchasing Act and provides for all purchase orders or contracts of whatever nature for labor, service or work. This act further provides that contracts not adapted to award by competitive bidding may be let without advertising. An opinion written by A. J. Resa recorded in Opinions of the Corporation Counsel, Vol. 22 page 136, is to the same effect.

It is therefore our opinion, that any contract for gas service must be entered into by the Purchasing Agent upon receipt of authority from the City Council rather than from the Board of Directors of the Municipal Tuberculosis Sanitarium.

SURGERY CONSENTS

(No. 11354—Medical Director, M. T. S.—E. R. H.—January 9, 1951.)

We acknowledge receipt of your letter of December 26, 1950, asking our advice on the following questions:

"(1) How long is the individual consent slip legal for surgery, assuming that the patient is of age and competent mentally?

(2) Is the present practice of having the patient sign a consent for each individual surgical procedure necessary or may a single blanket slip be utilized which would permit us to perform any operation which, in the surgeon's opinion, is necessary under the existing conditions?"

As to the first question. We presume that by the term "individual consent slip" you mean a consent signed by the patient. We have examined a number of legal authorities upon the question of consent, but we do not find any authority as to the validity of the consent with reference to the time elapsing between the date of the consent and the date of the operation. Obviously, such consent is revocable at the will of the patient. In our opinion such consent would be valid for a reasonable time after it is given and what would be a reasonable time would depend upon the facts and circumstances of each individual case. It may be that a consent given by a patient of the Tuberculosis Sanitarium would be held valid and protective while the patient remained continuously a patient of the Sanitarium prior to an operation. If the patient, having consented in writing to an operation, should leave the Sanitarium and later return there for treatment, it is our advice that a new written consent be taken before an operation be performed. In this connection please note our reference hereinafter to the *Pratt Case.*

As to your second question, it is our advice that the wisest course for you to pursue is your present practice of having the patient sign a consent for each individual operation. The single blanket consent referred to by you might not be adequate protection against possible liability.

Anent both your questions, we cite the case of *Pratt* v. *Davis,* 224 Ill. 300, which is referred to as authority on the question of consent in a number of cases in other States.

In that case the patient entered Dr. Pratt's Sanitarium in May, 1896. Thereafter, she remained in the Sanitarium without improvement for several weeks and then returned home. On July 29, 1896, her brother-in-law at the request of her husband took her again to the Sanitarium, and the next day Dr. Pratt performed a second operation upon her, removing her ovaries and uterus. Neither operation was successful so far as improvement in her health was concerned. She grew gradually worse mentally and then on August 25, 1898, was adjudged insane and sent to the State Insane Asylum at Kankakee.

The case was based upon the removal of the uterus in the second operation which was claimed to be performed without consent. The Supreme Court said in its opinion, Page 306:

> "While it is true that appellant (Dr. Pratt) says he told the husband in that conversation that he could not tell the extent of the surgery that would be necessary and says that Davis gave him *carte blanche* to do whatever he saw fit, it is yet apparent that neither of them contemplated that the wife would be taken home

after the first operation and later brought back the second time to the Sanitarium for the purpose of undergoing a second operation, and while we think it equally apparent from the appellant's (Dr. Pratt) testimony that the husband did not, at the time he was directed to bring his wife again to appellant for treatment, understand that any such operation as the removal of the ovaries and the uterus was to be performed, and that the mere fact that he, after that conversation, had his brother take the appellee to the Sanitarium is not to be regarded as tending to show consent to surgery of that character. * * *

Appellant (Dr. Pratt) then contends that in the absence of express authority to remove the uterus the law will imply the necessary consent from the fact that consent was, as he says, obtained for the removal of the ovaries. * * *

Appellee, by her brief, says that consent was given for the first operation * * * and that she erroneously believed that the ovaries were removed at the operation. * * * Be this as it may * * *. There is no evidence which tends to show that any permission was obtained for the second operation, when they were in fact removed, and there, therefore, is nothing to raise the implication in question."

The Supreme Court further said in its opinion on Page 309:

"Where the patient desires or consents that an operation be performed and unexpected conditions develop or are discovered in the course of the operation, it is the duty of the surgeon, in dealing with these conditions, to act on his own discretion, making the highest use of his skill and ability to meet the exigencies which confront him, and in the nature of things he must frequently do this without consultation or conference with anyone, except, perhaps, other members of his profession who are assisting him. Emergencies arise, and when a surgeon is called it is sometimes found that some action must be taken immediately for the preservation of the life or health of the patient, where it is impracticable to obtain the consent of the ailing or injured one, or of anyone authorized to speak for him. In such event the surgeon may lawfully, and it is his duty to, perform such operation as good surgery demands, without such consent."

Even where the surgeon operates under such emergencies, he may be called upon to prove the existence of the emergencies.

In this case Dr. Pratt operated having, as he thought, the "*carte blanche* to do whatever he saw fit," but the courts held against him. Blanket consents, even written, are unsatisfactory protection and we advise against them, and if there is doubt as to the validity of a consent which you have taken to perform an operation, a new consent signed by the patient should be obtained before the operation is performed.

RELEASING INFANT PATIENT

(No. 11372—President, Board of Health—E. R. H.—March 26, 1951.)

In reply to your letter of recent date in which you state:

"One of the patients at the Municipal Contagious Disease Hospital is an infant seven months of age, diagnosis: Pertussis.

It has been called to our attention that this child's mother was shot and killed since the patient was admitted to the hospital on

February 5, 1951. It is also our understanding that it is alleged that the shooting was done by the child's father, and that the latter is now in the City Jail.

Several persons who claim to be relatives have asked that the child be released to them. These include the maternal grandfather, the paternal aunt, and several cousins. The father has signed a statement asking for release of the patient to the aunt.

The child is now sufficiently recovered from his illness to be discharged from the hospital. It would be appreciated if you would advise how we should proceed to discharge this child.

Because of the cost to the City involved in maintaining patients in the hospital, discharge is urgent and a prompt reply would be appreciated."

Section 284, chapter 3, Illinois Revised Statutes, 1949 provides:

"284. § 132. Parental Right to Custody.) When both parents of a minor are living and are competent to transact their own business and are fit persons, they are entitled to the custody of the person of the minor and the direction of his education; and, if one parent is dead and the surviving parent is competent to transact his own business and is a fit person, he is similarly entitled. The parents have equal powers, rights and duties concerning the minor. If the parents live apart, the court for good reason may award the custody and education of the minor to either parent or to some other person."

In the case of *Stafford* v. *Stafford*, 299 Ill. 438 (1921), involving a controversy between a father of a child and his wife's sister as to the custody of the child, the charge was made that the father was a habitual drunkard. The Supreme Court, after holding that the evidence did not support the charge, said (pp. 448-449):

"Under the evidence in the record defendant in error (father) is entitled to the custody, care, control and education of his son as against plaintiff in error. He is its father and has the natural right to have such custody. As against him the plaintiff in error has no right whatever, under the law, to the custody of the child, no more than an absolute stranger, unless it can be shown that he has in some way forfeited his right. * * * As father of the child he has the right to its custody as against the world, because there is no showing that he has forfeited such natural right. *Sullivan* v. *People*, 224 Ill. 468; *Carmack* v. *Marshall*, 211 Ill. 519; *People* v. *Turner*, 55 Ill. 280."

The case of *Kulan* v. *Anderson*, 300 Ill. App. 287 (1939), involved the custody of a minor child. The court said in its opinion (p. 277):

"The father, under the law of this State and the admitted facts, had the right to the sole custody of the child, and the action of the trial court in ordering that the aunt have the custody of the child for a certain period of time on alternate week-ends was a material abridgment of that right. The rule that a parent has the right to the custody of his child against all the world, unless he has forfeited that right, was born of the natural desire of mankind to create and maintain a home; and, as has been often said, the home is the foundation of society and civilization. Deprive worthy parents of their natural right to the custody of their children, where they have not forfeited that right, and you undermine the home."

To the same effect is the case of *Schneeman* v. *Schneeman*, 317 Ill. App. 286 (1942) in which the court upheld the superior right of the father as to the custody of his child as against its paternal grandmother.

In the case of *People ex rel. Yarmulnick* v. *Hoff*, 323 Ill. App. 535 (1944), the court upheld the father's right to the custody of his minor child as against the sister of his deceased wife.

While your letter states that the child's mother was killed by his father, the father would be presumed to be innocent of the homicide until the judgment of a court of competent jurisdiction pronounces him guilty. Unless you have knowledge of other facts which would point to the unfitness of the father, he would have a right to designate the paternal aunt as the child's custodian if she is a fit person.

We have in Cook County a Juvenile Court which has jurisdiction of such matters and you have either of two courses to follow:

1) Refer the matter to the Juvenile Court upon the question of the fitness of the father, or

2) Deliver the child to the person designated by the father if you are certain that the designation you have in your possession is authentic, advising the Juvenile Court by letter of the facts in the case as you have them and that you have delivered the child to the person so designated by the father, giving the person's name and address.

The Juvenile Court may then investigate the matter to the end that the child is in fit and proper custody.

The discharge of the child being urgent as you state in your letter, it would seem more expedient for you to follow the second course outlined above.

RETENTION OF X-RAY NEGATIVES

(No. 11379—Medical Director, M. T. S.—E. R. H.—April 19, 1951.)

We acknowledge your communication of April 12, 1951 enclosing a copy of a letter dated April 14, 1951 from the American Medical Association, Bureau of Legal Medicine and Legislation, addressed to your Department of Radiology and requesting our "advice and formulation of a policy concerning the holding of X-ray films for a specified length of time."

The sole purpose of the establishment of the Municipal Tuberculosis Sanitarium is to cure and eradicate tuberculosis. Section 72-7 of Chapter 24 Illinois Revised Statutes authorizing the creation of the institution provides among other things that the Board of Directors "has the power * * * to do all things in and about the treatment and cure of persons so afflicted which will have a tendency to effect a cure of the persons afflicted and to stamp out tuberculosis in that city or village."

The X-ray film is a means to that end. Keeping such films indefinitely would over-tax your storage facilities and increase expenditure. You can lawfully destroy such films when they have completely served their purpose and your medical personnel would be the best judges as to the time within which such films would have served that purpose and are no longer of use to that end.

Such films may be pertinent and material evidence in litigation, civil or criminal, but you are not required by law to preserve the films for such purpose, and, that they are destroyed is a sufficient answer, if you were called upon to produce them at any time in such litigation.

However, the films might be material and pertinent evidence in malpractice suits against your medical personnel. Such actions can be brought upon a contract of employment or in tort upon negligence. In 48 Corpus Juris, P. 1138, Par. 145 it is said:

> "Ordinarily the gist of an action against a physican for malpractice is negligence, and not the violation of the contract of employment, but where an express promise on the part of the physician to treat the patient is alleged and counted upon, the action is in contract and not in tort." (*Kiersey* v. *McNeemer*, 197 Ill. App. 173; *Peters* v. *Howard*, 206, Ill. App. 610.)

If the suit is based upon negligence our statute of limitations would bar the action after two years. A suit upon an oral contract would be barred after five years while a suit upon a written contract would be barred after ten years.

Rarely does a physician and a patient enter into a written contract so that the ten year statute of limitations would very seldom be involved. Not often would a suit be brought upon an oral contract barred in five years. The greater number of malpractice suits would be based upon negligence barred in two years and most of such actions would be commenced in time so that the statute of limitations could not be pleaded in bar.

From a legal standpoint and for the protection of your medical staff it might be well to retain such films just beyond the two year limitation.

We do not feel competent on the Medical aspect of the subject to suggest a policy on the holding of such films but trust that what we have said above from a legal view will assist you to that end.

DONATIONS TO SANITARIUM

(No. 11382—Board of Directors, M. T. S.—E. R. H.—April 24, 1951.)

We acknowledge your letter of April 19, 1951 in which you state in substance that you are in receipt of a check for $30.00 as a donation to the Sanitarium.

You request our opinion on the following points:

1. How may this be accepted by M.T.S.
2. What is the disposition the Sanitarium is permitted to make.

We are advised, in a telephone conversation with Dr. Bettag, that the check is made payable to the Municipal Tuberculosis Sanitarium. We received from Dr. Bettag a copy of a letter accompanying the check, and it makes no specific direction as to the use of the money.

The statute under which the Sanitarium is created specifically provides for the acceptance of gifts. Section 72-9 of Chapter 24, Illinois Revised Statutes 1949, provides:

> "72-9. § 72-9. Donations—Monthly reports.) The board of directors, in the name of the city or village, may receive from any person any donation of money or property. The board shall pay over to the municipal treasurer all money thus received as often as once

in each month and shall take the treasurer's receipt therefor. At the next regular meeting of the corporate authorities the board shall report to the corporate authorities the names of the persons from whom any donation has been received and the amount and nature of the money or property so received from each and the date when received.

"Any person desiring to make any donation, bequest or devise of any money or property for the benefit of such a sanitarium may vest the title to the money or property in the board of directors created under this article. That board shall hold and control this money or property, when accepted, according to the terms of the donation, devise, or bequest and shall be a trustee of the money and property."

It is our opinion as to point 1 of your letter that the check is accepted by a letter from the Sanitarium acknowledging receipt thereof. The check should be endorsed "Pay to the order of William G. Milota, Treasurer of the City of Chicago" signing it "Municipal Tuberculosis Sanitarium," by the directors. The check so endorsed should be forwarded to the City Treasurer, requesting that the donation be credited to the M.T.S. Fund and asking his receipt therefor.

As to point 2 of your letter: Inasmuch as the donor did not designate any specific use to be made of the gift, it is disposed of when placed in the hand of the City Treasurer to be credited to the Sanitarium Fund and the directors would have no further duty other than to advise the City Council at its next meeting, of the donation received and forwarded to the City Treasurer, its amount and the name of the donor as the statute requires.

AUTHORIZATIONS TO RELEASE INFORMATION

(No. 11392—Medical Director, M. T. S.—E. R. H.—June 7, 1951.)

We acknowledge your letter of May 29, 1951, asking our advice "on whether a signature authorizing the Sanitarium to furnish confidential information regarding health, etc. must be witnessed and/or notarized."

We talked with one of your assistants on the telephone in connection with this matter and were informed that you had in the Sanitarium files the signature of the patient, or his or her legal representative, to his or her consent to enter the institution as required by statute and that the signature upon request for information is compared with the signature in your files before such information is released.

There is a possibility that the signature upon the request for such information could be artfully simulated and precaution against such simulation should be taken. A notary's acknowledgment of such signature would be an excellent precaution, but may be inconvenient for the patient and usually involves a small fee which the patient may be unable to pay.

It is our advice that upon all requests for such information referred to in your letter, that you require the signature of a witness to the signature of the patient, or his or her representative, and also the address of the witness which will enable you, if necessary, to more readily trace the witness.

ABANDONED PERSONAL PROPERTY

(No. 11395—Medical Director, M. T. S.—E. R. H.—June 11, 1951.)

We acknowledge your letter of June 5, 1951, asking our opinion regarding the responsibility of the Municipal Tuberculosis Sanitarium with reference to valuables and other possessions left at the Sanitarium by deceased patients.

Persons do not have a natural or inherent right to dispose of their property at the time of their death; nor do they possess such right to have their property descend to their heirs. They possess such rights only through our statutes.

Ramsay v. *Van Meter*, 300 Ill. 193.

People v. *Flanagin*, 331 Ill. 203.

26 Corpus Juris Secundum p. 996 par. 2.

In the case of *Ramsay* v. *Van Meter*, the Supreme Court states the law as follows: (P. 204)

> "The right to demand that property pass by inheritance or will to heirs or devisees is not an inherent or natural right but is a purely statutory right. The right to distribute and to control the distribution of an intestate's property is in the State, and the legislature of the State can make any provision for the distribution of the intestate's property that it may see fit."

In the case of *People* v. *Flanagin*, the Supreme Court said: (P. 209)

> The descent of property, whether by inheritance or devise, is regulated wholly by statute. All property owned by any person passes at his death, either under the Statute of Descent to the persons mentioned in that statute, or under the Statute of Wills to his devisees and legatees."

A decedent, having no inherent right to dispose of his property at the time of his death, there are only two statutory methods by which his property can devolve. First testate, in which the decedent himself by a will executed in accordance with specified statutory formalities, directs the manner in which, and the persons to whom, his property shall pass; second, intestate, in which such disposition has not been made by the individual, but is governed by the substantive rules of the Statute of Descent and Distribution. An attempt to dispose of a decedent's property by any other means is void legally.

However, in the case of small estates, Section 478, Paragraph 324, Chapter 3, Illinois Revised Statutes, 1949 provides.

> "Upon receiving an affidavit that a resident of this state died leaving personal estate not exceeding one thousand dollars in value, that no letters are then outstanding on the estate in this state, that no petition for letters on the estate is pending in this state, that all funeral expenses of the decedent have been paid, that thirty days have elapsed since the death of the decedent, and that the affiant has knowledge of the facts, any person or corporation indebted to or holding personal estate of the decedent may pay the indebtedness or deliver the personal estate to the following persons respectively: (a) When the affidavit also states that a surviving spouse's or child's award is allowable under this Act, to the surviving spouse or child; (b) When the affidavit also states that no person is entitled to a surviving spouse's or child's award under this Act, that the decedent died intestate and there are no creditors of the decedent, and the

names, places of residence, and relationship of the heirs of the decedent, to each heir that portion of the estate to which he is entitled under this Act; or (c) When the affidavit also states that the decedent died testate, that his will was admitted to probate in this state, that no proceedings to contest the will are pending, that an authenticated copy of the will is attached, that no person is entitled to a surviving spouse's or child's award under this Act, and that there are no creditors of the decedent, and the names, ages and places of residence of the heirs of the decedent and of the legatees under the will, to each legatee that portion of the estate to which he is entitled under the will. If nine months have not elapsed since the will was admitted to probate in this state the affidavit shall be accompanied by the written consent of all the decedent's heirs."

Legally the property of a deceased patient at the Sanitarium should be turned over to the executor or administrator of the decedent's estate, except that in the case of small estates amounting to not over one thousand dollars in value the decedent's property may be turned over to the decedent's heirs or legatees, as the case may be, upon the presentment to the Sanitarium of the affidavit required by the above statute.

ABANDONED PERSONAL PROPERTY

(No. 11399—Medical Director, M. T. S.—E. R. H.—July 2, 1951.)

We acknowledge your letter of June 27, 1951 referring to our communication of June 5, 1951 regarding the disposition of valuables left at the Sanitarium by deceased patients and asking our further opinion as to the disposition of "small, and for the most part, worldly goods which are of little or no value * * * watches, rosary beads, rings, small radios, wallets with little or no money, identification cards, etc."

Such articles are designated by law as personal property and may be the subject of abandonment. It is said in 1 Corpus Juris Secundum, Paragraph 5, page 13,

> "Undoubtedly, the most common subject of abandonment is personal property. It is well settled that personalty may be abandoned, and ownership of it thereby lost."

If persons lawfully entitled, do not comply with the legal requirements outlined in our letter of June 5, 1951, qualifying them to the possession of the property of a decedent within a reasonable time after his or her death, you may regard as abandoned to the city such articles as mentioned in your letter of June 21, 1951.

Small sums of money so abandoned should be forwarded to the Treasurer of the City of Chicago, who is the custodian of all monies belonging to the city, with your advice as to its source. The other items you mention should be delivered to the Purchasing Agent of the city for disposition as surplus obsolete or unusable material with like advice as to its source.

EMERGENCY CALLS

(No. 11405—Medical Director, M. T. S.—E. R. H.—July 24, 1951.)

We acknowledge your letter of July 17, 1951 in which you state:

"The Sanitarium, either through its Clinic Division or through the Hospital proper, receives calls at various times of the day and night, seven days of the week, including holidays, for either emergency attention or immediate admission to the Sanitarium. The question of responsibility of the M.T.S. to respond to such calls was discussed at a recent meeting of our staff.

"So many of these requests arise from patients concerning whom we have never had previous inquiry, and on fewer occasions from patients who may be registered in our Clinics. Some of the requests for assistance are from known tuberculous patients, but the complaints upon investigation are found to have no association with tuberculosis, for example, acute appendicitis. Statements such as the patient may be hemorrhaging or seriously short of breath, etc. are received. The calls may be made directly by the patients, by friends or relatives or by the family physician.

"To date, we have tried to be reasonable and assist the community. When one of our members does respond to such an inquiry, it necessitates a disruption in our scheduling of physicians for regular day duty in the Clinics or Sanitarium, where we have a direct responsibility, since time-off allowance must of necessity be granted."

The Municipal Tuberculosis Sanitarium was established under an Act of our legislature, article 72, Illinois Revised Statutes, 1949, page 578. The statute provides in part:

"The corporate authorities of every city and village have the power, in the manner provided in this article, to establish and maintain a public sanitarium and branches, dispensaries, and other auxiliary institutions connected therewith within or without the corporate limits of the city or village, for the use and benefit of the inhabitants of the city or village for the treatment and care of persons afflicted with tuberculosis."

Paragraph 72-6 provides for the organization, powers and duties of its directors, and provides that the directors

"shall adopt by-laws, rules and regulations for their own guidance and for the government of the sanitarium and the branches, dispensaries and auxiliary institutions and activities connected therewith as may be expedient. * * *"

Paragraph 72-7 provides:

"Every sanitarium established under this article shall be free for the benefit of the inhabitants of the city or village which established it, *if they are afflicted with tuberculosis.* They shall be entitled to occupancy, nursing, care, medicines, and attendance according to the rules and regulations prescribed by the board of directors of the sanitarium. The sanitarium always shall be subject to such reasonable rules and regulations as the board may adopt *in order to render the use of the sanitarium of the greatest benefit to the* greatest number, and the board may exclude from the use of the sanitarium those inhabitants and other persons who wilfully violate these rules and regulations."

Paragraph 72-8 provides:

"When such a sanitarium is established, the physicians, nurses, attendants, the persons sick therein, and all persons approaching or

coming within the limits of the sanitarium or the grounds thereof, and all furniture and other articles used or brought there, shall be subject to such rules and regulations as the board of directors may prescribe. These rules and regulations shall extend to all branches, dispensaries, and other auxiliary institutions located within or without the corporate limits of the city or village and to all employees therein and to all employees sent to the homes of the afflicted as provided for in section 72-7."

Definitely the purpose of the sanitarium, its branches or dispensaries and personnel is solely for the treatment and cure of tuberculosis and no other illness.

It is our opinion that your board of directors has plenary power to handle the situation referred to in your letter "in order to render the use of the sanitarium of the greatest benefit to the greatest number," as the statute provides.

HIRING EMPLOYEES

(No. 11411—Medical Director, M. T. S.—E. R. H.—August 8, 1951.)

We acknowledge your letter of July 30, 1951 in which you ask our advice on the following:

1. New employees in the older age group frequently give their age as being considerably below the actual figure. Should we attempt to verify the actual age in new employes?

2. When we engage a new employee who has a hernia, moderate hypertension, etc., we ask them to sign a waiver to indicate that they know they have this pathology. Does such a waiver protect the Institution against subsequent suit if the employee's disease progresses or develops complications?

3. A considerable percentage of the new employees being engaged by this Institution are people who are middle-aged or elderly. Many of them are likely to develop the degenerative diseases of old age such as coronary occlusion, cerebral thrombosis etc. What can or should we do to protect the Institution against subsequent suit by such employees?

On your first question, our advice is that you obtain certified copies of birth certificates. The certificates are not difficult to obtain and at small cost to the applicant.

As to your second question, we received from you a sample of the waiver you referred to in your letter. The law does not permit an employee to waive the benefits of laws enacted for his protection for the reason that this would be against public policy. Statements of the character contained in the sample furnished would be of very little value in defense of any employee's claim. Our advice is that the applicant be given a thorough, physical examination prior to employment and that a detailed record of that examination be kept in your files.

With reference to your third question, regarding middle aged or elderly applicants, here again, the physical examination and detailed record is important and helpful in claims of such employees. The importance of a physical examination of applicants referred to in your letter is illustrated in a recent decision of our Supreme Court. We refer to the case of *Town*

of Cicero, et al., v. *Industrial Commission, et al.*, 404, Ill. 487. In that case, an award by the Industrial Commission to the wife of one Paul Miller, by reason of his death was upheld. From the evidence, it appeared that Miller had been suffering from chronic myocarditis for at least five years; that he had been advised by his physician a few weeks before his death that he should quit his job with the Fire Department because it was too strenuous for him; that while fighting a fire, he collapsed and died in a short time without regaining consciousness. The Supreme Court said:

> "In the instant case, the fact that Miller was suffering from chronic myocarditis predisposing him to collapse and death is of no consequence. Whether he might have died in the same way in the absence of any examinations at all, while staying in his own home, or whether he might have suffered collapse if he had stayed at home and not worked that day is immaterial. The question for the Commission was whether the work he was doing in connection with fighting the fire caused, or contributed to cause, his collapse and death."

The physical examination would be a guide as to the advisability of employing applicants and the record in your files would be helpful in respect to those hired.

ELIGIBILITY REQUIREMENTS

(No. 11431—Medical Director, M. T. S.—E. R. H.—October 1, 1951.)

We acknowledge your letter of September 21, 1951 in which you state:

> "Inquiry has been made to this office as to what constitutes eligibility of patients for admission to the Municipal Tuberculosis Sanitarium on the basis of legal residence in Chicago. A search of our files discloses carbon copy of a request to Honorable Benjamin S. Adamowski, Corporation Counsel, dated December 12, 1949, for such legal opinion. However, we have not been able to find the reply to this request."

We have made a diligent search in our office and do not find the letter nor do we find that a reply was made to it. We regret that the letter has been lost or miscarried.

Replying to your letter and the copy of a letter enclosed, addressed to the Honorable Benjamin S. Adamowski, the statute defining those persons eligible for admission to the Tuberculosis Sanitarium provides: (Par. 72-7, Chap. 24, Ill. Rev. Stats., 1949)

> "Every sanitarium established under this article shall be free for the benefit of the inhabitants of the city or village which established it, if they are afflicted with tuberculosis. * * *.
>
> The board may extend the privileges and use of the sanitarium and treatment to afflicted persons who reside outside of the city or village but in this State, upon such terms and conditions as the board may prescribe by its rules and regulations."

You will note that the word "inhabitant" was used by the Legislature in the first paragraph above quoted, while the word "reside" was used

Webster's New International Dictionary, Second Edition, Unabridged, defines the word "inhabitant" as:

> "One who dwells or resides permanently in a place as distinguished from a transient, lodger or visitor; as an inhabitant of a house, a town, a city, county or state. Inhabitant is not a term of exact meaning. It ordinarily implies more fixity of abode than 'resident,' but is variously construed according to the context, sometimes, for example, as equivalent to citizen. Ordinarily inhabitant is not a synonym for 'citizen' or 'resident.'"

Bouvier's Law Dictionary, Rawles Division, defines "inhabitant" as:

> "one who has his domicile in a place; one who has an actual fixed residence in a place. The words 'inhabitant,' 'citizen' and 'resident' as employed in different constitutions to define the qualifications of electors, mean substantially the same thing; and one is an 'inhabitant,' 'resident' or 'citizen,' at the place where he has his domicile or home. But the terms 'resident' and 'inhabitant' have also been held not synomymous, the latter implying a more fixed and permanent abode than the former, and imparting privileges and duties to which a mere resident would not be subject. When relating to municipal rights, powers or duties, the word 'inhabitant' is almost universally used as signifying precisely the same as domiciled."

Black's Law Dictionary, Third Edition, defines "inhabitant" as:

> "One who resides actually and permanently in a given place, and has been domiciled there." Citing ex parte Shaw 145 U.S. 444.

From the manner in which the words were used by our Legislature as above pointed out, it is our opinion that the word "inhabitant" as used in the statute was intended to designate one having a more fixed and permanent abode than a mere "resident."

Under date of March 18, 1915 we rendered an opinion on this subject to your institution which we are advised you have in your files and which is found in Volume 8, page 371, Opinions of the Corporation Counsel. In that opinion we stated at page 372:

> "It is indeed difficult to determine just how long a residence should be required in order to entitle a person to any benefits of the institution. No special rule as to the time required for residence can be laid down. It is incumbent upon the Board of Directors of your institution to weigh the facts in each case and to determine from said facts whether or not the patient comes within the provisions of the statute and the definition of 'inhabitant' as our Courts have defined it." We still adhere to the principles set forth in the opinion and refer you to it.

TRANSFER OF LIBRARY BOOKS

(No. 11492—Medical Director, M. T. S.—E. R. H.—March 3, 1952.)

We acknowledge receipt of your letter of February 29, 1952, in which you state that "The Board of Directors of the Municipal Tuberculosis Sanitarium requests permission to give to the Medical Library of the University of Illinois" certain enumerated medical books, "of value to a large library such as the University of Illinois but of little or no value to ours and we need the shelf space for books that are used by our clientele."

This office has no power in this regard other than to render our opinion as to the Directors' authority to dispose of these books as stated in your letter.

Section 72-6 of chapter 24, Illinois Revised Statutes, 1951, with reference to the powers and duties of directors, etc., provides among other things that the board of directors

> "has the exclusive control of the construction of any sanitarium building or other buildings appropriate for its branches, dispensaries, and other auxiliary institutions and activities in connection with the institution, and of the supervision, care and custody of the grounds, rooms or buildings constructed, leased or purpose. * * * The board in general shall carry out the spirit and intent of this article in establishing and maintaining a public sanitarium."

It is our opinion that under the statute above quoted your Board of Directors have ample power to make the transfer of the volumes referred to in your letter to the Medical Library of the University of Illinois.

SEARCHING VISITORS

(No. 11499—Medical Director, M. T. S.—E. R. H.—March 14, 1952.)

We acknowledge your letter of March 7, 1952, in which you refer to our opinion of July 13, 1949* regarding the disposal of quantities of intoxicating liquors and cigarettes forbidden to patients in the Sanitarium and asking "to what extent may we go in 'providing for their seizure.' Do we have the authorty to search shopping bags of visitors and patients returning from passes, patients' lockers, etc?"

Section 72-7, Chapter 24 of the Illinois Revised Statutes (1951) provides:

> "§ 72-7. * * *. The sanitarium always shall be subject to such reasonable rules and regulations as the board may adopt in order to render the use of the sanitarium of the greatest benefit to the greatest number, and the board may exclude from the use of the sanitarium those inhabitants and other persons who wilfully violate these rules and regulations. No person so afflicted may enter the sanitarium or any of its branches, dispensaries, or other auxiliary institutions without first giving his written consent, or in case of a minor or one under a disability, the written consent of the parents, guardian, or conservator, as the case may be."

> "§ 72-8. * * *. When such a sanitarium is established, the physicians, nurses, attendants, the persons sick therein and all persons approaching or coming within the limits of the sanitarium or the grounds thereof, and all furniture and other articles used or brought there, shall be subject to such rules and regulations as the board of directors may prescribe. These rules and regulations shall extend to all branches, dispensaries, and other auxiliary institutions located within or without the corporate limits of the city or village. * * *"

Your rules and regulations prohibiting intoxicating liquors and cigarettes to patients in the Sanitarium are promulgated solely and unquestionably in the best interest of your patients and in furtherance of the

* Opinion No. 11159, page 57.

statutory mandate "to render the use of the Sanitarium of the greatest benefit to the greatest number."

In our opinion you are authorized to use any reasonable procedure to make such rules and regulations effective and, if necessary, even to the extent of searching shopping bags of visitors and patients returning from passes and patients' lockers.

VETERANS TRAINING PROGRAM

(No. 11501—Board of Directors, M. T. S.—E. R. H.—March 25, 1952.)

We acknowledge your letter of February 25, 1952, in which you state in substance that there has been presented to your Board of Directors for consideration a contract with the Veterans Administration, relative to the training of Veterans in the School of Medical Technology at the Municipal Tuberculosis Sanitarium for which the Veterans Administration is willing to pay $500.00 for a thirty week period of instruction including all books, materials, gowns, laundry and noon meal.

You further state that you now "have a working agreement with Roosevelt College and upon occasion students with the necessary prerequisites are sent to us for training. The charge for this service is $25.00 to cover breakage." You ask our opinion "as to whether you legally can enter into a contract with the Veterans Administration regarding the above and charge a fee, such fee to be deposited into the General Fund of the Sanitarium."

We also acknowledge your letter of March 18, 1952, in which you state that since our telephone conversation on the matter you further discussed it with Dr. Irons and Dr. Bettag. You enclosed what might be termed a prospectus of the school and an application blank and your letter refers to the overall program of the school "which is for the benefit of medicine in general."

The Municipal Tuberculosis Sanitarium was established under Section 72 of Chapter 24, Illinois Revised Statutes, 1951. Section 72-1 provides among other things:

> "The corporate authorities of every city and village have the power, in the matter provided in this article, to establish and maintain a public sanitarium and branches, dispensaries and other auxiliary institutions connected therewith within or without the corporate limits of the city or village, for the use and benefit of the inhabitants of the city or village for the treatment and care of persons afflicted with tuberculosis. * * *.
>
> All taxes specified in this section or in section 72-16 to 72-21 inclusive, shall be levied and collected in like manner with the general taxes of the city or village and shall be known as the 'Tuberculosis Sanitarium Fund.' "
>
> Section 72-6 provides in part that the Directors "shall have the exclusive control of all money collected to the credit of 'the Tuberculosis Sanitarium Fund.' All money received for the Sanitarium shall be deposited to the credit of the 'Tuberculosis Sanitarium Fund' and shall not be used for any other purpose. * * *."

Section 72-7 provides in part that the Board of Directors

> "has the power to extend the benefit and privileges of the institution, under proper rules and regulations, into the homes of persons afflicted with tuberculosis, to furnish nurses, instruction, medicines, attendance and all other aid necessary to effect a cure, and to do all things in and about the treatment of the care of persons so afflicted which will have a tendency to effect a cure of the persons afflicted and to stamp out tuberculosis in that city or village.
>
> The Board may extend the privileges and use of the Sanitarium and the treatment to afflicted persons who reside outside of the city or village but in this State. * * *."

The Board of Directors has full power to do all things in and about the treatment and care of persons afflicted with tuberculosis which will have a tendency to effect a cure of the persons so afflicted and to stamp out tuberculosis in the city or village where the Sanitarium is established. Persons outside of the city but within the State of Illinois are eligible for treatment. Nonresidents of the State are not eligible.

Definitely from the above statutory provisions the Sanitarium must deal primarily and basically with tuberculosis. Tuberculosis is its specialty. It is supported by taxes collected and placed in the "Tuberculosis Sanitarium Fund," and it is provided that fund "shall not be used for any other purpose." Other matters may be incidental. Any activity which does not have a reasonably proximate tendency to effect a cure of and stamp out tuberculosis within the territorial confines provided by the statute is beyond the purpose of the Sanitarium as authorized by law and its directors have no right to pursue such activity particularly when it may involve the expenditure of Tuberculosis Funds.

The Prospectus enclosed with your letter under the term "General Information" states:

> "The school of Medical Technology at the Municipal Tuberculosis Sanitarium, 5601 North Pulaski Road, Chicago 30, Illinois, is a recognized and fully accredited training school. Although the Institution specializes in the treatment of tuberculosis, the students are made familiar with all the laboratory procedures which are used in general hospital work. Needless to say, there is some potential danger to working in an environment where contaminated materials are processed and studied, but those in charge of the training program take every precaution to safeguard the health of the students and employees alike."

The prospectus also gives information on entrance requirements, registration, outline of course, fees and expenses and faculty.

There is nothing in the statute under which the Sanitarium was organized specifically authorizing the establishment of such a school. If the school is an activity of the Sanitarium having a reasonably proximate tendency to effect a cure and stamp out tuberculosis within the territory limited by the statute, it is within the authority of the statute as a proper activity, otherwise the operation of this school is an activity beyond the scope of the Sanitarium authority.

In your letter of March 18 on this subject you refer "to the overall program which is for the benefit of medicine in general." If this school and its program is for the benefit of medicine in general and touches tuberculosis but remotely, it is an activity not authorized by the statute either directly or indirectly and you would, of course, have no authority to enter into the contract referred to in your letter.

FORCIBLE HOSPITALIZATION

(No. 11610—Medical Director, M. T. S.—E. R. H.—November 5, 1952.)

We acknowledge your recent letter in which you state that your office was informed that a City Ordinance was passed during the administration of John Dill Robertson, M.D., Commissioner of Health, whereby persons in the City of Chicago afflicted with tuberculosis could be forcibly hospitalized, and you ask to be advised as to whether such is a fact, and whether such an ordinance is still in force and effect.

We have examined the Chicago codes for the years 1911, 1922, 1931 and 1939. This period covers the regime of Dr. Robertson as Health Commissioner for the City of Chicago. We do not find any ordinance in the codes of the above mentioned years providing that persons afflicted with tuberculosis could be forcibly hospitalized; nor, does the present code of the City of Chicago contain any such ordinance.

In a telephone conversation upon this matter you stated that you were familiar with the provisions of the present code regarding the quarantine of persons afflicted with a contagious disease. The Chicago codes above mentioned all contain similar quarantine provisions.

We rendered an opinion on this subject under date of November 13, 1940, to Dr. Bundesen, President of the Board of Health, copy of which we herewith enclose.

PSYCHOPATHIC PATIENTS

(No. 11616—Medical Director, M. T. S.—November 21, 1952.)

We acknowledge your letter of November 13, 1952 in which you ask our opinion with reference to the transfer to the Psychopathic Hospital of an MTS patient who suddenly becomes psychotic with resultant danger of injuring himself or others. You further state that it sometimes occurs that you are unable to transfer a patient promptly to the Psychopathic Hospital because of refusal by the family of the patient to sign for his detention there and that the Psychopathic Hospital will not accept a patient unless the relatives give their written consent.

Article VI of Chapter 91½, Illinois Revised Statutes (1951), with reference to emergency detention of mentally ill persons provides in part as follows:

> "6-1. Petition.] § 6-1. When any person shall be or be supposed to be mentally ill, or in need of mental treatment, and in such condition that immediate restraint is necessary for the protection of such alleged mentally ill person or person in need of mental treatment, or others, any reputable citizen of this State may, in the county where such mentally ill person, or person in need of mental treatment, resides, or is found, present to the Superintendent of a hospital as verified petition alleging that such named person is mentally ill, or in need of mental treatment and that the condition of such person is such that immediate restraint is necessary for the protection of such person, or others. Such petition shall also state the name and address of the spouse or of the nearest relative of such

person alleged to be mentally ill or in need of mental treatment, if known to petitioner, and, if not known, that diligent inquiry has been made to learn the name of such spouse or relative; the name and address of the person or persons, if any, having custody and control of the person alleged to be mentally ill or in need of mental treatment; and the names of the witnesses by which the facts alleged may be proven, at least one of which witnesses shall be a physician having personal knowledge of the case. The petition may be prepared by the Superintendent of any hospital as well as by other persons hereinabove authorized to prepare petitions generally."

"6-2. Certificate of physician.] § 6-2. Such petition shall be accompanied by the certificate of a duly qualified physician not an employee of, or financially interested either directly or indirectly in, any licensed private hospital to which admission, or in which detention, is sought certifying to the existence of such condition of the alleged mentally ill person, or person in need of mental treatment. Upon presentation of the petition and certificate such person may be admitted to or detained in a hospital for the mentally ill for a reasonable length of time, not to exceed 30 days, except as provided in Section 6-4 of this Act, pending judicial inquiry into the mental condition or need of mental treatment of such person. The certificate of the physician hereinabove provided for shall be based upon a personal examination of the person alleged to be mentally ill or in need of mental treatment, and shall be dated the day of the examination. If, owing to the fact that no duly qualified physician is immediately available, it is not possible to obtain the certificate hereinabove provided for, then such alleged mentally ill person, or person alleged to be in need of mental treatment, may be admitted to or detained in a hospital for the mentally ill upon presentation of the petition alone, pending the obtaining of such certificate, for a period not to exceed 12 hours exclusive of the hours between 6 p.m. and 6 a.m. In such case the petition shall show, in addition to the requirements hereinabove provided for, that an effort was made to obtain a certificate from a duly qualified physician, but that there was no duly qualified physician available."

"6-3. Presentation of petition and certificate—Execution in triplicate.] § 6-3. The petition and certificate shall be executed in triplicate and shall be presented to the Superintendent of the hospital to which admission is sought with the person alleged to be mentally ill or in need of mental treatment, not more than 48 hours after the examination. Such petition and certificate shall be the authority of the Superintendent for the detention of such person and for giving such standard treatment including surgery as may be necessary for the welfare of such person or of the public. The Superintendent shall endorse the time of admission or of the beginning of such detention of the patient on all copies of the petition and certificate. Provided, however, that the petition and certificate hereinabove in this section provided for may be presented to the county judge of the county in which such patient resides, or is found, and, if such judge is satisfied that the welfare of the patient or of the general public requires it, such judge may order that a writ issue directing the Sheriff of the county or any properly authorized police officer to take charge of such patient and transport him to a hospital for the treatment of mentally ill persons, which hospital shall be designated in the order and writ, and there deliver the patient to the Superintendent of such hospital in accordance with the preceding provisions of this Section."

Chapter 91½ with reference to mental health also provides in effect that the Department of Public Welfare of the State shall prescribe, all necessary forms to be used. The department is also charged with

the duty of printing and furnishing to the Clerks of the courts having jurisdiction of such matters a supply of such forms.

If you will contact the Mental Health Section of the Department of Public Welfare located in the State Building, 160 N. La Salle Street, Chicago, you can obtain a supply of necessary forms.

You will note that the provisions of the statutes above quoted do not require the signature of a relative. The petition may be signed by "any reputable citizen of this State in the county where such mentally ill person, or such person in need of mental treatment, resides, or is found." A relative may sign if he is a citizen, but it is not mandatory that he sign. In effect all that is required by the law is the certificate of the examining physician and a verified petition signed by a citizen of the State.

We talked with Dr. V. G. Urse, Superintendent of the Psychopathic Hospital in connection with this matter and if you will advise with him in this connection, we are sure that you will be able to formulate a well working procedure. Dr. Urse assured us that he will be glad to cooperate with you.

T. B. PATIENTS IN PRIVATE HOSPITAL

(No. 11753—Medical Director, M. T. S.—A. F. G.—October 13, 1953.)

In your letter of October 5, 1953 you state:

> "The Municipal Tuberculosis Sanitarium recently begun to hospitalize patients from its waiting list in other institutions within the State of Illinois, in accordance with the provisions of Bill 291. I would appreciate your advice and guidance concerning certain questions which have arisen.
>
> We have no questions concerning those patients whom we have assigned to institutions from our own waiting list. Recently, however, certain private and semi-private institutions have requested us to pay for the care of Chicago residents in their hospitals who cannot afford to pay them any longer or who have been indigent patients."

You then ask the following questions:

> "1. If a Chicago resident is a patient in a private or semi-private sanitarium and can no longer afford to pay for this hospital care is the M. T. S. empowered to pay for this care under the above Bill?"

Our answer to this question is "Yes." Prior to July 1, 1953 our answer would have been in the negative. At the last session of the General Assembly Senate Bill No. 291 was enacted. This bill amended sections 72-1 and 72-7 of the "Revised Cities and Villages Act." The amendment to section 72-1 increased the amount of taxes the M. T. S. may levy for the years 1954 and 1955 to $5,500.000. Section 72-7 was amended by adding at the end of that section the following provision:

> "The board may use funds secured under the provisions of this Act in providing sanitarium care of tuberculosis patients in private or public sanitariums of this State or of another state if no sanitarium facilities are available in this State."

Since July 1, 1953, the effective date of this amendatory Act, the board has power to use its funds to provide sanitarium care of tuberculosis patients in public or private sanitariums.

Your next question is:

"2. If an indigent Chicago resident is hospitalized in a private or semi-private sanitarium such as Winfield, for instance, free of charge or at a nominal rate up to the present time, is the M. T. S. empowered to pay for this hospital care at the request of the said institution?"

Our answer to this question also is "Yes," but we are of the opinion the request should also be made by the patient.

Your third question is:

"3. Is M. T. S. empowered to pay for a patient if the holding institution charges the patient an additional fee?"

We think this a matter of policy to be regulated by rules and regulations of M. T. S. and by contractual arrangements between your body and the holding institution. If the patient who is able and willing to pay, desires extra service not essential to his care, such as being furnished a private room, extra nursing service not provided for by your rules and regulations, we do not believe you would be required to pay for such de luxe service.

Your next question is:

"4. Is the M. T. S. empowered to pay additional fees for medicine or surgery to the sanitarium caring for the patients?"

If expensive medicine is required in certain cases or if surgery is necessary to effect a cure in certain cases, we are of the opinion you have power to pay these additional costs. Your contractual arrangements with these institutions should make provision for such cases. If surgery is required your rules should provide that it may be performed by the full time surgeons employed by your board when such surgeons are available for this purpose, rather than employ outside surgeons at much greater expense.

Your last question is:

"5. Is the M. T. S. expected to exercise any supervision over the medical and surgical treatment of the patients whom it hospitalizes in other sanitariums?"

As it is the primary duty of M. T. S. to provide sanitarium care to residents of the city of Chicago, free of charge, it would appear to be your right and duty to exercise supervision of the care given by an institution to which you have sent patients because of lack of facilities at your own sanitarium. Again we are of the opinion that the extent of your supervision should be incorporated in your rules and regulations governing such cases.

PURCHASE OF MEALS BY EMPLOYEES

(No. 11756—General Superintendent, M. T. S.—E. R. H.—October 22, 1953.)

We acknowledge your letter of October 15, 1953 in which you say, "Inquiries are being made at this office regarding employees who are not entitled to receive one meal daily for each day worked at the Municipal Tuberculosis Sanitarium, purchasing their noon day meal in the employees' cafeteria."

You ask our opinion as to the power of the directors of the Sanitarium to permit sanitarium employees not entitled to maintenance or meals under their employment, to purchase their noon day meal in the employees' cafeteria.

The powers and duties conferred upon Municipal Tuberculosis Sanitarium directors are set forth in Section 72-6, chapter 24, Ill. Rev. Stat. (1953) and provides in part as follows:

> "* * * The board has the power to purchase or lease ground within or without the corporate limits of the city or village, and to purchase, lease, or erect appropriate buildings for the use of the sanitariums, branches, dispensaries, and other auxiliary institutions and activities connected therewith with the approval of the corporate authorties. It has the exclusive control of the construction of any sanitarium building or other buildings appropriate for its branches, dispensaries, and other auxiliary institutions and activites in connection with the institution, and of the supervision, care and custody of the grounds, rooms or buildings constructed, leased or purchased for that purpose. The board has the power to appoint suitable superintendents or matrons or both and all necessary assistants and other employes, to fix their compensation and to remove such appointees. The board in general shall carry out the spirit and intent of this article in establishing and maintaining a public sanitarium. * * *"

It is our opinion that under the above statutory authority, the board of directors of the Sanitarium have the power and right to permit such employees of the Sanitarium to purchase their noonday meal in the employees' cafeteria if in the judgment of the directors it is necessary and desirable, and is incidental to the operation and service of the sanitarium as an activity thereof. Such an activity, however, should not be operated for profit and neither should it be operated at a loss.

NURSE'S BADGES

(No. 11763—General Superintendent, M. T. S.—E. R. H.—November 10, 1953.)

We acknowledge your letter of October 28, 1953, with reference to new badges for field nurses for your clinic division, and enclosing copies of letters from The Tuberculosis Institute authorizing your use of the double barred cross on the proposed new badge, and seeking our opinion thereon.

The Municipal Tuberculosis Sanitarium was organized under Article 72, Chapter 24, Ill. Rev. Stats. (1953), and its purpose was, as provided in part by para. 72-1;

"for the use and benefit of the inhabitants of the city or village for the treatment and care of persons afflicted with tuberculosis."

Primarily this is the only purpose of the sanitarium under the statute and its authority extends only to tuberculosis problems of Chicago public health.

The board of health uses badges and with reference thereto, chap. 9 of the Municipal Code of Chicago provides in part:

"9-25. No person shall falsely or pretend to be an officer, inspector or employe of the board of health. Nor shall any person not authorized by the board of health:

(b) Wear or use any badge, star or device adopted and used by the board;

(c) Produce or display any badge, star or device adopted and used by the board and thereby obtain free passage upon any public conveyance or commit any other fraudulent act by means thereof.

Nor shall any person:

(a) Counterfeit or imitate or cause to be counterfeited or imitated any badge, star or device adopted and used by the board;

(b) Wear or use any badge, star or device similar in appearance to that adopted and used by the board.

Any person violating any of the provisions of this section shall be fined not less than ten dollars nor more than one hundred dollars for each offense."

We have examined badges used by the board of health and find that the facsimile referred to in your letter could be confused by the casual observer with those used by the board of health.

Section 72-6, Chap. 24, Ill. Rev. Stats. (1953) which defines the powers and duties of the board of directors provides in part:

"They shall adopt such by-laws, rules and regulations for their own guidance and for the government of the sanitarium and the branches, dispensaries and auxiliary institutions and activities connected therewith as may be expedient, not inconsistent with this article and the ordinances of the city and village. * * *

The board has the power to appoint suitable superintendents or matrons or both and all necessary assistants and other employes, to fix their compensation, and to remove such appointees. The board in general shall carry out the spirit and intent of this article in establishing and maintaining a public sanitarium. * * *"

It is our opinion that under the above statutory provisions the board of directors of the sanitarium has the power to authorize the adoption of a badge for your nurses similar to the facsimile attached to your letter, but bearing some apt wording identifying it with the Municipal Tuberculosis Sanitarium.

Our criticism of the facsimile submitted containing reference to "Chicago Public Health" is that it does not specifically identify itself with the Municipal Tuberculosis Sanitarium, and may be confusing as emanating from some other source than the Municipal Tuberculosis Sanitarium.

E. OTHER DEPARTMENTS AND OFFICES

RETENTION OF ELECTION RECORDS

(No. 11266—City Clerk—A. F. G.—March 10, 1950.)

In your letter of February 28, 1950, you call attention to the fact your office has on hand numerous election records, consisting of large envelopes containing Tally Sheets of votes cast at various elections. You state that such accumulations of records present a difficult storage problem and that you have no advice as to how you may dispose of them. You ask to be advised:

"(a) whether I have authority to destroy such election records from time to time, and if so,

"(b) how long after an election I am obligated to keep the records before destroying them."

The election code is not clear as to how long clerks and other officers who are custodians of election returns are required to keep such records. Section 17-20 of the code provides that after the canvass of the vote by the precinct officials, the judges shall fold and string closely upon a single piece of flexible wire, all ballots which have been counted by them, except those marked "objected to," unite the ends of the wire and securely seal the knot and enclose the ballots so strung in a secure canvas covering securely tied and sealed and return said ballots in such sealed canvas covering to the proper clerk or to the board of election commissioners, as the case may be, who shall carefully preserve said ballots for two (2) months, and at the expiration of that time shall grind and sell the same to the highest and best bidder for each, the proceeds to go to the treasury of the municipality which paid for such ballots; provided, if any contest of election shall be pending at such time in which such ballots may be required as evidence, the same shall not be disposed of until after such contest is determined.

Sections 7-55, 17-22, 18-14 and 18-16 of the said code make provisions for the delivery to the proper clerk or board, of poll books, statement of votes, tally sheets and other election returns.

Section 7-55 applies only to primary elections, and requires delivery to the clerk from whom the primary ballots were received, the primary poll books, the tally sheets and the envelopes containing the ballots properly endorsed, "which clerk shall safely keep the same for three (3) months."

Section 17-22 requires a list of voters, or other proper return, and one of the tally sheets to be filed with and kept by the Secretary of State for one year.

Section 18-14 requires duplicate statements of the result of the canvass to be prepared, enclosed in an envelope, sealed, and signed by the judges and clerks of election, one of which shall be directed to the county clerk and one to the comptroller of the city. Duplicate sets of tallies, also signed by the judges and clerks, enclosed in an envelope and sealed, one of which shall be directed to board of election commissioners and the other to the city, village or town clerk.

Section 18-16 also provides for the delivery of the poll books, statements and tallies to the officers to whom addressed, and provides in the last sentence: "It shall be the duty of the respective officers so designated

to whom such poll books, statements and tallies are ordered to be delivered, to receive the same and to keep safely under lock and key until ordered to be surrendered as herein provided."

From the foregoing digest of the pertinent sections of the election code relating to the custody of election returns, it would appear that the legislature did not intend the permanent retention of the tally sheets by the officer to whom delivered. It requires the ballots, which are the best evidence of the result of an election, to be destroyed after two months unless a contest is pending. It authorizes all returns of a primary election to be kept safely for only three months. It requires the tally sheets delivered to the Secretary of State, which are identical with the tally sheets delivered to the city clerk, the county clerk and the board of election commissioners, to be kept by that officer for only one year. If the ballots, which are primary evidence of the result of an election, must be destroyed in two months, unless a contest impends, what possible reason can be advanced for the preservation of tally sheets which at best are only secondary evidence for a longer period?

That seems to be the reasoning of the board of election commissioners and the county clerk, as we are advised by officers of each of these departments that they destroy the tally sheets at the same time the ballots are destroyed.

They say, that when the official canvass of the votes cast at an election is made by their respective departments, an abstract or statement of the votes is made, and said abstract or statement becomes a permanent record in their offices and there is no further necessity for the preservation of the tally sheets.

We are, therefore, of the opinion, if no contest is pending or no order of court impounding your records is served on you, that if you retain the tally sheets for one year, which is the period fixed by statute for the preservation of the tally sheet filed with the Secretary of State, you will have substantially complied with the law.

-

HOUSE OF CORRECTION
SENTENCE DURATION

(No. 11316—Warden, House of Correction—C. N.—July 5, 1950.)

We have your letter of June 6, 1950, in which you present the question: "If an inmate came in on the first with five days and our papers and all are stamped the first, when is his discharge date?"

You ask for an opinion on computation of time governing sentences to the House of Correction.

> "A 'sentence' to a term of imprisonment is personal punishment for a crime or misdemeanor imposed by a court, whereby a person is involuntarily deprived of his liberty and confined in prison for a definite term." (*Hart* v. *Norman*, 155 N.Y. S. 238, 240, 92 Misc. 185).
>
> " 'Term of imprisonment' does not begin until defendant is taken into custody on mittimus or incarcerated under sentence * * *." (*Ex parte Volker*, 223, N.W. 890, 891, 120 Neb. 508, 72 A.L.R. 1267).

"In the computation of time, where the time must be computed from an act done, the day on which the act is done is to be included, especially where the computation must be from and after the doing of an act." (*Arnold* v. *U.S.*; *13 U.S.*, 9 Crunch, 104, 105, 3 L. Ed. 671).

A library study of this subject matter gives us no absolute rule-of-thumb method of answering your question and we know of no previous instance in which this department was called upon to determine computation of time in criminal and quasi-criminal cases.

However an analysis of the foregoing citations and leading cases prompts us to reach the conclusion that this is a matter of custom and usage, rather than absolute law. This study convinces us that the computation of time used in so many branches of law under which the term is figured by omitting the first day and adding the last, is not the controlling factor. All citations point to the requirement that sentences must be definite, indeed as definite in law as they are in grammar.

These cases and various references in the State's Criminal Code make it clear that the state of entrance to your institution is calculated as an entire day in computing time, irrespective of the hour of admittance. Therefore a five day sentence starting on the first day of any month would terminate on the fifth day of the same month, the term time being inclusive.

Since the imposing of such a sentence is of a light, disciplinary nature and involves no reference to hard labor, there is no legal duty imposed upon you to require the prisoner's retention until midnight of the fifth or final day. All that is necessary is that your records show that the inmate was in your institution on the final day. The exact hour of release is to be determined by you, in view of your varied administrative problems and in accord with the custom and usage prevailing in similar institutions.

PARK DISTRICT PARKING GARAGE

(No. 11343—Committee on Traffic—A. F. G.—October 27, 1950.)

In your letter of October 9, 1950 you ask our opinion as to the power of the Chicago Park District to construct and maintain underground parking facilities on park property, or to lease its property for the construction of such underground parking facilities; and, in the event the Park District does not have this legal power, that we prepare a resolution to memorialize the General Assembly to enact the necessary legislation to accomplish this purpose.

Unlike the City of Chicago, which has been granted express power by Section 52.1-1 of the Revised Cities and Villages Act, to own, construct, equip, manage, control, erect, improve, extend and operate motor vehicle parking lots, the Chicago Park District has not been granted such express power. The section referred to does not apply to park districts. We are of the opinion, however, that where parking facilities are necessary, useful or convenient for the greater enjoyment of patrons of the parks, the park district has the implied power to provide such parking facilities and may make a charge for their use.

Your proposal is different. You call attention to a large area, intensively developed with multistory hotels and apartments in a vicinity where no vacant land is available for the establishment of parking lots. You state the lack of such facilities has created an intolerable condition and

inquire if the Chicago Park District has the power to establish and operate in Lincoln Park parking lots for the convenience of the general public who reside or come into that area.

As pointed out above we do not believe the park district has been given power to own or operate parking lots except such as are incidental to the proper use of the parks under their control. However, we call attention to "an Act in relation to the transfer of real estate owned by municipalities," approved July 2, 1925, as amended. (Ill. Rev. Stat. 1949 Chap. 30, Par. 157) This Act provides a method of making transfers of real estate from one municipality to another and which applies to park districts and cities. By this Act the City Council may by ordinance declare that the area owned by the park district is necessary or convenient for the city to use, occupy or improve in the making of any public improvement or for any public purpose and the Chicago Park District may then exercise the power by a resolution passed by a vote of two-thirds of all the park commissioners to transfer all of its right title and interest in and to said land.

If the City Council passes such an ordinance requesting a lease or easement only to the subsurface of the park property, a use which would leave the land unimpaired for park purposes, the consent of the park district to such transfer could probably be obtained, particularly in view of the important public purpose which would be served thereby. It might be different if the city council were to request the use of the surface of the land, now dedicated to park purposes.

We would suggest your subcommittee negotiate with the park district officials with the view of reaching an amicable settlement of this matter.

ELECTION PETITION

(No. 11358-A—City Clerk—S. R. D.—January 24, 1951.)

We are in receipt of your letter of January 22, 1951 in which you state that on Thursday, January 18, there was filed in the City Clerk's office a petition designating Water E. Pacanowski, residing at 18 E. Elm Street in the City of Chicago, as a candidate of the Republican Party for nomination for the office of mayor of the City of Chicago, to be voted for at the Primary Election to be held on February 27, 1951.

You further state that the petition consists of a series of sheets purporting to contain the signatures of qualified primary electors, fastened together in book form, the first sheet bearing the No. "1" and the last sheet bearing the No. "164." You state that each sheet contains twenty-five lines for signatures, but all sheets are not filled, the total number of purported signatures amounting to 3895.

You further state that the sheets are numbered consecutively from No. 1 to No. 157, both inclusive, and from No. 159 to No. 164, both inclusive; that there is no sheet No. "158"; and that a signed and sworn statement of candidacy is attached to the petition.

You request our opinion as to what is your duty in reference to certifying Mr. Pacanowski as a candidate for the Republican nomination for mayor.

Section 7-10 of the Election Act (1949) Ill. Rev. Stats., chap. 46, par. 7-10) provides in part that the name of no candidate for nomination * * * shall be printed upon the primary election ballot unless a petition

for nomination shall have been filed in his behalf; that such petition shall be signed by qualified primary electors * * * in their own proper persons only and at the bottom of each sheet of such petition shall be a statement certifying that the signatures on that sheet of said petition were signed in the presence of the party making the certification, and are genuine; that whoever, in making the sworn statement above prescribed, shall knowingly, wilfully, and corruptly swear falsely, shall be deemed guilty of perjury and whoever forges the name of a signer upon any petition shall be deemed guilty of a forgery; that for a city office the petition for nomination shall be filled in by the electors of the entire city by at least one-half of one per cent of the qualified primary electors of his party in the city; and that the number of primary electors shall be determined by taking the total vote cast for the candidate for such political party who received the highest number of votes in the State, subdivision thereof, or municipality or division thereof, at the last general or municipal election within the same.

Section 7-17 of the Act provides in part that it shall be the duty of the city clerk to cause to be printed upon the primary ballot of each political party the name of each candidate whose petition for nomination has been filed in his office, as herein provided.

The Primary Election Act is silent in regard to the filing of objections or for hearing thereon pertaining to the legality and sufficiency of primary petitions filed for the nomination for a city office. Therefore, the question arises whether you, as City Clerk for the City of Chicago, must "cause to be printed upon the primary ballot of each political party * * * the name of each candidate whose petition for nomination has been filed" in your office, or whether, you may determine, from the face of the petition, if the petition complies with the provisions of the Act and if not, refuse to have the name of the candidate appearing on the defective petition printed upon the primary ballot.

The general law pertaining to the right of the officer with whom the nomination petition is filed to pass on its form and sufficiency is set forth in 29 C. J. S. 214 as follows:

> "Usually the officers or boards with whom declarations of candidacy, nomination certificates, petitions, or other nomination papers are required to be filed are authorized, as part of their ministerial duties, to pass on the form and sufficiency of the nomination papers as manifest from the papers themselves, but they have no authority to exercise judicial functions and decide controversies in regard to the regularity of the nomination nor determine other objections which go beyond the prima facie validity of the nomination papers, such as questions as to the qualifications of the signers of petitions or certificates, of the eligibility or qualification of candidates, although as part of its ministerial duty a board may examine the registration records to determine whether the signers are registered."

This general rule of law was followed in the case of *The People* v. *Dillon*, 266 Ill. 272 where the court said (p. 275-276):

> "The town clerk is a ministerial officer. It was his duty to examine the petition, and if upon its face it appeared that it was not in compliance with the requirements of the statute he was not required to submit the question for a vote at the ensuing election. He, however, has no judicial powers, and where the petition presented appears on its face to be in compliance with the statute he cannot institute an investigation to determine whether the parties signing it were legal voters, whether they signed it in their own proper persons, whether the statement required to be made at the bottom of each sheet of the petition was made by a person authorized to make it, and whether it was sworn to before an officer authorized to administer an oath. The statute imposes the absolute duty on the clerk to sub-

mit the question to be voted upon when a petition is filed in compliance with the statute. He is given no discretionary power when a petition proper on its face is filed. *His only function is to determine whether, upon the face of the petition, it is in compliance with the law. If it does not purport to be signed by the requisite number of voters of the town, if it does not purport to be signed by the voters in their own proper persons, and in other respects does not purport to conform to the requirements of the law, it would impose no duty upon the clerk to cause the question to be submitted at the election; but in determining these things the clerk acts as a ministerial and not as a judicial officer.*" (Italics ours.)

In *The People* v. *Righeimer*, 298 Ill. 611 the court said (p. 619):

"It is not essential to the validity of an act for the nomination of candidates that objections or questions relating to a nomination shall be referred to any judicial or administrative authority for a hearing and decision, but, as in any other case where an officer is required to receive and act upon a certificate, report or other paper, he has authority to determine whether the paper is genuine and such as he is required to receive and make the basis of his action."

In the *People* v. *Gifford*, 353 Ill. 107 an original petition was filed in the Supreme Court of Illinois against the City Clerk of Zeigler commanding him to place the names of the petitioners upon the ballot under the name of Peoples Party, at a city election to be held on April 18, 1933. The petitioners' nomination papers and their petition to organize a new political party was filed under the Elections Act, par. 298a of which provided that the petitions "shall be deemed to be valid unless objections thereto are made in writing within five days"; par. 298b designated the membership of the Electoral Board of the City to hear and pass upon such objections; and par. 298c made final the decision of the majority of such Board on such objections. The City Clerk, in the absence of objections filed and prior to the expiration of the five days within which the objections might be filed, arbitrarily sent written notices to the petitioners refusing to place their names upon the ballot, because, as he stated, the petition apparently was not in conformity with the statute. The court granted a writ of mandamus stating that it appeared on the face of the petition for mandamus, that the petitioners had apparently complied with the statute and it became the duty of the City Clerk, as a purely ministerial officer, to direct that their names be placed upon the ballot.

The *Gifford* case is not authority for the problem at hand as there the statute provided for the filing of objections to nomination petitions, the holding of hearings thereon and that the decision of the majority of the Electoral Board shall be final. The City Clerk, ignoring the statutory provisions, arbitrarily refused to place the names of the petitioners upon the ballot. In the present situation there is no statutory provision for the filing of objection, or the holding of a hearing thereon. Under the Primary Election Act the duty rests upon the City Clerk to "examine the petition, and if upon its face it appears that it is not in compliance with the requirements of the statute" he is not required to cause to be printed upon the primary ballot the name of the candidate whose defective petition for nomination has been filed in his office.

Here the last general election was held on November 7, 1950. At that time John E. Babb, Republican candidate for Sheriff of Cook County, received 876,816 votes in the City of Chicago. Under section 7-10 of the Primary Election Act the nomination petition of Walter E. Pacanowski, as a candidate of the Republican party for nomination for the office of mayor of the City of Chicago to be voted for at the Primary Election to be held on February 27, 1951, must be signed by at least one-half of one per cent of the qualified electors of the Republican party cast for John E. Babb, Republican candidate for Sheriff of Cook County in the general

election held on November 7, 1950. Therefore, in order for the nomination petition of Walter E. Pacanowski as a candidate of the Republican party for nomination for the office of mayor of the City of Chicago to comply with the statutory provisions, it must contain a minimum of 4384 signatures of qualified primary electors of the Republican party in the City of Chicago. You state that the total number of purported signatures amount to only 3895. Therefore, it is apparent from the face of the nominating petition of Pacanowski, filed in your office, that it does not comply with the law, and is fatally defective.

Any other interpretation of the Primary Election Act would nullify its statutory provisions. If, under the Act, you must cause Pacanowski's name to be placed on the Republican primary ballot when it appears from the face of his nominating petition that he has not the required number of signatures, then any nominating petition filed in your office, whether it contains a 1000, 500, 100, 50 or 25 signatures, would compel you to cause the name appearing on said nominating petition to be placed on the primary ballot. Surely, that was not the intent of the legislature as expressed by the provisions of the Primary Election Act, no more than you are required to certify a name based on a petition filed without a certificate of candidacy or a petition filed to a non-existent election. It may well be that you, as City Clerk, do not have the power or duty to institute an investigation to determine whether the parties signing the nominating petion were the legal voters, whether they signed it in their own proper persons, whether the statement required to be made at the bottom of each sheet of the petition was made by a person authorized to make it, and whether it was sworn to before an officer authorized to administer an oath. But, the statute does impose the absolute duty on the City Clerk to examine the nomination petition and determine whether, upon the face of the petition, it is in compliance with the law.

We are therefore of the opinion that if Pacanowski does not file a "withdrawal" within the time fixed by law, it is your duty to refuse to certify his name to be printed upon the Republican primary ballot.

FOURTEEN YEAR SENTENCE TO HOUSE OF CORRECTION

(No. 11406—Superintendent, House of Correction—S. R. D.—July 27, 1951.)

We acknowledge receipt of your letter in which you state that on July 5, 1951, Judge Gibson E. Gorman, one of the judges of the Municipal Court of Chicago, sentenced a person to the House of Correction for a term of five years and also imposed a fine of $5000. You state that if the prisoner is compelled to serve his term and work out his fine he will remain an inmate of the House of Correction for a period of 14 years and 48 days.

You further state that, in your opinion, this is too long a sentence for the House of Correction, inasmuch as you do not have adequate facilities or the security to handle inmates with this kind of sentence; that you do not believe the House of Correction should receive any inmate on a State case for over a year; that the House of Correction was never established to handle terms of this length and if this practice continues, new arrangements will have to be made immediately.

Attached to your letter is a mimeographed copy of the amendment to Section 23 of the "Uniform Narcotic Drug Act," (1949 Ill. Rev. Stat., Chap. 38, par. 192.23) passed at the 1951 session of the General Assembly, which provides as follows:

"Section 1. Section 23 of the "Uniform Narcotic Act" approved July 8th, 1935 as amended, is amended to read as follows:

Section 23. Whoever violates this act by selling, prescribing, administering or dispensing any Narcotic Drug, shall be imprisoned in the penitentiary for a term of not less than one year nor more than five years for the first offense.

Whoever violates this act by possessing, having under his control, manufacturing or compounding any Narcotic Drug shall be fined for the first offense not more than $5,000.00 or be imprisoned for a period of not less than one year nor more than five years, or both. For any subsequent offense the violator shall be imprisoned in the penitentiary for any term from two years to life.

Whoever violates this act by selling, prescribing, administering or dispensing any Narcotic Drug to any person under 21 years of age shall be imprisoned in the penitentiary for any term from two years to life.

Whoever is authorized in this act to manufacture, possess, have under his control, sell, prescribe, administer, dispense or compound any Narcotic Drug, who violates this act by failing to comply with any provision prescribed in this act for the exercise of such authority, for the first offense, shall be fined not more than $1,000.00 or be imprisoned in the county jail for a term of one year, or both; and for any subsequent offense shall be fined not more than $3000.00 or be imprisoned in the penitentiary for a term of not more than five years or both.

Any offense under this act shall be deemed a subsequent offense if the violator shall have been previously convicted of a felony under any law of the United States of America or of any state or territory, or of the District of Columbia relative to Narcotic Drugs.

SECTION II. Whereas the ominous and ever present problem of Narcotics has recently become acute in many parts of the State, therefore an emergency exists and this act shall take effect upon its becoming a law."

In your supplemental letter you state that Mims was charged with "unlawfully having in his possession a certain habit-forming drug, to-wit: Heroin."

You request our opinion as to whether or not the sentencing of Haney Mims to the House of Correction for a period of five years and the imposing of a fine of $5,000.00 was proper.

The Houses of Correction Act (1949 Ill. Rev. Stat., Chap. 67) provides:

"It shall also be lawful for the municipal authorities of any city within the state to establish a house of correction, which shall be used for the confinement and punishment of criminals or persons sentenced or committed thereto under the provisions of this act, or any law of this state, or ordinance of any city or village, authorizing the confinement of convicted persons in any such house of correction * * *."

* * * *

"Section 8. The board of supervisors or commissioners of any county, and the board of trustees of any village or town, in any

county in this state, in which a house of correction is established, shall have full power and authority to enter into an agreement with the legislative authorities of such city, * * * to receive and keep in said house of correction any person or persons who may be sentenced or committed thereto, by any court or magistrate, in any of said counties * * *."

"Section 9. In counties, towns and villages having such agreement with any such city, it shall be the duty of every court, police justice, justice of the peace, or other magistrate in such county, town or village, by whom any person, for any crime or misdemeanor punishable by imprisonment in the county jail, shall be convicted, to commit such person to the said house of correction, in lieu of committing him to the county jail, village or town calaboose, there to be received and kept in the manner prescribed by law and the discipline in the said house of correction; * * *. Every sentence to such house of correction shall be commutable within the first thirty (30) days thereof and the order of commitment may be modified or vacated by the court or judge entering the same in anytime with (within) thirty days after the entry thereof."

Pursuant to the provisions of Section 1 of the Houses of Correction Act, the City of Chicago enacted an ordinance creating a house of correction for the City of Chicago (Municipal Code of Chicago, Chapter 24). The pertinent parts of the ordinance are as follows:

"24-5. It shall be the duty of said superintendent to receive into the house of correction such persons as may be committed thereto by any court or magistrate in the county authorized to commit prisoners to such house of correction by the laws of the state or by any ordinance of the city, or any town or village in the county having a contract with the city for the care of its prisoners, and to put each of such prisoners so committed as are able to labor to the work which they are respectively best able to do, not to exceed eight hours for each working day.

The superintendent shall also receive into said house of correction any person who may be sentenced or committed thereto by any court or magistrate in and of the county, when such commitment is for a time not less than thirty days, under an agreement to that effect between the city and the board of commissioners of the county."

"24-7. Every person committed to the house of correction by a judge of the Municipal Court for a violation of any city ordinance shall be allowed, for each days work, exclusive of his board, the sum of two dollars, which shall be applied in payment and satisfaction of the fine and costs imposed upon such person."

"24-10. No person shall be released from the house of correction by the superintendent thereof, except upon the payment of the fine or by order of the mayor or of some court of competent jurisdiction. He shall release only prisoners received by virtue of contract with any county, village or town upon the expiration of sentence, or by order of the board of village trustees, or by order of a court of competent jurisdiction.

In every case where a prisoner is released by the order of any court of competent jurisdiction, the superintendent of the house of correction shall at once report such release to the corporation counsel, and such report shall be accompanied with a copy of the mittimus on which such prisoner was committed to his charge."

Pursuant to Section 8 of the Houses of Correction Act, the City Council of the City of Chicago enacted an ordinance authorizing the City to enter into a contract with Cook County for the care and custody of prisoners convicted of violating a state penal statute, (Municipal Code of Chicago, Chapter 26, section 24). The ordinance provides as follows:

"26-24. Contracts may be made with any county in the state, or with the trustees of any town or village in Cook County, for the care and custody of prisoners in the house of correction, at a price not less than twenty-five cents per day for each prisoner. All such contracts shall extend for the care of such prisoners until the expiration of their terms of sentence. Under such contracts the labor of every such prisoner shall be the property of, and for the benefit of the city."

In accordance with the foregoing statutory and ordinance provisions the City of Chicago and the County of Cook entered into a contract (Council proceedings p. 1042, October 21, 1931) providing for the confinement of county prisoners in the house of correction. This contract, covering the period from December 1, 1930 to December 31, 1940, provides in part as follows:

"1. The City shall receive from the County for confinement at the House of Correction and/or at the Houses of Shelter, prisoners committed thereto by any court of competent jurisdiction on charges of the people of the State of Illinois, for any crime or misdemeanor punishable by confinement in the County Jail, and shall keep such prisoners in the manner prescribed by law, provided that the County shall not commit to the House of Correction and the City shall not be required to receive from the County at the House of Correction any prisoner beyond the total capacity of such House of Correction. The total capacity of the House of Correction shall be determined from time to time by the Superintendent of the House of Correction, who shall give notice to the County Commissioners when any change in the capacity of same shall have been determined upon."

Although this contract expired on December 31, 1940, we are informed by the office of the Comptroller that no other written contract has been executed by the City of Chicago and the County of Cook pertaining to the confinement of county prisoners in the House of Correction; and that county prisoners are now being confined in the House of Correction in accordance with this agreement, except that the amount of compensation to be paid the City of Chicago has been increased because of increase in costs of operation.

It will be noted that the statutory, ordinance and contractual provisions pertaining to the creation of the House of Correction and the commitment of county prisoners thereto contain no limitations on the period of time for which a prisoner may be committed to the House of Correction.

The legislature has defined a Felony (1949 Ill. Rev. Stat. Chap. 38, par. 585) to be:

"A felony is an offense punishable with death or by imprisonment in the penitentiary."

The legislature has also defined a Misdemeanor (1949 Ill. Rev. Stat. Chap. 38, par. 586) to be:

"Every other offense is a misdemeanor."

The Supreme Court of Illinois has on numerous occasions discussed the distinction between a felony and a misdemeanor. In *The People* v. *Mangano* (1933), 354 Ill. 329, the court said (p. 341):

"A felony, under our statutes, is an offense punishable with death or by imprisonment in the penitentiary, while every other offense is a misdemeanor. When the offense may be punished by imprisonment in the penitentiary, or by fine only, or by punishment in the penitentiary and by fine, in the discretion of the court or jury, it is only a misdemeanor."

Other cases to the same effect are *The People* v. *Bain* (1935), 359 Ill. 455, 470 and *The People* v. *Sullivan* (1936), 363 Ill. 34, 37.

Mims was found guilty of unlawfully having in his possession a certain habit-forming drug, to-wit, Heroin. The 1951 amendment to Section 23 of the "Uniform Narcotic Drug Act" fixes the penalty for unlawfully possessing a narcotic drug as follows:

> "Whoever violates this act by possessing, having under his control, manufacturing or compounding any Narcotic Drug shall be fined for the first offense not more than $5,000.00 or be imprisoned for a period of not less than one year nor more than five years, or both. For any subsequent offense the violator shall be imprisoned in the penitentiary for any term from two years to life."

From the facts that you have furnished us, Mims was a first offender and, therefore, it appears that Mims was convicted of a misdemeanor rather than a felony.

An examination of the various statutory provisions pertaining to terms of sentences and places of confinement of persons convicted of crime and of violating penal statutes does not disclose any provision limiting the time for which one may be sentenced to the County Jail or House of Correction.

Section 1 of the Sentence and Parole Act (1949 Ill. Rev. Stat., Chap. 38, par. 801) provides:

> "In all cases where any person, male or female, over ten years of age, shall be charged with either of the offenses of misprision of treason, murder, rape or kidnapping, and the case shall be tried by a jury and the jury shall find the defendant guilty, the jury shall also by its verdict fix the punishment, and if the punishment imposed is imprisonment, the jury shall fix the term of such imprisonment; if the case is tried by the court, without a jury, or on a plea of guilty, and the court shall impose imprisonment as the punishment, the court shall fix a definite term of punishment, and the court in each case, shall fix the place of confinement. In every such case of imprisonment, the court shall sentence the defendant to the penitentiary * * *."

Section 2 of the Sentence and Parole Act (1949 Ill. Rev. Stat., Chap. 38, par. 802) provides:

> "Except for the crimes enumerated in Section 1 of this Act, the courts of this State, in imposing a sentence to the penitentiary or to the reformatory for women or to any other State institution now or hereafter provided by law for the incarceration, punishment, discipline, training or reformation of persons convicted and sentenced to, or committeed to such institutions (not including, however, county jail), shall fix the minimum and maximum limits or duration of imprisonment.
>
> * * *
>
> No court of otherwise competent criminal jurisdiction shall be deprived of jurisdiction to sentence and commit or commit, under this Act, for terms of imprisonment for a crime or offense in this Act enumerated, although such crime or offense may in addition to such imprisonment, be punishable by other or alternative punishment.
>
> No person shall by any court be committed to the penitentiary, to the reformatory for women, or to any other State institution for the recovery of a fine or costs."

Section 3 of the Sentence and Parole Act (1949 Ill. Rev. Stat., Chap. 38, par. 803) provides:

> "Except for the crimes enumerated in Section one of this Act, every person, male or female, over ten years of age, who shall be adjudged guilty of felony or other crime punishable by imprisonment in the penitentiary, or *by imprisonment either in the penitentiary or Jail, and as to whom the court shall not have assessed the jail sentence,*

shall in all cases, except as herein otherwise provided in clauses one and two, be sentenced to the penitentiary and the court imposing sentence shall fix the minimum and maximum limits or duration of imprisonment." (Italics ours.)

The Sentence and Parole Act applies only to a Felony where the convicted person had been committed to the penitentiary. The only exception is contained in Section 3 of the Act which provides that every person who shall be adjudged guilty of a crime punishable "by imprisonment either in the penitentiary or jail" and as to whom the court shall not have assessed a jail sentence, shall be sentenced to the penitentiary. In the case under review Judge Gorman assessed the jail sentence and, therefore, Section 3 of the Act has no application.

Other statutory provisions pertaining to the place of confinement of a convicted person are found under DIVISION XIV (Chap. 38, pars. 749-768). Section 6a thereof (1949 Ill. Rev. Stat., Chap. 38, par. 754a) provides:

"For all crimes or offenses to which the act cited in the preceding paragraph [Sentence and Parole Act, 1949 Ill. Rev. Stat., Chap. 38, Pars. 801-816] may not be applicable, the following procedure shall apply:

* * * *

(b) When the punishment may be either by imprisonment in the penitentiary, or by confinement in the county jail, with or without fine, if the jury will not inflict the punishment of imprisonment in the penitentiary, it shall, if it finds the accused guilty, fix the time of confinement in the jail, or fine, or both, as the case may require. In all cases where the penalty as prescribed by statute is confinement in the county jail, or fine, or both, if the jury finds the accused guilty, it shall also fix the time of confinement, or fine, or both, as the case in its judgment requires.

(c) When the accused pleads guilty, and in all other cases not otherwise provided for, the court shall fix the time of confinement, or the amount of the fine, or both, as the case may require."

Section 10 of DIVISION XIV (1949 Ill. Rev. Stat., Chap. 38, par. 758) provides as follows:

"Any person convicted, in a court of this state having jurisdiction, of any crime or misdemeanor the punishment of which is confinement in the county jail, may be sentenced by the court in which such conviction is had, to labor for the benefit of the county, during the term of such imprisonment in the work house, house of correction or other place provided for that purpose by the county or city authorities."

Section 14 of DIVISION XIV (1949 Ill. Rev. Stat., Chap. 38, par. 762) provides:

"When a fine is inflicted, the court may order, as a part of the judgment, that the offender be committed to jail, there to remain until the fine and costs are fully paid or he is discharged according to law."

Sections 10-8 and 23-106 of the Cities and Villages Act (1949 Ill. Rev. Stat., Chap. 24, pars. 10-8, 23-106) provide that no fine or penalty for a violation of a municipal ordinance shall exceed $200.00 and no imprisonment shall exceed six months for one offense. However, this limitation has no effect on the matter under consideration as here Mims was convicted of violating a State statute and not a municipal ordinance.

We have also examined the statutory provisions pertaining to jails (1949 Ill. Rev. Stat., Chap. 75, pars. 1-29). Section 29 thereof contains a table for diminution of time from the term of imprisonment for good behavior of the prisoner. The maximum sentence listed as 12 months, which might leave the impression that the limitation of imprisonment in the County Jail (and because of the provisions of Section 9 of the Houses of Correction Act, 1949 Ill. Rev. Stat., Chap. 67, par. 9, in the House of Correction) is likewise 12 months. Our research discloses that this section has never been the subject of judicial review. In the light of the cases hereinafter discussed we are of the opinion that Section 29 of the Jails and Jailers Act cannot be interpreted as placing a limitation on the length of time a prisoner can be confined in the County Jail or the House of Correction.

It therefore appears that there is no statutory or ordinance provision which limits the period of time for which a person convicted of a statutory offense may be confined in the House of Correction or which limits the period of time a court of competent jurisdiction may sentence a person convicted of a State charge to the House of Correction.

Research fails to disclose any case where a convicted person was sentenced to the House of Correction for more than one year. Conversely, we have failed to find any case which prohibits a court from sentencing a person convicted of a State charge to the House of Correction for more than one year.

The next question for consideration is whether the Municipal Court of Chicago had jurisdiction to conduct a trial under the penalty provisions of the Uniform Narcotic Drug Act.

Section 2 of the Municipal Court of Chicago Act (1949 Ill. Rev. Stat., Chap. 37, par. 357) provides, in part, as follows:

> "Section 2. That said Municipal Court shall have jurisdiction in the following cases:
>
> Third. Cases to be designated and hereinafter referred to as cases of the third class, which shall include all criminal cases in which the punishment is by fine or imprisonment otherwise than in the penitentiary; all other criminal cases which the laws in force from time to time may permit to be prosecuted otherwise than on indictment by a grand jury, and all criminal cases of whatever nature which may be transferred to it by change of venue or otherwise by any other court of competent jurisdiction."

Section 27 of the Municipal Court of Chicago Act (1949 Ill. Rev. Stat., Chap. 37, par. 382) provides in part:

> "That all criminal cases in the Municipal Court in which the punishment is by fine or imprisonment otherwise than in the penitentiary, may be prosecuted by information of the Attorney General or the State's Attorney, or some other person, and when an information is presented by any other person than the Attorney General or the State's Attorney, it shall be verified by affidavit of such person that the same is true, or that the same is true as he is informed and believes."

The courts, on many occasions, have interpreted the foregoing provisions of the Municipal Court of Chicago Act.

In *The People* v. *Glowacki* (1908), 236 Ill. 612; an information was filed in the Municipal Court of Chicago charging the defendant with unlawfully living and cohabitating in a state of adultery. The jury found him guilty and he was sentenced to pay a fine of $400 and costs and to stand committed until such fine and costs were paid. The defendant contended that under Section 8 of Article II of the Constitution the Municipal Court did not have jurisdiction because the offense was one which called for an indictment rather than an information. The court, in overruling the contention of the defendant, said (p. 619):

"We conclude, therefore, that under the constitution and the Municipal Court act the municipal court of Chicago has jurisdiction to try, on information, all violations of criminal laws punishable by fine or by imprisonment otherwise than in the penitentiary, or by both fine and such imprisonment. If the offense is one that may be punished either by fine or by imprisonment in the penitentiary or both by fine and imprisonment in the penitentiary, then it can only be prosecuted under an indictment."

In *The People* v. *Sullivan* (1936), 363 Ill. 34, one Jacobson was convicted in the Municipal Court of Chicago on the charge of obtaining money by false pretenses and sentenced to the House of Correction for one year and to pay a fine of $2000. An original petition for mandamus was filed in the Supreme Court seeking to release and discharge Jacobson from the custody of the superintendent of the House of Correction of the City of Chicago. The statute upon which the conviction of Jacobson was based, so far as it is applicable here, was as follows:

"Whoever, with intent to cheat or defraud another, designedly * * * by any false pretense, * * * obtains from any person any money, personal property or other valuable thing, shall be fined in any sum not exceeding $2000 and imprisoned not exceeding one year."

The court, in discussing the jurisdiction of the Municipal Court of Chicago, said (p. 37):

"The averment of the petition for habeas corpus was that the offense, if one was charged in the information in the municipal court, was a felony, in which class of cases that court has no jurisdiction. A felony is an offense punishable with death or imprisonment in the penitentiary. Every other offense is a misdemeanor. (Ill. State Bar Stat. 1935, chap. 38, div. 2, secs. 5, 6, p. 1237; *People* v. *Bain*, 359 Ill. 455; *People* v. *Mangano*, 354 id. 329; *People* v. *Stavrakas*, 335 id. 570.) The municipal court of Chicago is given jurisdiction in "cases to be designated * * * as cases of the third class, which shall include all criminal cases in which the punishment is by fine or imprisonment otherwise than in the penitentiary." (Ill. State Bar Stat. 1935, Municipal Court act; sec. 2, p. 1102.) The punishment provided for the offense tried in the municipal court, which was the basis of the habeas corpus proceeding, is a fine not exceeding $2000 and imprisonment not exceeding one year. There is no provision that such imprisonment must be in the penitentiary. On the trial of the defendant the sentence imposed was a fine of $2000 and imprisonment in the house of correction for one year, which was within the terms of the statute. If there was an offense charged, (which will be hereafter discussed,) it was a misdemeanor, of which the municipal court had jurisdiction, and the court did not exceed its jurisdiction in the entry of the particular judgment. *People* v. *Glowacki*, 236 Ill. 612."

The penalty for possessing a habit-forming drug, for a first offense, is a fine of not more than $5,000.00 or imprisonment for a period of not less than one year nor more than five years, or both. This is a misdemeanor, (*The People* v. *Mangano* (1933), 354 Ill. 329, 340-342; *The People* v. *Bain* (1935), 359 Ill. 455. 470-472; *The People* v. *Basuris* (1935), 360 Ill. 192, 193). The penalty does not provide for commitment to the penitentiary and therefore we are of the opinion that the Municipal Court of Chicago had jurisdiction to try the case.

The next question for consideration is whether, under the provisions of Section 23 of the Uniform Narctoic Drug Act, as amended in 1951, the defendant could be sentenced to the House of Correction.

Section 23, as amended, provides for a different penalty for each of the four violations therein set forth. For the act of selling, prescribing,

administering or dispensing, a narcotic drug, contrary to the Act, the penalty is imprisonment in the penitentiary for a term of not less than one year nor more than five years for the first offense. For the act of possessing, having under his control, manufacturing or compounding any narcotic drug in violation of the Act, the penalty is a fine for the first offense of not more than $5000 or imprisonment for a period of not less than one year or more than five years, or both; and for any subsequent offense the penalty is imprisonment in the penitentiary for a term from two years to life. For the act of selling, prescribing, administering or dispensing any narcotic drug to any person under 21 years of age the violator shall be imprisoned in the penitentiary for any term from two years to life, Any manufacturer who violates any provision of the Act, for the first offense, shall be fined not more than $1000 or be imprisoned in the county jail for a term of one year or both; and for any subsequent offense shall be fined not more than $3000 or be imprisoned in the penitentiary for a term of not more than five years or both.

It is a cardinal principle of law that penal statutes are to be strictly construed, and matters and things which are not clearly included cannot be brought within the operation of such statutes by construction.

In *The People* v. *Kirkrand* (1947), 397 Ill. 588, the court said (pp. 589-590):

> "This court has held that a criminal or penal statute is to be construed in favor of the accused and nothing is to be taken by intendment or implication against him beyond the literal and obvious meaning of the statute. The object, however, in construing criminal and penal, as well as all other statutes, is to ascertain the legislative intent. The rules as to strict or literal construction are of value only as assisting in finding the real meaning of the statute. (*People* v. *Lund*, 382 Ill. 213.) The ascertainment of the legislative intent is, even where penal statutes are concerned, the sole legitimate purpose of judicial construction, and the rule of strict construction is to be utilized along with the various other rules of construction simply as a means of discerning and making the means of legislative intent effective. It is true penal laws are to be construed strictly but they are not to be construed so strictly as to defeat the obvious intention of the legislature."

A study of Section 23, as amended, reveals that the legislature had in mind and knew the distinction and difference between a felony and a misdemeanor. It had in mind and knew the difference between confinement in the penitentiary and the county jail. It also knew and had in mind that if no place of confinement was designated in the statute the trial court has the discretion of designating the place of confinement (*The People* v. *Murphy* (1900), 185 Ill. 623, 626-627; *Thomas* v. *The People* (1885), 113 Ill. 531, 536-537).

The legislature, in its wisdom, determined that one selling a narcotic drug should be confined in the penitentiary. At the same time, it imposed a fine or an imprisonment, without specifying the place of confinement, for one who possessed a narcotic drug. It made the selling of a narcotic drug a felony while the possession thereof a misdemeanor.

The fact that the legislature omitted the place of confinement in providing for the penalty for possessing a narcotic drug raises the conclusive presumption that confinement should be in the county jail (24 C.J.S. 1247, par. 2000). In *Ex parte Schiaffino* (1924) 232 P. (Cal.) 719, the court was called upon to determine the place of confinement of a person convicted of violating the following statute:

> "Any person who, with intent to commit crime, breaks and enters, * * * any building, * * * and opens * * * any vault * * * by use of nitroglycerin * * * shall be deemed guilty of burglary with

explosives. Any person duly convicted of burglary with explosives shall be punished by imprisonment for a term not less than twenty-five nor more than forty years."

The Penal Code of California provided:

"A felony is a crime which is punishable with death or by imprisonment in the state prison. Every other crime is a misdemeanor."

The court held that the defendant must be confined in the county jail, saying (pp. 719-720):

"Though it seems an absurdity that one convicted of a crime which is punishable by imprisonment for not less than 25 years should be confined in a county jail rather than in the state prison, the language of the section does not permit any other interpretation."

In *State* v. *Toy* (1922), 211 P. (Mont.) 303, the defendant was convicted of an infraction of the narcotic law which provided as follows:

"Any person who violates or fails to comply with any of the requirements of this act shall on conviction, be punished by a fine of not more than one thousand dollars or by imprisonment for not more than three years, or by both such fine and imprisonment."

The court held that the defendant was properly confined in the county jail, saying (p. 305):

"It is the general rule that where no place of imprisonment is fixed by the statute such imprisonment is in the county jail or city prison, as the case may be, rather than in the penitentiary. This rule is supported by *Gherna* v. *State*, 16 Ariz. 344, 146 Pac. 494, Ann. Cas. 1916D, 94; *Union Ice Co.* v. *Rose*, 11 Cal. App. 357, 104 Pac. 1006; *Commonwealth* v. *Francis*, 250 Pa. 350-352, 95 Atl. 798. Therefore the judgment was not invalid, since it fixed the place of imprisonment in the county jail."

Other cases to the same effect are *Commonwealth* v. *Ashe* (1947) 55 A. 2nd (Penn.) 433; *Commonwealth* v. *Smith* (1935), 177 A. 73.

As previously stated, the prisoner was found guilty of "unlawfully having in his possession a certain habit-forming drug; to-wit: Heroin." The penalty for possessing a narcotic drug is, for the first offense, a fine of not more than $5,000 or imprisonment for a period of not less than one year nor more than five years, or both. The legislature has not stated the place of confinement. We are therefore of the opinion that one found guilty of possessing a narcotic drug cannot be confined in the penitentiary but his place of confinement must be in the county jail. We have previously shown by statutory, ordinance and contractual provisions that it is the duty of the trial court to sentence a violator to the House of Correction in lieu of the county jail. Therefore, in our opinion, the prisoner was properly committed to the House of Correction.

It is immaterial that the legislature provided that on any subsequent offense, the violator shall be imprisoned in the penitentiary for any term from two years to life. In *The People* v. *Boykin* (1921), 298 Ill. 11, the court said (p. 21):

"The municipal court had jurisdiction of this offense. That court is a court of limited jurisdiction, but it has jurisdiction of offenses committed within the boundaries of the city which are prosecuted by information and punishable by fine and imprisonment otherwise than in the penitentiary, and this is not questioned by plaintiff in error. His contention is, that under the information in question he might have been convicted of a second offense if the proof had shown that he had been previously convicted of pandering. We cannot accede to this contention. Every fact necessary to sustain a sentence imposed by a court in a criminal case must be alleged in

the information or in the indictment, and an indictment under which it is sought to impose a higher penalty by reason of a previous conviction must allege the fact of such conviction. (I McClain on Crim. Law, sec. 26, p. 28.) *It is neither proved in this case nor charged by plaintiff in error that he was ever convicted of pandering, or of any other offense, previous to the filing of the information. In fact, the record shows that he never was previously convicted of or charged with any offense. It is true that if the information had properly alleged a conviction of a former offense of pandering the municipal court would not have had jurisdiction, as the prosecution would have had to be by an indictment and tried in a court of record having jurisdiction to impose the penalty of imprisonment in the penitentiary. But that is not the fact here, where the misdemeanor charged is the first offense of pandering, and there is no reason for holding that the municipal court did not have jurisdiction."* (Italics ours.)

Summarizing the foregoing we conclude:

(1) That there is no statute, ordinance or contract provision which limits the time that a person, found guilty of violating a State penal statute, can be sentenced to the County Jail or the House of Correction by a court of competent jurisdiction.

(2) That the penal provision of the Uniform Narcotic Drug Act, for the first offense of illegally possessing a narcotic drug, provides for a misdemeanor rather than a felony or an infamous crime.

(3) That the penalty provision for the first offense of illegally possessing a narcotic drug does not designate the place of confinement and, therefore, the place of confinement of one found guilty thereof is the County Jail or the House of Correction, and not the penitentiary.

(4) That the Municipal Court of Chicago had jurisdiction to conduct a trial of one charged with the first offense of possessing a narcotic drug and, upon conviction, to sentence him to the County Jail or the House of Correction.

(5) That although the contract between the County of Cook and the City of Chicago for the confinement in the House of Correction of prisoners found guilty of a state charge has expired, the City has been accepting prisoners; that, in the matter under consideration, the Superintendent of the House of Correction has accepted the prisoner and now has him confined in the House of Correction; and that, therefore, under Sections 24-10 and 26-24 of the Municipal Code of Chicago he must retain and care for him until the expiration of his term of sentence, or until ordered to release him by the Board of County Commissioners, or by order of a court of competent jurisdiction.

(6) That questions of adequate facilities, security to handle inmates with such a length of sentence, and new arrangements or policies to be formulated are administrative rather than legal.

(7) That the sentencing of the prisoner by Judge Gibson B. Gorman of the Municipal Court, for a term of five years and a fine of $5000 was legal and proper; and the Superintendent of the House of Correction must confine and retain him until the expiration of his sentence, unless previously ordered to release him by order of the Board of County Commissioners or a court of competent jurisdiction.

HOUSE OF CORRECTION VEHICLES

(No. 11468—Superintendent, House of Correction—A. F. G.—January 11, 1952.)

In your letter of December 14, 1951 you state:

> "We have five trucks going around the city on various missions and a truck and a station wagon at the Farm that runs back and forth to the House of Correction.
>
> The past practice here has been to have the regular officers as drivers of those trucks. I would like to have an opinion from you as to the responsibility of the City of Chicago or my personal responsibility if any one of those trucks should become involved in an accident. Should those trucks be insured and should the drivers have chauffeur's licenses?"

When you say that "regular officers" drive trucks on errands for the institution, we assume you mean regular employees such as guards, laborers, etc. Section 27 of the "Motor Vehicle Law," Paragraph 33, Chapter 95½, Ill. Rev. stats. 1951 which provides for the liscensing of chauffeurs has the following proviso:

> "Provided, however, that no person shall be held to be a chauffeur, and subject to the provisions hereof, who operates a motor vehicle incidentally to some other and principal occupation and where such motor vehicle is not used for the transportation of passengers or merchandise for hire.'

It is our opinion, therefore, that the employees referred to whose principal occupation is not driving trucks, but who do so occasionally, are not required to be licensed as chauffeurs. We do not believe in this case the city would have any greater responsibility for damages in case of accident than if it had employed licensed chauffeurs in the operation of these trucks. We do not see how the practice of the board as stated in your letter would subject you to personal liability.

It is probable in an action for damages growing out of the negligence of such drivers, the courts would hold that in the operation of a penal institution such as the House of Correction, the city was engaged in a governmental capacity and not answerable in tort for the negligence of its servants employed therein.

The City of Chicago does not carry insurance on its trucks through policies written by insurance companies. It is a self insurer, a status authorized by section 42-12 (k) of the "Motor Vehicle Law."

REMOVAL OF SIDEWALK OBSTRUCTIONS

(No. 11480—Commissioner of Public Works—A. F. G.—February 20, 1952.)

With your letter of February 6, 1952, you attached copy of a letter from the Commissioner of Streets and Electricity dated November 23, 1951. He advised you that his department had removed various articles from the sidewalk in front of 1406 Belmont Avenue which he stored in the city

shop at 37th Street and Princeton Avenue. He called attention to section 34-2 of the Municipal Code of Chicago which authorizes you to sell such articles to pay cost of removal and storage. He asks your permission to remove these articles to the house of correction pending such sale.

You ask our advice as to the proper course you should follow in this matter.

The articles consist of some vending machines for soft drinks and some broken file cabinets.

Section 34-2 of the said code reads as follows:

> "The commissioner of public works is hereby authorized to order any article or thing whatsoever which may encumber or obstruct any public way, public landing, wharf or pier within the city to be removed. If such article or thing shall not be removed within six hours after notice to the owner or person in charge thereof to remove the same, or if the owner cannot be readily found for the purpose of such notice, the commissioner of public works shall cause the same to be removed to some suitable place, to be designated by said commissioner. The owner of any article so removed shall be subject to a penalty of not more than ten dollars, in addition to the costs of such removal.
>
> Any article or thing which may be removed in accordance with this section, if of sufficient value to more than pay the expenses thereof, shall be advertised ten days and, unless the same shall be reclaimed and the penalty and costs paid by the owners thereof, shall be sold by the department of public works. The proceeds of such sale shall be paid into the city treasury, and the balance, if any, after deducting the penalty and costs, shall be paid to any person furnishing satisfactory proof of ownership."

If the owner of the property is known he should be notified to remove the articles after payment of the penalty of ten dollars and the costs of such removal. If he fails to comply with your notice and the property has sufficient value to more than pay the cost of removal, storage and advertising, you should follow the ordinance and advertise their sale. However, if the property has not sufficient value to meet these charges you may regard them as a common nuisance and dispose of them as such; but before so doing you should make an inventory of the same, giving a detailed description of each article, and preserve the list for identification in the event of future litigation.

Opinions of the Corporation Counsel on the same subject matter appearing in Vol. 9 at p. 96; Vol. 19 at p. 242 and Vol. 20 at p. 220 are in accord with the view here expressed.

ELECTION PETITION

(No. 11484—City Clerk—A. F. G.—February 26, 1952.)

In your letter of February 19, 1952 you call attention to a nominating petition for a candidate for Associate Judge of the Municipal Court of the City of Chicago on the Republican ticket, which was filed in your office February 18, 1952.

You state that the petition contained 2459 signatures. You state also:

"The petition consists of a series of sheets purporting to contain signatures of qualified primary electors, fastened together in book form, the first sheet bearing the numbers '1' and the last sheet bearing the number '133', but some numbers are missing, and the sheets are not in consecutive order, as is indicated below. Attached to said petition are a signed and sworn statement of candidacy and a 'loyalty' oath.

Said petition contains numbered sheets arranged in the following order: from No. 1 to No. 34, both inclusive, Nos. 36, 37, 39 to 43, both inclusive; Nos. 45 to 55, both inclusive, Nos. 57 to 68, both inclusive; Nos. 70 to 77, both inclusive; Nos. 79 to 108, both inclusive; Nos. 114 to 117, both inclusive; Nos. 109 to 112, both inclusive.

The petition does not contain sheets numbered 35, 38, 44, 56, 69, 78, or 113."

Section 7-10 (d) of the Election Code provide that a petition for Judge of the Municipal Court of Chicago shall be signed by at least one-half of one per cent of the qualified primary electors of his party in the city. This number is determined by taking the total vote cast for the candidate of such political party who received he highest number of votes in the municipality at the last municipal election held therein.

The last municipal election was held April 3, 1951, and the candidate who was highest in the number of votes on the Republican ticket received 574,959 votes. It follows therefore that a petition for nomination as a candidate for Municipal Court Judge in order to comply with the statutory provision must contain a minimum of 2875 signatures of qualified primary electors of the Republican party in the city of Chicago. You state that the total number of signatures amount only to 2459. It is apparent therefore from the face of the petition filed in your office that it does not comply with the law and is fatally defective.

In an opinion to you dated January 24, 1951, concerning a petition filed in your office by a candidate on the Republican ticket for mayor of Chicago, which petition like the one here involved did not contain the number of signatures required by law, we held that it was your duty to refuse to certify his name to be printed on the Republican primary ballot. We cited as authority for so holding *The People* v. *Dillon*, 286 Ill. 272, in which it was held that the city clerk is a ministerial officer, and it was his duty to examine the petition, and if upon its face it appeared that it was not in compliance with the requirements of the statute he was not required to submit the question for a vote at the ensuing election.

Sections 7-3 and 10-4 of the Election Code provides that the petition shall consist of sheets of uniform size and that each sheet shall contain above the space for signatures an appropriate heading giving information as to the name of the candidate or candidates in whose behalf such petition is signed, the office, the political party represented, place of residence, and such other information or wording as required to make the same valid; and the heading of each such sheet shall be the same. The sections then provide as follows:

"Such sheets before being presented to the election board or filed with the proper officer of the electoral district or division of the state or municipality as the case may be, shall be neatly fastened together in book form by placing the sheets in a pile and fastening them together at one edge in a secure and suitable manner, and the sheets shall then be numbered consecutively. The sheets shall not be fastened by pasting them together end to end and so as to form a continuous strip or roll."

Your letter indicates that this provision of the law was not observed in the petition. The sheets are not numbered consecutively. Certain

numbered sheets are not contained in the petition which would not occur if the sheets were numbered consecutively as provided above.

Sheets bearing higher numbers precede sheets with lower numbers. When the legislature provided for the consecutive numbering of the sheets in a petition we must assume it had a definite purpose in making this requirement, and a petition not in conformity with this provision is on its face not in compliance with the statute and there is no duty imposed on you to certify such petition to the board of election commissioners.

Because the petition in question does not comply with two separate provisions of the Election Code, and the non-compliance is apparent on the face of the petition we are of the opinion you should not certify the said petition.

PRISON SENTENCES

(No. 11489—Superintendent, House of Correction—E. R. H.—February 28, 1952.)

We acknowledge your letter of January 18, 1952 asking our opinion with reference to the sentences and fines against one, Ray and one, Evans, committed to the House of Correction by the Municipal Court of Chicago.

You state as:

> *"Example No. 1.* We received Ray, M. C. No. 22506 from Branch 32 on January 15, 1952, with 13 two month commitments to run consecutively, and 8 $110.00 City fines, also to run consecutively."

and

> *"Example No. 2.* On January 17, 1952, we received Evans from Judge Oscar Caplan's court with 8 commitments $10.00 and $10.00 for violation of the Chicago Park District ordinance 12-20."

We have examined the records of the Municipal Court of Chicago in both of these cases. In the case of Ray, the 13 two month commitments are for separate and distinct crimes of which Ray was found guilty. The mittimus case No. 22506 provides for a two month sentence and each mittimus in the other 12 cases orders a two month sentence to commence at the expiration of a previous two month term. There is no question of the legal propriety of these sentences. The court has made them consecutive and in our opinion all are in conformity with the law.

The court records disclosed the 8 "city fines" against Ray referred to in your letter. All of these fines are for violations of Section 193 of the Municipal Code of Chicago. The complaint in each case is signed by a different person and each case is a separate and distinct offense and a separate and distinct fine. All cases against Ray bear different case numbers.

Section 10-8, Chapter 24 of the Illinois Revised Statutes, 1951, provides among other things:

> "* * *. The person upon whom any fine or penalty is imposed, upon the order of the court or magistrate before whom the conviction is had, may be committed to the county jail as provided in Section

23-80 or to any place provided by ordinance for the incarceration of offenders until the fine, penalty, and costs are fully paid. No imprisonment, however, shall exceed six months for any one offense.

The corporate authorities may provide by ordinance that every committed person shall be required to work at whatever labor his strength permits, within and without the place of incarceration, not to exceed ten hours each working day. The committed person shall be allowed, exclusive of his board, a credit of fifty cents for each day's work on account of the fine, penalty and costs."

Section 24-7 of the Municipal Code of Chicago provides:

"24-7. Every person committed to the house of correction by a judge of the municipal court for a violation of any city ordinance shall be allowed, for each day's work, exclusive of his board, the sum of two dollars, which shall be applied in payment and satisfaction of the fine and costs imposed upon such person."

Please note that Section 10-8 of Chapter 24 of the Statutes, above quoted, provides "no imprisonment, however, shall exceed six months for any one offense."

The eight city fines against Ray being for separate and distinct violations of an ordinance of the City of Chicago and inasmuch as the above quoted statutes provides that no imprisonment shall exceed six months for *any one offense*, it is our opinion that the fines, if not paid, must run consecutively.

With reference to your example 2, involving Evans, the records of the Municipal Court disclose that the eight commitments and fines were for eight separate and distinct violations of Section 12-20 of the ordinances of Chicago Park District. The violations occurred on several distinct days in the year 1951 and are several and distinct violations of the same Section of the Code of the Chicago Park District Ordinances and have separate case numbers.

Section 331 of Chapter 105, Illinois Revised Statutes, 1951, provides in part:

"* * *. Any person upon whom any fine or penalty shall be imposed may, upon the order of the court or magistrate before whom the conviction is had, be committed to the county jail or the city prison, house of correction, or other place in said county, provided by such public park commissioners, or as may be designated by them, for the incarceration of such offenders until such fine, penalty and costs shall be fully paid: Provided, however, that no such imprisonment shall exceed six months for any one offense. Every person so committed shall be required to work at such labor as his or her strength will permit, within and without such prison, house of correction or other place provided for the incarceration of such offenders, as aforesaid, not to exceed ten hours each working day; and for such work the person so employed or worked shall be allowed exclusive of his or her board, the sum of fifty cents for each day's work on account of such fine and costs."

Please note that the above statute also provides:

"That no such imprisonment shall exceed six months for *any one offense*."

It is our opinion that the eight commitments against Evans referred to in your letter are separate and distinct violations of the ordinances of the Chicago Park District and that inasmuch as the above statute provides that no imprisonment shall exceed six months for *any one offense*, these fines against Evans should be served consecutively if not paid.

We find no Illinois decisions upon this subject nor do we find any decisions in the reviewing courts of other States, except the State of Ohio. In the case of *Anderson, Sheriff* v. *Brown,* 159 N. E. 372, 117 Ohio State, 393, the Ohio Supreme Court held that credits on unpaid fines for each day of imprisonment cannot apply concurrently on two fines in separate sentences on the same individual. In that case the defendant Brown received prison sentences aggregating 60 days, fines and costs totaling $303.25. The sentences did not provide that they should be served consecutively nor did they provide that they should be served concurrently. The sentences contained a statement that Brown should stand committed to the County Jail until such fines and costs were paid or until he should be discharged therefrom by allowing a credit of $1.50 per day on such fine and costs, or until he be otherwise legally discharged.

Brown had no money to pay any part of any of the fines or costs. He remained in jail 135 days and then demanded his release claiming that the credit of $1.50 per day allowed by law for that number of days was sufficient to extinguish his larger fine of $200.00 and $2.00 costs.

That his two sentences of 30 days each in jail had been more than served was manifest and he claimed that the balance of his fines and costs had been extinguished by further application to them of the same credit applied in answering the larger fine and costs of $202.00.

After remarking the dearth of authority on the subject in holding that the sentences did not run concurrently, the Court said:

> "We are quite unable to appreciate why any difference should be made in computing time or computing credits, where credits take the place of time. A day answers for one day and no more; and a dollar answers for one dollar and no more. The real practical affect of the allowance of credits, as provided in section 13717, General Code, is to change the fine into an imprisonment sentence in order that the violation of law may not escape punishment even though he cannot pay the fine in money; the amount of the fine divided by the per diem credit being used to determine the time of further detention. It is in no sense an account payable or a bill payable to the State. It is a liability, distinctly so, instead of an asset of the State, as the State not only does not and cannot collect anything thereon, but on the contrary is obliged to board and maintain the prisoner while he is thus making amends for his violation of law."

The defendant in error was not entitled to his liberty when he had been in jail a total of only 135 days.

In each of the fines assessed against the defendants in the examples you cite, the Court provides that, if not paid, the fines are to be worked out at the rate of two dollars per day and it is our opinion that in both these examples and in like cases, the sentences run consecutively.

BOARD OF EXAMINERS OF PLUMBERS

(No. 11524—Secretary, Plumbers Board—A. F. G.—April 28, 1952.)

In your letter of September 14, 1951 you state that the Board of Examiners of Plumbers are still operating under the ordinance of the City of Chicago, authorizing the examination of master plumbers, journeyman plumbers and the certification of plumber's apprentices. You then ask: "We would appreciate your written opinion as to the right of this Board to continue as such, or will it be necessary to change to the new set up as provided for in the enclosed pamphlet."

The pamphlet referred to contains an Act passed at the recent session of the general assembly, entitled "An Act in relation to the regulation of Plumbing and to repeal a certain Act therein named," (Filed July 26, 1951.) The Act repealed by the foregoing Act is an Act entitled "An Act in relation to the regulation of plumbing and the licensing of Master Plumbers, Journeyman Plumbers and the registration of Plumber's Apprentices, and for the protection of public health, and repeal of a certain Act therein named." (Filed June 17, 1935).

Your board was created under authority of section IX of the Act last referred to which was repealed by the Act recently passed by the General Assembly. The authority of the city council to create your board having been repealed it is our opinion your board has no longer any legal existence.

However, the new plumbing Act has this provision:

> "Sec. 8 (1) Any city, village or incorporated town having a population of 500,000 or more, may, by ordinance, containing provisions substantially the same as those in this Act provide for a board of plumbing examiners to conduct examinations for Journeyman Plumbers and Master Plumbers, and to issue, suspend and revoke plumbers' licenses within such city, village or incorporated town. The provisions of this Act except as otherwise herein provided shall not apply within any such city, village or incorporated town which enacts such an ordinance."

The power granted to the city council by the section quoted above is more limited than that granted by section IX of the repealed statute. The new action requires the ordinance to contain "provisions substantially the same as those in this Act." No such provision is found in section IX of the repealed statute. Section IX authorized the city to provide for the "registration of plumbers' apprentices." The present section 8 grants no power to the city to make such registrations. The fees provided for certificates, for licenses for plumbers by the present ordinances are greatly in excess of the fees provided for comparable certificates by the new statute.

It is our opinion your board should not attempt to exercise the power granted by the present ordinance and the city council if it wishes to avail itself of the power vested by section 8, should enact a new ordinance in conformity with the powers granted by the new statute.

FILLING JUDICIAL VACANCIES

(No. 11549—Committee on Rules—A. F. G.—June 10, 1952.)

Pursuant to a verbal request for clarification of the provisions of the statutes relating to the filling of vacancies where they occur in the office of Associate Judge of the Municipal Court of Chicago, we wish to express our views on this question, particularly as there is now a vacancy in that court.

Section 9 of the Municipal Court Act, Par. 364, Chap. 37, Ill. Rev. Stats. 1951, provides:

> "Vacancies in the office of chief justice or associate judge of the municipal court shall be filled by election at the regular municipal, judicial or other general election which shall occur next after a period of 60 days from the time such vacancies respectively occur, but where the unexpired term does not exceed one year, the vacancy shall be filled by appointment by the Governor."

Section 7-61 of the Election Code provides:

"In the event that a vacancy in the office of chief justice or associate judge of the Municipal Court of Chicago occurs less than ninety (90) days prior to the primary election preceding the election at which such vacancy is to be filled, or in the event that no primary election intervenes between the occurrence of such vacancy and the election at which such vacancy is to be filled, the municipal central committee of each political party for the city shall nominate a candidate of such party to fill the vacancy and no primary election shall be held therefor. The chairman of the municipal central committee of each political party shall, not less than forty-eight (48) days before the election at which the vacancy is to be filled, file in the office of the city clerk a call for the convention of his party for the nomination of candidates. The call shall state the time and place of such convention which shall not be less than forty (40) days nor more than forty-five (45) days before the election. All nominations so made by convention shall, at least thirty-eight (38) days before the election, be certified by the presiding officer of the convention, attested by the secretary thereof, to the city clerk. The city clerk shall, not less than thirty-five (35) days before the election, certify to the board of election commissioners the names of the persons so nominated and the offices for which they were nominated and the names so certified shall be placed upon the official ballot at the *special election* for the office for which they were nominated. * * * " (Emphasis ours).

Section 9 of the Revised Cities and Villages Act reads in part as follows:

"9-7. Special elections.) Except as otherwise provided in this Act, whenever there is a vacancy in any municipal office, the corporate authorities may order a special election for the purpose of filling the vacancy. * * *"

The resignation of Judge Charles S. Dougherty, an Associate Judge of the Municipal Court of Chicago, effective June 5, 1952 has been presented to and accepted by the city council.

By Section 9 of the Municipal Court Act quoted above this vacancy must be filled at the general election of November 4, 1952 as that is the election which occurs next after a period of 60 days after the vacancy occurred.

Nominations for candidates to fill the said vacancy by the Municipal Central Committee of each political party shall be made in the manner provided in Section 7-61 of the Election Code, which section is in part quoted above.

While the law is not clear as to whether the election to fill a vacancy in the Municipal Court is a special election, we are of the opinion that the last sentence of that part of Section 7-61 of the Election Code which we have quoted indicates the legislative intent that it is a special election.

We recommend the adoption of an ordinance calling a special election for November 4, 1952 to fill the Dougherty vacancy and transmit herewith a copy of such an ordinance.

AMENDMENT TO CITY PLANNING LAW

(No. 11651—Chicago Plan Commission—J. C. M.—February 19, 1953.)

In your letter of January 23, 1953 you advised that the Chicago Plan Commission adopted the following proposed amendment to Chapter 24, Article 53, subject to our determination that it is both feasible and legal:

"An amendment to the City Planning Section of Chapter 24 Article 53. The Act should authorize the Plan Commission to prepare and recommend to the corporate authorities an official street map giving the location of existing and proposed streets, and if it is proposed to widen existing streets or relocate them, to set forth the lines of the proposed street widths and location.

The Act should then provide that if the proposed street map is approved by the City Council, the map shall be filed with the recorder of deeds and that after such filing the map shall be notice to all persons dealing with land abutting on the streets of the proposed street lines. The Act should further provide that unless construction of any proposed streets or street widening projects on the official map has commenced within given years from the date of recordation, the map shall cease to be notice to persons dealing with the land unless the municipal authorities by appropriate resolution have re-adopted the map within the five-year period. The Act should provide that the procedure for re-adoption is the same as that for original adoption; that is, that the Plan Commission must recommend to the municipal authorities the adoption of the proposed plans.

Before the Plan Commission submits the proposed map to the municipal authorities it should be required to hold a public hearing on the map.

There should also be a clause making it clear that nothing in the Act prevents an owner from recovering compensation for the value, as existing at the time the condemnation is instituted, of the land and buildings in the mapped streets when such land is condemned by the municipal authorities."

The apparent purpose of the amendment is to put owners of private properties or prospective purchasers of such properties on notice that a public improvement, such as the opening, widening or relocation of streets according to a plan adopted by the Commission, is contemplated and will affect the properties and that the owners or prospective purchasers will be denied permits to improve said properties or alter buildings thereon within the proposed changes in street lines.

We have previously held that under Statute (Chap. 24, Art. 53 Ill. Rev. Stat. 1951) and the Municipal Code of Chicago (Section 21-43):

> "It is the intention that the functions of the plan commission shall be advisory, investigatory and recommendatory only and that its functions shall in no way 'derogate from the powers of the City Council to pass upon and appropriate for all city projects and improvements" (Vol. XXI Op. Corp. Counsel p. 42, opinion No. 10420.)

The enactment of an ordinance directing the purchase or condemnation of land is not a taking of the land within the meaning of Section 13 of Article 2 of the Constitution or in any other sense. *It confers no right in the land and does not interfere in any way with its use, control or disposition.* Its only effect is an indication of an intention to acquire the land. *(Mitls* v. *Forest Preserve District* (1931), 345 Ill. 503, 509). A threat to take property by condemnation is not a taking. *(Hempstead* v. *U. S.* (1951), 98 F. Supp. 572).

In *Eckhoff* v. *Forest Preserve District* (1941) 377 Ill. 208, an ordinance was passed for the taking of 80 acres of land. In 1931 a condemnation proceeding was instituted to acquire the land which proceeding was later abandoned. In 1938 another condemnation proceeding was filed to acquire 20 acres of that tract, which suit proceeded to a conclusion. An action was filed for damages due to delay in filing the first action after the passage of the ordinance. The Supreme Court denied liability upon the proposition that the property belonged absolutely to the owners *with full right to use or build upon it* for any purpose they might see fit, *up to the time of the filing of* the petition, nothwithstanding the ordinance. The series of corporate action, such as passing ordinances, resolutions etc., cannot be said to have the same effect upon the land as the filing of a condemnation petition.

The proposed amendment, if valid, would change the law as enunciated in the *Hills* and *Eckhoff* cases.

Section 13 of Article 2 of the Constitution of 1870 provides: "Private property shall not be taken or damaged for public use without just compensation."

The enactment of the proposed amendment and the recording of an ordinance describing the plan and the streets to be affected, would be similar to building or set-back lines under zoning ordinances and would probably have the following effect:

(1) The Building Commissioner would not approve plans or issue permits for the construction or alteration of buildings upon the private property if the preferred plans do not give consideration to the proposed public improvement as appears from the record. This circumvention is one of the desired ends of the proposed amendment. Another is that the owner would construct such a building at the risk of not receiving its value in the event the municipality later determined to proceed with the improvement.

(2) The recorded plans would probably deter any purchaser from purchasing the properties.

(3) The recorded plans would probably decrease the market value of the privately owned properties abutting on the designated streets and affected by the restrictions.

The public improvements contemplated may never be consummated. Under the proposed law, the recorded plans could be renewed every five years, without any provision for compensation in the event the proposed improvements are not consummated.

Under the authority granted by Chapter 24, section 73-1 of the statutes of the State of Illinois (1951), municipalities have the power to limit the building or setback lines on or along any street. Such restrictions on the use of private property, to be upheld, must not be so unreasonable and confiscatory as to constitute an unlawful invasion of property rights. To be valid, a zoning ordinance must have a real and substantial relation to the public health, safety, morals or general welfare. (*People ex rel. Joseph Lumber Co.* v. *City of Chicago*, 402 Ill. 321 and cases therein cited and discussed.) Under Chapter 24, section 53-3, no maps or any plots of any subdivision presented for record, shall be entitled to record or shall be valid unless the subdivision shown thereon provides for streets, alleys and public grounds in conformity with the applicable requirements of an official plan adopted by the municipality.

In *Galt* v. *County of Cook*, (1950) 405 Ill. 396, North Avenue was a state bond issue highway having a right of way of 66 feet wide. Section 17 of the Cook County Zoning ordinance ordained that no part of any building or structure shall be located within 80 feet of the established

center line of any federal-aid, state-bond-issue, state-aid and section line road, provided that special set-backs, where noted, should be observed. When the ordinance became effective in 1940, special setbacks of 130 feet were imposed on North Avenue, which increased the usual building line restrictions applicable to state-bond-issue roads by 50 feet. To sustain this additional 50 feet of set-back, the County of Cook, "relied upon the then existing and long contemplated preparations to widen North Avenue. * * * That one of the four principal purposes of a building-line restriction is in the interest of the public, (so) that and when an improvement does come along as is planned in this case, the State or County will not be obliged to pay excessively for removing improvements which are in the way of ultimate highway improvements."

The court in holding the special restrictions to be invalid said (p. 406):

> "Furthermore, the record makes it abundantly clear that the primary purpose of the special set back restriction was to hold down the cost of acquiring additional land for the widening of North Avenue and that this was to be accomplished at the expense of a few industrial land owners. In both purpose and extent the restriction involved bears no perceptible relation to the public health, safety, comfort and general welfare. It destroys, rather than conserves land values, and being designed to conserve public funds in the purchase of land, has, at the most, only a remote and incidental effect upon the reduction of traffic congestion."

The court did not, in reaching its decision, pass directly on the narrow question as to whether the recordation of any plan of future public improvements which restricts the use or contemplates a partial taking of land as provided by ordinance could be effective as to the present use of properties without doing violence to the rights of owners of the properties under the Constitution.

As stated in *Grosso* v. *Board of Adjustment,*(194) 61 *Atl.* (2) 167, 169:

> "The due process and kindred protective property clauses and the police power operates independently, each within its own sphere. The former constitute a limitation upon the latter, in that they guard against arbitrary action. The difference is between the appropriation of private property for public use and what is essentiallly the regulation of its use and enjopment by the owner. * * * The problem is to draw the line between constitutional regulation and the invasion of the natural right of private property."

In this case the Court recognized the benefit to the community of municipal planning, but as to the official map, held:

> "It was plainly not open to the defendant municipality, in the exercise of the planning power, to dedicate the locus to highway uses on the 'official map' and thereby deprive the landowner of all use thereof, without making compensation, until the municipality was prepared to lay out the street."

In the case entitled in Re *Philadelphia Parkway,* (1929) 295 Pa. 538, 145 Atl. 600, it appears that the State of Pennsylvania was committed to the doctrine that "mere plotting a street on a city plan does not constitute a taking in the constitutional sense, so as to give abutting owners the right to have damages assessed," based upon a previous ruling in *Philadelphia Parkway,* 250 Pa. 257, *Atl.* 429, and a statute that provided that, in absence of actual appropriation at an earlier date, the placing of a park or parkway on the city plan shall be considered an appropriation of land to public use at the expiration of five years from the date of confirmation of such plan, with the same effect as if the land had been appropriated for public park purposes or the parkway had been duly opened to the public by ordinance.

This act placed a maximum period of five years during which the City may remain inactive. At the expiration of that time, it must pay damages, unless in the meantime, the ordinance placing the parkway on the city plan shall have been repealed. The act postponed the right of the property owner to damages for a period of five years unless (1) the city proceeded with the improvement or (2) the city repealed the plan within the five year period. The Court in that case held that the act did not do violence to the constitution.

However, in *Miller* v. *City of Beaver Falls* (1951) 82 *Atl.* (2) 34, the Supreme Court of Pennsylvania again reviewed the questions involved and casts doubt on the soundness of the doctrine laid down in the previous cases. Since the problem presented by your letter is one of first impression in Illinois, we take the liberty of quoting somewhat at length from that opinion (p. 37-38) as follows:

> "A principle of questionable constitutionality should not be extended beyond its present application or limitation especially if such extension would violate either the letter or the spirit of the Constitution. 'The law as to what constitutes a taking has been undergoing a radical change during the last few years. Formerly it was limited to the actual physical appropriation of the property or a divesting of title, but now the rule adopted in many jurisdictions and supported by the better reasoning is that when a person is deprived of any of certain rights in and appurtenant to tangible things, he is to that extent deprived of his property, and his property may be taken, in the constitutional sense, though his title and possession remain undisturbed; "and it may be laid down as a general proposition, based upon the nature of property itself, that, *whenever the lawful rights of an individual to the possession, use or enjoyment of his land are in any degree abridged or destroyed by reason of the exercise of the power of eminent domain, his property is, pro tanto, taken, and he is entitled to compensation*" ' *Chase* v. *Whitehead,* 1 F. Supp. 321): 11 McQuillin, Municipal Corporations (3rd Ed.) § 32.26, p. 312. As the Court of Appeals of New York, in *Forster* v. *Scott,* 136 N. Y. 577, 32 N.E. 976, 18 L.R.A. 543, in a case involving a statute (very similar to Section 3701 of the Act of June 23, 1931, supra) which it held to be 'in conflict with the provisions of the constitution for the protection and security of private property' so aptly said, 136 N. Y. at page 579, 32 N. E. at page 977: 'What the legislature cannot do directly it cannot do indirectly, as the constitution guards as effectually against insidious approaches as an open and direct attack. Whenever a law deprives the owner of the beneficial use and free enjoyment of his property, or imposes restraints upon such use and enjoyment that materially affect its value, without legal process or compensation, it deprives him of his property, within the meaning of the constitution. All that is beneficial in property arises from its use and the fruits of that use, and whatever deprives a person of them deprives him of all that is desirable or valuable in the title and possession. It is not necessary, in order to render a statute obnoxious to the restraints of the constitution, that it must, in terms or in effect, authorize an actual physical taking of the property or the thing itself, so long as it affects its free use and enjoyment, or the power of disposition at the will of the owner.' "

Mr. Justice Holmes in *Pennsylvania Coal Co.,* v. *Mahon,* 260 U. S. 393, 416, 43 S. Ct. 158, 160, 67, L. Ed. 322, in commenting upon the exercise of police power by the State in relation to the constitutional protection to private property said:

> "We are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change."

In *Lansburgh 1. Market St. Ry. Co.* (1950) 220 p. (2) 423, the District Court of Appeals of California refused to follow the reasoning of the Pennsylvania Courts and held that the filing of a map showing contemplated public improvements had no legal significance as to constitute a cloud on title and it did not impede the free use of the property or deprive the owner of compensation for the construction of a building in disregard to the limitations contained in the map in the event the property was acquired by condemnation. Such is the present law in Illinois.

In our opinion the City would be faced with many suits, as it has by reason of the dismissal of special assessment and condemnation proceedings under the Local Improvement Act after they have been pending for long periods of time. As an example, the proceedings to open and construct Holden Court between Lake Street and the lower level of Wacker Drive were dismissed by the City after pending twelve years. The owners of the Pure Oil Building claimed that the building was built in contemplation of the opening of that street and they relied upon the completion of that project. In fact, they claimed that they were prevented by the City, by being denied building permits, from erecting a building upon their entire holdings because one of their lots along the west side of the present building was to be taken by the City in the proceedings for part of Holden Court. Upon dismissal of the special assessment proceedings, suit was filed against the City for $7,000,000.00 damages. We were successful in obtaining a favorable verdict from the jury and a judgment on the verdict. That case is pending in the Appellate Court on appeal. There were many other factors involved than just the ordinance, the proceedings and the dismissal that worked in favor of the City upon the trial and overcame their claims for damages.

Another example is the proceedings for the widening of North State Street between the Chicago River and Chicago Avenue in contemplation of the construction of a four-tube subway in and under State Street in 1930. Those proceedings were pending for eighteen years and were finally dismissed. On account of the pendency of the suit and the delay in determining to abandon the improvement, the City was liable in damages.

Streets dedicated to a definite width which dedication has been accepted by the municipality, would in effect be widened by the recommendation of the ordinance setting forth the contemplated widening for public purposes, but the payment of compensation for the taking of the necessary additional land would be postponed until a judgment in condemnation is had. Whether the municipality ever pays such compensation is determinative upon whether the program is adopted and condemnation proceedings are prosecuted to a conclusion. In the meantime the owner has been deprived of the full use of his land. These situations create possibilities of adverse verdicts and judgments in enormous amounts.

A property owner should be allowed to enjoy the full and free use of his property until there is an actual legal taking and the payment of compensation as provided by the Constitution. A public improvement should be a certainity and the law contemplates that such action be prosecuted with diligence. As stated in *Winkelman* v. *City of Chicago,* (1905) 213 Ill. 360:

> "When a municipal corporation institutes a proceeding to condemn land, it should prosecute the suit with diligence. Upon damages being fixed by the judgment, it is its duty to determine within a reasonable time, whether it will pay the damages and enter upon the land or abandon the proceeding, and if it takes the latter cause, its purpose should be promptly and unequivocally made a matter of record by vacation of the judgment and the dismissal of the proceeding. If it wrongfully delays the trial of the cause, and omits to make its election to take the land or abandon the proceeding within a reasonable time

after the amount of the judgment has been fixed, and then elects to discontinue, it is liable to the owner of the land for damages occasioned by such wrongful acts."

Roach v. *Village of Winnetka* (1937) 366 Ill. 578.

Having the long range proposed improvements spread on the city mays and recorded in the records of the Cook County Recorder's office may be compared to the filing of a condemnation proceeding which is allowed to pend indefinitely until the authorities, as stated in the *Winkelman* case, find it convenient to proceed or abandon.

"Public policy forbids that a municipal corporation should be permitted to practice such an imposition upon the property owner."

It was held in the *Winkelman* and *Roach* cases, that the constitutional provisions are self-executing, independent of any statute. Certainly it should follow that if, in law, a municipality is liable in damages for a wrongful delay in the prosecution of a condemnation proceeding to acquire private property for a public improvement, the filing of which evidences a present *bona fide* intention to proceed with dilligence, it would follow that the municipality would have to respond in damages for the delay in filing proceedings to acquire the land required for the public improvement as platted in the ordinance, if the proposed statute and the ordinance are to have any legal effect. However, it is our opinion that (1) if the proposed amendment to the statute is to change the law as pronounced by the Court in *Mills* v. *Forest Preserve Dist.* and *Eckhoff* v. *Forest Preserve District*, supra, to authorize the creation of a cloud on title or prevent the free use and improvement of private property for a period of five years or at any time short of a judgment for the taking and the payment of compensation thereunder, it would create a liability for damages under the Constitution but (2) if it is *to permit a mere expression of a future plan* for public improvements, it would not be effective in law or equity and it could not be used for the purpose of preventing a property owner the free use of his property. Such a proposed plan would be advisory only as is already provided by the Municipal Code of Chicago.

As stated in *Bauman* v. *Ross* (1897) 167 U. S. 548, 42 L. Ed. 270, as to the recording of the future plan of development:

"It does not restrict in any way the use of the improvement of lands by their owners before the commencement of proceedings for condemnation of lands for such highways, nor does it limit the damages to be awarded in such proceedings. The recording of the map, therefore, did not, of itself, entitle the owners of lands to any compensation or damages."

The matter of relocating streets, once dedicated, would give rise to questions of egress and ingress to and from properties abutting thereon and located in the immediate neighborhood. Destruction of the rights of egress and ingress has resulted in actions for damages dueto decrease in market value of properties brought about by the changes. Recovery, however, is dependent upon the facts in each individual case. No liability would occur until there was an actual physical relocation.

The rule in all cases, to warrant a recovery, is that it must appear that there has been some direct disturbance of a right which the owner enjoys in connection with his property and which gives it an additional value, and that by reason of the disturbance of that right he has sustained special damage with reference to his property, in excess of that sustained by the public generally. (*Eckhoff* v. *Forest Preserve Dist.* (1941) 377 Ill. 208, 212.)

The municpality is under no present obligation to proceed with diligence to consummate public improvements defined in ordinances. It is under such duty to proceed with diligence after instituting condemnation proceed-

ings which evidence a present intention to proceed to a conclusion. Any person building on the premises sought by the action does so at his peril after the filing of the petition in condemnation. Under the authority sought by the amendment you propose that the municipality have the benefits of the law applicable to condemnation proceedings without being required to proceed with diligence and without being accountable in damages for long delays in determining to proceed with the public improvements or abandoning them. The effect is to initiate a "shorter cut than the constitutional way of paying for the change."

In 1947 the state sought to change the fundamental procedure surrounding the acquisition of land for public purposes. Section 2 A was added to the statute on Eminent Domain. It authorized a "quick taking" for highway purposes by the state. In holding the Act unconstitutional, the Supreme Court in *Department of Public Works* v. *Gorbe* (1951), 409 Ill. 195, said:

> "The assertion is made that fifteen states have constitutional provisions equivalent to ours and the courts in none of these jurisdictions have construed their constitutional guaranties to prohibit the taking and use of private property before the payment of just compensation. Whatever the rule may be elsewhere, it is firmly settled in Illinois that the constitutional guaranty against the taking of private property for public use without just compensation prohibits the possession and use of private property until just compensation has been fixed and paid."

Our Supreme Court has zealously guarded the constitutional rights of its citizens as indicated in the cited cases and many others. It is our opinion that any act that would have the effect of taking or damaging private property for public use without providing for compensation as contemplated by the constitution would be invalid. We think the proposed amendment comes within that category and therefore, cannot approve it.

REFUSAL TO ADMIT INSPECTORS

(No. 11657—City Collector—E. R. H.—March 6, 1953.)

We have your letter of February 21, 1953 and the report of Claude Flynn, license investigator, wherein it appears that a home is being operated on the premises located at 7912 Indiana Avenue, Chicago, without the necessary license as required by Section 136-2 of the Municipal Code of Chicago.

You state that owner of this business has refused permission to license investigators to examine the premises for the purpose of ascertaining whether such license is required. You request advice as to what action should be taken in this situation.

Section 101-28 provides that the city collector and all license investigators shall have the right to enter at any time any place of business for which a license is required for the purpose of ascertaining whether or not the license provisions of the Code have been complied with.

Section 136-2 provides that it shall be unlawful for any person to conduct or operate any home, as defined in Section 136-1 without first obtaining a license therefor.

If you have competent evidence to establish that the owner of the home referred to in your communication is in fact operating a home as defined in Section 136-1, you may properly institute proceedings in the Municipal Court of Chicago against such owner (1) for violating of Section 101-28, for failure of such owner to permit license investigators to inspect the premises to ascertain whether the license requirements of the Code are being complied with, and (2) for violation of Section 136-2, for failure of such owner to obtain a license to conduct and operate such home as required by Section 136-2 of the Code.

REGIONAL PORT DISTRICT—LAKE CALUMET

(No. 11700—City Council—J. F. G.—June 16, 1953.)

Reference is made to your inquiry at the last meeting of your committee held on June 8, 1953 upon the above subject.

1. The City of Chicago has title to the lands constituting the bed of Lake Calumet and all artificially made or reclaimed lands in said Lake, excepting (a) the water basin and slips as approved by the State Department of Public Works and Buildings (Van Vlissingen Plan, July 22, 1921, C. J. p. 936), and (b) the lands granted to owners of riparian rights established by boundary line agreements. (Ch. 19, Par. 115, Ill. Rev. St. 1951).

2. On July 1, 1951, it became unlawful for the City to fill in or build any structure over, under, in or within 40 feet of the water of Lake Calumet without submitting plans therefor to Chicago Regional Port District and receiving a permit therefor. (Ch. 19, Par. 162, Ill. Rev. St. 1951).

3. Chicago Regional Port District has power (a) to issue permits for the construction of harbor facilities in Lake Calumet waters and within 40 feet thereof; and for the deposit of earth, rock, sand, or other materials in the water and (b) to acquire, own, construct, lease, operate and maintain such port and water terminal facilities as may be specifically authorized by act of the General Assembly. (Ch. 19, Par. 156, Ill. Rev. St. 1951).

Up to the present time there does not seem to be any Act of the General Assembly specifically authorizing the Port District to acquire, construct, operate and maintain any particular port or water terminal facilities. Until the General Assembly acts, no person or corporation, private, public or municipal (other than the City of Chicago) may construct port facilities at Lake Calumet without first securing the consent of the city council. (Ch. 24, Sec. 41-5, Ill. Rev. St.).

CHAPTER II—RIGHTS AND DUTIES OF CITY EMPLOYEES

A. CIVIL SERVICE

PROBATIONARY LUNCHROOM ATTENDANT

(No. 11110—President, Civil Service Commission—C. H. L.—January 3, 1949.)

We have before us your letter of November 10, 1948, requesting our opinion whether or not a probationary Civil Service lunchroom attendant may be dealt with:

> "upon the assumption that such lunchroom attendant is a probationary employee subject to discharge under Section 10 of the Cities Civil Service Act and Section 5 of Rule IV of the Rules of this Commission."

You say that:

> "It appears from our records that this individual was certified and appointed to the position of lunchroom attendant on March 22, 1948, and was suspended by the head of her department on October 4, 1948. Our records further indicate that, due to a summer vacation lay-off of about two months, the actual time served by such employee as a lunchroom attendant prior to November 1, 1948, was less than six months."

Rule IV, Section 5 of the Civil Service Commission's rules reads:

> "Sec. 5. PROBATION. Original appointment shall be on probation for a period of six months. In no case shall a probationer be discharged until after the appointing officer has received from the Commission a notice in writing that the Commission has approved such discharge. Time served on probation, whether continuous or not, shall be credited upon the period of probation."

The time served on probation is therefore not necessarily continuous.

From your letter it appears that the lunchroom attendant was suspended on October 4, 1948.

The question here involved is whether the two months vacation period shall be considered time served on probation.

Upon inquiry addressed to the Law Department of the Board of Education as to the provisions of the Rules of the Board of Education pertaining to this question, also as to whether or not there is an appropriation for the payment of a salary for a lunchroom attendant for said vacation period we have received a letter from Frank R. Schneberger, Assistant Attorney of the Board of Education from which we quote:

> "The Board rules are silent on the particular question you ask. They merely provide:

'All employees of the Board, with the exception of members of the teaching force and assistant attorneys, shall be appointed pursuant to the act entitled: 'An Act to Regulate the Civil Service of Cities.' (Sec. 2, Art. 4, Chap. 1)

As to your second inquiry, I point out that there is no appropriation in the Board's budget for payment of lunchroom attendants during the summer vacation period. These employees are taken off the rolls during this period. They are appropriated for on an hourly basis of $1.00 per hour for the period when the lunchrooms are in operation, to-wit, when schools are in session. For example, they do not work during, nor are they paid for, the summer vacation, the spring vacation or the Christmas holidays when schools are closed. In the 1948 budget the appropriation for this type of employee appears at page 537 of the Board proceedings of 1948 under the heading 'Department of Plant Engineering and Lunchrooms.'

I also wish to point out that in the preamble to the budget which appears at page 505 of the 1948 Board proceedings, the following provision is made:

'Sec. 3. That the appropriations herein made for salaries and wages for officers or employees shall be regarded as maximum appropriations both as to the sum appropriated and the length of time for which the incumbent of each position is to be employed. * * *

Sec. 4. That where appropriations are made for groups of officers or employees working on an annual, monthly, weekly or daily basis, the total amount appropriated for the entire group is the amount appearing at the end of the item under the heading 'Amounts Appropriated.' In the case of officers and employees so grouped, the item of appropriation has been determined on the rates of compensation computed for the year for each office or position of such group, notwithstanding that the sum of such items of appropriation are less than the arithmetical totals secured by adding together the salaries or wages for all members of the group. The difference, if any, between such arithmetical total and the item of appropriation being accounted for by the difference between the amount necessary for the employment of the maximum number of officers and employees authorized during the year 1948 and the amount available for the employment of the number of officers and employees needed from time to time during the year.' "

It would therefore appear that the lunchroom attendants work on an hourly basis of $1.00 per hour for the period only when lunchrooms are in operation, to-wit: when schools are in session; they do not work during, nor are they paid for the summer vacation.

We are therefore of the opinion that the lunchroom attendant in question cannot be credited for said vacation period as a probationer, and the suspension period subsequent to October 4, 1948, is not a part of the probationary period, wherefore said lunchroom attendant is a probationary employee subject to discharge under Section 10 of the Cities Civil Service Act and Section 5 of Rule IV of the Rules of your Commission.

MILITARY PREFERENCE CREDIT

(No. 11123—President, Civil Service Commission—C. H. L.—January 28, 1949.)

We have before us your letter of January 12, 1949, to which you attach a letter without date, received by you on January 6, 1949, from Mr. Bjorn Lundeen in which he states:

> "Wish to ask you to have my veterans preference filed, as you see I tried once before and was told I was too late as I had already been certified, but since then I have found that I am entitled to it by a civil service ruling even tho it will be filed late, now, the reason it was not filed before certification was because I was not notified, now I have checked with the post office and checked the dead letter office and they find no trace of it.
>
> "The preference would give me my rightful place on the list, and would therefore be of great value."

You also attach a letter from Bjorn Lundeen dated July 10, 1948, addressed to the Civil Service Commission to which he attaches his Honorable Discharge from the United States Navy as a seaman first class USNR, dated January 31, 1946.

We note from your letter that the eligible list for the position of painter was posted on May 19, 1948; that before giving effect to military preferences Mr. Lundeen was No. 40 and after giving effect to military preferences his name appeared as No. 106 on such list.

Section 10½ of the Cities Civil Service Act pertaining to persons honorably discharged from military service provides that:

> "* * * it shall be the duty of the examiner or commissioner certifying the list of eligibles who have taken the examinations provided for in this Act, to place the name or names of such persons at the head of the list of eligibles certified for appointment."

And Rule III of the Civil Service Commission's rules provides:

> "Sec. 4. *Military Preference.* In original entrance examinations, the names of all persons who were engaged in the naval or military service of the United States during the years specified in Section 10½ of the Civil Service Act, who have attained a standing sufficient to entitle them to be placed on the eligible register, shall be placed at the head of the list in order of their relative standing. Proof of military or naval service by virtue of which an eligible is entitled to claim preference shall be furnished by the applicant or eligible to the Commission. In the absence of such proof no preference shall be awarded."

You say that "shortly after the original posting of such list a notice was given to the eligibles whose names appeared thereon to present within five days evidence of any military service as a basis for military preferences" and that "Mr. Lundeen did not present any evidence as to prior military or naval service."

It is apparent that the Civil Service Commission acted in accordance with established routine in this matter and gave military credit to 66 veterans, whose names were moved up on the list above Mr. Lundeen's name as a result of their military preferences given.

Mr. Lundeen's first letter, above mentioned, indicates that the notice mailed to him by the Civil Service Commission never reached him and as a result thereof he failed to receive the military preference he was entitled to at the time.

You say that Mr. Lundeen was certified from the painters' eligible list on July 1, 1948, and has held such position as a civil service employee since that time.

That being the case, Mr. Lundeen is no longer on the eligible list for certification as contemplated by the provisions of Section 10½ of the Civil Service Act and Rule III, Sec. 4 of the Rules of the Commission. His final status on the list was fixed at the time of his certification and cannot now be changed.

We return herewith Mr. Lundeen's letters addressed to you, his letter to the Commission dated July 10, 1948, and his Honorable Discharge papers.

VALIDITY OF MILITARY PREFERENCE

(No. 11138—President, Civil Service Commission—L. L. K.—April 19, 1949.)

This will acknowledge receipt of your letter of April 1, 1949, in which you refer to the opinion of the Supreme Court of Illinois rendered March 24, 1949, in the case of *People ex rel. Duffy* v. *Hurley*, No. 30789 and request our opinion "as to whether under existing law this Commission may recognize or allow any military credit to any one in respect of any such promotional list heretofore or hereafter posted by it, and, if so, how and under what circumstances."

The *Duffy* decision clearly holds unconstitutional the provisions contained in the 1947 amendments to section 10½ of the Cities Civil Service Act, (Ill. Rev. Stat. 1947, ch. 24½, par. 49), relating to military preference on promotional eligible lists on the ground that the statute provides no method of applying military credit. While the *Duffy* case raised the question of the validity of these amendments, the opinion of the court in striking down military preference on promotional lists is broad enough in its terms to affect the military credit provisions relating to promotional examinations which appeared in the original section 10½ of the Cities Civil Service Act. This conclusion is inevitable because the original section 10½ is almost identical with the language in the amendments and the reasons set forth in the opinion for holding the amendments unconstitutional are equally applicable to the original section 10½. We must therefore conclude that the effect of the decision is to require you to refuse to recognize or allow any military credit to any one in respect to promotional positions in the classified civil service.

In your letter you ask the further question, in the event that we hold that military credit may not be allowed in respect of promotional lists,

> "1. Should this Commission revise all of its existing promotional eligible lists so as not to reflect the allowance of military credit to anyone whose name appears thereon."

It is our opinion that the answer to this question is yes.

You also ask, in the event that we advise that such a revision must be made, "what action should this Commission take,

(a) as to an eligible on such a list who would have been entitled to be certified therefrom for appointment to a promotional position in the City's classified service but for the allowance of military credit to another or others;

(b) as to an employee holding such a promotional position who would not have been previously certified and appointed thereto but for the allowance to him of military credit in respect of such a list."

The answer to this question is not entirely free from difficulty. On the one hand is the case of *People ex rel. Laist* v. *Lower*, 251 Ill. 527 (1911) in which the Supreme Court of Illinois held than an appointment is complete when the last act required of the appointing power has been performed and the authority to make the appointment has then been exhausted, and said (p. 529):

> "In such a case the appointing power cannot revoke the appointment, and the one appointed can only be removed by lawful authority."

In this case after the Civil Service Commission had certified the relator Laist to the position of city architect, appointment was refused because he did not possess a license from the state of Illinois as an architect. Thereupon the Civil Service Commission revoked the certification. The court points out that the Commission has no power to appoint to any office or position, but the power to appoint is in the head of the department or office in which a position classified under the Civil Service Act is to be filled. The court said (p. 529):

> "There was no intended revocation of an appointment since none had been made, but when it was learned that a certificate had been improvidently made and the relator was lacking in a necessary qualification for appointment, it was within the power of the Civil Service Commission to correct its mistake by withdrawing the certificate."

In *People ex rel. McCabe* v. *Gregory*, 328 Ill. App. 513 (1946), McCabe was certified and appointed ward superintendent. A question was thereafter raised as to the propriety of his having received military credit for service in World War II after he had taken the original entrance examination for that position. The court held that he had properly been given military credit and that his appointment was therefore vaild. The court distinguished the case from *People ex rel. Laist* v. *Lower*, by pointing out (pp. 525) that there was no fraud, deception or mistake in the certification and appointment of relator and that under these circumstances the Commission was without power to cancel McCabe's certification. It will be noted however that in the *McCabe* case the court held that he was properly given military credit and that his certification and appointment were valid.

On the other hand, it has been held that:

> "The rule is universal that an unconstitutional law confers no right, imposes no duty, and affords no protection. It is in legal contemplation as though no such law had ever been passed."

People v. Schraeberg, 347 Ill. 392, 394 (1932);

Highway Commissioners v. *City of Bloomington*, 253 Ill. 164, 176 (1912);

Norton v. *Shelby County*, 118 U. S. 425, 442 (1885).

There is also the case of *Corbett* v. *City of Chicago*, 391 Ill. 96 (1945) wherein the plaintiffs had in a prior suit obtained the writ of mandamus to compel their certification and appointment to the position of telephone operators in the civil service. The city had taken an appeal which resulted in the judgment of the trial court having been affirmed and the plaintiffs were thereafter appointed. They then brought suit for salaries due from the date of the writ of mandamus to the date of appointment. The city contended that because of the fact that civil service positions were involved, if the decree of the trial court in the mandamus proceeding had been followed and the plaintiffs appointed after the issuance of the writ of mandamus, an appeal would be of no value because, by the time the appeal had been perfected, the plaintiffs would have become permanent employees under the civil service and, regardless of the outcome of the appeal, could not be removed. The court said (p. 100):

> "With this we cannot agree because if we assume that on appeal the decision favored the city, the result of such a holding would be a determination that the plaintiffs were never entitled to civil service status."

We are therefore confronted on the one hand by the *Laist* and *McCabe* cases which hold that after certification and appointment an employee can only be removed by lawful authority, which means the filing of charges and a hearing; on the other hand by the authorities referred to which hold that all acts performed under an unconstitutional statute are void and of no effect and must be considered as conferring no right, imposing no duty, and affording no protection, and the *Corbett* case which holds that civil service status cannot be obtained as a result of an illegal appointment. It is our opinion that you are bound by the latter authorities and must proceed on the theory that those persons who have been promoted as the result of the unlawful award of military credit have no rights in the positions to which they have been promoted, can claim no protection in those positions, and have acquired no status therein. We believe that both the Civil Service Commission and the Commissioner of Police must take such steps as are necessary to remove from these promotional positions such person as have been unlawfully appointed and appoint thereto the persons who would be rightfully entitled to them without military credit.

Your question number 3 is as follows:

3. If any employee holding a promotional position must be separated therefrom because he had heretofore been allowed military credit to which he is not entitled under existing law:

   (a) What action should the Commission take as to such separation;

   (b) Should the employee so separated from the promotional position be returned to the eligible list therefor or to the reinstatement list therefor;

   (c) Should the employee so separated be restored to the position in the next lower rank or grade last previously held by him;

      (i) if such a position exists and there is a vacancy therein;

      (ii) if such a position exists but has been filled by another person certified from the eligible list therefor, and in such event what action must be taken affecting the status of such latter person;

(d) If the name of the employee so separated appears on an eligible list for a higher position for which he could qualify only by virtue of holding his present position, should his name be removed from the list for the higher position;

(e) If such an employee has taken or has applied to take a pending examination for a higher position for which he could qualify only by virtue of holding his present position, should his name be kept off the eligible list resulting from such examination.

It is our opinion, in answer to (a) that the Commission should notify the heads of departments affected that persons who have been promoted from existing promotional lists with military credit have been illegally certified and appointed in view of the *Duffy* decision and should be removed. Our answer to (b) is that an employee so separated from the promotional position is to be returned to the eligible list at the point where his grade in the examination exclusive of any military credit would place him.

Our answer to (c) is that the employee so separated should be restored to the position in the next lower rank or grade last previously held by him. In answer to (c) (i), it is our opinion that if the position exists and there is a vacancy therein no question arises; that if as stated in (c) (ii) the position exists but has been filled, the person now filling the position must be removed to make way for the person returning from the promotional position and the one presently occupying the position returned to the place, position or list where he was prior to the appointment.

As to (d) the situation is so novel because of the circumstances involved here that we are unable at this time to render an opinion based upon any applicable authority. We appreciate that persons promoted with military credit prior to the *Duffy* decision have taken promotional examinations and have passed and are presently on promotional registers but that they cannot qualify for the promotional positions unless they occupy the next lower rank or grade at the time their names are called. In view of your statement to us that many who would, as a result of this decision, be demoted but would also be repromoted because the lapse of time has created vacancies and their names will again be reached for certification, we suggest for your consideration as a matter of policy that it might be better to permit these names to remain on the eligible list and consider each situation as it arises.

As to your question (e), this situation is completely within your control and if the steps taken pursuant to this opinion result in the removal of the applicant desiring to take an examination, or where the results have not been posted, his disqualification to take the examination is apparent and his name should not appear on the eligible list.

Suit has been filed in the Superior Court of Cook County seeking a writ of prohibition against the Commission to prevent your demoting employees certified with military credit. This suit comes up before Judge Graber on Thursday, April 21. We have also been informed that an original petition for mandamus will be filed in the Supreme Court to compel you to demote persons unlawfully promoted with military credit. We welcome the filing of such a suit and intend, if it is filed in time for the May Term, to ask the Court for a prompt decision which will clarify the uncertainty which we have herein discussed relating to the applicable law.

REINSTATEMENT

(No. 11144—Police Commissioner—C. H. L.—May 11, 1949.)

Answering your request of March 30, 1949, re Patrolman Gibbons demand to be restored to his position on active duty.

It appears from the demand that Patrolman Gibbons was injured while on duty on or about April 5, 1938, and was hospitalized for a period of eight months.

After leaving the hospital he attempted to perform light work but after a few months he was physically incapacitated and applied for disability pension which he was awarded until 1943 due to exhaustion thereof under under the Police Pension Statute.

Starting with April 1, 1940, Gibbons signed various leaves of absence, the last one of which expired April 1, 1949, when he refused to execute any further leave of absence and notified your department that he is ready and willing to resume his work in the position from which he took leave.

In our opinion No. 9467 to the then Commissioner of Police, dated March 30, 1937, we wrote:

> "When a civil service employee returns from a leave of absence and within the proper time notifies his department head that he is ready and willing to assume work in the position from which he took leave, it is the duty of his department head to assign him to work if there is a vacancy in the position, or if the position is being held by a temporary appointee who is not in the classified service. If there is no vacancy in the position, or the position has been filled by a civil service employee from the classified register or the reinstatement list, the returned employee is entitled to have his name put on the reinstatement list for the position from which he took leave in the order of his seniority by the Civil Service Commission upon a report of the facts by the department head.
>
> Despite the fact that a person who has returned from a leave of absence may be physically and mentally unfit and unsafe to serve as a policeman, he is nevertheless entitled to reinstatement to his position as policeman or to have his name certified for listing on the reinstatement list. He cannot lose his civil service status or his right to his position because of illness or disability until there is a finding to that effect by the Civil Service Commission after a hearing on charges at which he has an opportunity to be heard."

We concur in what we then said and recommend that you reinstate Patrolman Gibbons to active duty.

Should he be unable to perform his duties as a patrolman, it will be your duty to file charges against him before the Civil Service Commission.

INJURED IN LINE OF DUTY

(No. 11147—President, Civil Service Commission—May 23, 1949.)

This will acknowledge receipt of your letter of May 1, 1950 in which you ask for advice as to the course which the Commission should pursue

in the situation in connection with the civil service examination for the position of sergeant (police) branch IV, class S, grade 4, announced in call #157, dated April 26, 1948, wherein a patrolman having permanent civil service status who took and passed the examination, has been unable to pass the physical examination solely as the result of an injury heretofore received by him as a result of the performance of an act of duty while he was working as a civil service patrolman.

The second paragraph of Section 10 of Rule III provides as follows:

> "When an officer or employe has been injured in the performance of his duties, such injury shall not disqualify him for promotion or advancement to a higher rank or grade, providing the head of the department in which said injuries were received shall certify to the nature of same, that they were received in line of duty and that such promotion or advancement would not be prejudicial to the best interests of the service."

Section 6 of the Cities Civil Service Act (Ill. Rev. Stats. 1949, Chap. 24½, Par. 44) vests in the Commission complete control of all examinations including physical examinations of applicants for positions in civil service and Section 9 thereof (Par. 47) provides that the method of examination and the rules governing the same shall be the same for promotions as for original appointments. The above quoted rule is, in our opinion, a valid exercise of the power conferred by the statutes referred to. Supporting this view was the action of the legislature which, in 1947, amended Section 6 specifically to provide for the waiving of a physical examination on behalf of an applicant who sustained an injury as the result of the performance of an act of duty while working as a temporary employe in the position for which he was being examined, to which we had occasion to refer in our opinion rendered to you July 30, 1947. It is our view that this amendment, extending to a temporary employe, not in civil service, the right to have the physical examination waived for original application, constitutes a recognition of the right provided by the statute and rule referred to, to have the physical examination waived in case of a promotion of one already in civil service.

BLANKETING LABORERS INTO CIVIL SERVICE

(No. 11154—President, Civil Service Commission—C. H. L.—June 23, 1949.)

We have before us your communication of June 20, 1949, in which you state that you are unofficially advised that House Bill 633 to amend Section 10 of the above Act has been recently passed by the Illinois General Assembly and approved by the Governor so as to become law and to be operative on July 1, 1949, and that the resulting amendment relates to the placing upon eligible registers without examination of

> "laborers in the employ of the City on July 1, 1949, who, as of such date, have been employed under temporary authority for three years or more or during parts of three or more calendar years,"

to be

> "certified before other laborers are given positions, preference being given to those laborers under temporary authority who have had the longest term of service in such positions."

You request our advice as to eight questions arising under this amendment, which we shall endeavor to answer as follows:

Question 1: Does the amendment apply to and only to all positions in Branch V, Class U, Non-competitive Service, as defined in Rule I of the Civil Service Rules of this Commission?

Answer: It does.

Question 2: In determining, for the purposes of the amendment, the dates and length of employment of any laborer so employed on July 1, 1949, under temporary authority in a particular position, with reference to his certification for appointment thereto, should account to be taken only of the dates and periods of his employment in that position, or should account also be taken of the dates and periods of his employment under temporary authority as a laborer in another position or positions in the same department or by the City of Chicago, or by the following of its municipal agencies: the Business Department of the Board of Education, the House of Correction, the Municipal Tuberculosis Sanitarium and the Chicago Public Library?

Answer: In our opinion the amendment contemplates all "laborers in the employ of the City," as stated in the amendment, who are paid from city funds, whether or not they have changed their positions from one city department to another.

Question 3: Would a laborer so employed on July 1, 1949, under temporary authority as a laborer in one position to which the amendment applies to entitled thereunder to be placed upon the eligible register for another position for laborers to which the amendment applies in which he was formerly employed under temporary authority for the requisite period or periods?

Answer: Yes.

Question 4: Would an individual who is so employed on July 1, 1949, under temporary authority in the City's competitive classified service be entitled to be placed upon the eligible register for a position as a laborer to which the amendment applies in which he was formerly employed under temporary authority for the requisite period or periods?

Answer: Yes.

Question 5: Does not the amendment apply to each laborer within its terms who is so employed under temporary authority on July 1, 1949, irrespective of whether his name does or does not appear upon any present or future eligible list for such position?

Answer: It does.

Question 6: Are not laborers, who under the amendment are entitled to be placed upon eligible registers without examination, required to be so placed and to be certified for appointment therefrom without reference to military service or any credit on account thereof and also without any physical or medical examination or test?

Answer: They are entitled to be so placed, and certified for appointment.

Question 7: Is is not correct to assume that in computing, for the purposes of the amendment, any period of service in a position, employment in that position need not have been continuous?

Answer: The service need not have been continuous.

Question 8: Is it not correct to assume that, for the purposes of the amendment, any employment of a laborer under temporary authority upon any day in a calendar year constitutes employment for a part of such calendar year?

Answer: In our opinion the assumption is correct.

MALE AND FEMALE NAMES ON REGISTERS

(No. 11161—President, Civil Service Commission—C. H. L.—July 25, 1949.)

We have before us your communication of May 2, 1949, in which you give us these facts:

1. An original eligible list for the position of Junior Clerk was posted on October 29, 1948, at which time eligibles' whole names appeared thereon included both males and females.
2. As of now there are no longer any male eligibles on this list but there are still many female eligibles on the list.
3. You are currently receiving requests for temporary appointments of male junior clerks.

You now ask our opinion as to whether or not under these circumstances males not on such eligible list may be lawfully given temporary appointments to the position of Junior Clerk and as to whether or not this Commission may properly approve such temporary appointments.

In the recent case of *Peo. ex. rel. Cashin* v. *Geary*, 330 Ill. App. 172, the court said:

> "To hold that the appointing officer has the right to make temporary appointments when there is none of the sex he designates on an eligible list, would throw open the door to abuse and circumvention of the Civil Service Act, the fundamental purpose of which is to improve the public service."

The above case thus holds that the department head may not make temporary appointments under the circumstances herein under discussion, ergo the Commission may not properly approve any such temporary appointments contemplated or made.

REINSTATEMENT OF POLICEWOMEN

(No. 11164—Civil Service Commission—S. R. D.—August 2, 1949.)

We acknowledge receipt of your letter of August 2, 1949, in which you state that there are now only six vacancies in the position of policewoman, Branch IV, Class S, Grade 3, and our advice is re-

quested as to how the reinstatement of the seven policewomen, plaintiffs in the above matter, to the said position in such service is to be effected under the circumstances.

On December 1, 1947, the Trial Court entered an order directing the issuance of a writ of mandamus ordering the reinstatement of the plaintiffs from and after February 26, 1947. Their rights to reinstatement are effective as of that date. If there are not enough vacancies existing at this time to reinstate the seven policewomen without removal of a policewoman, or policewomen, certified and appointed subsequent to February 26, 1947, then such policewoman, or policewomen, last certified and appointed should be removed from her or their position and placed on the reinstatement list.

NEW MILITARY CREDIT ACT

(No. 11167—Civil Service Commission—S. R. D.—August 15, 1949.)

We acknowledge receipt of your letter of August 4, 1949, in which you set forth certain provisions of the above Act and request our opinion as to whether you should revise all of the existing promotional eligible registers in conformity with the provisions of said Act; and also whether military credits are allowable in respect of any eligible list or certification or appointment therefrom to anyone whose name would not otherwise, and in the absence of such credit, appear on such eligible list.

Senate Bill No. 357 In House became a law when the Governor of Illinois signed the same on August 1, 1949. It generally would be your duty to comply with the provisions of said Act and revise all existing promotional eligible registers by applying the military credit as provided for in said Act. However, on August 5, 1949, we advised you that on that date Judge Frank M. Padden, one of the judges of the Superior Court of Cook County, entered the following order in the case of *Alfred Casey, et al., plaintiffs,* v. *Stephen E. Hurley, et al., defendants,* Superior Court case No. 49 S 11468:

> "IT IS ORDERED, that STEPHEN E. HURLEY, ALBERT H. WILLIAMS and CHARLES A. LAHEY, constituting the Civil Service Commission of the City of Chicago, and as such Civil Service Commission of said City, are hereby temporarily restrained from enforcing against Plaintiffs, ALFRED CASEY, RICHARD J. SHEEHY, WALDEMAR PETZ, LEROY CARRIER, ERNEST P. SCHAEFER, GEORGE MURPHY, EDWARD DENNIS, EDWARD E. EGAN, STANLEY W. SAMAS, EUGENE STEINWAY, JOHN J. PAYTON, DONALD T. COAKLEY, from enforcing the provisions of Senate Bill 357 in House (66th General Assembly) until further order of this court."

In said letter we advised you that as long as said order remains in full force and effect, you should take no further steps in carrying out the provisions of Senate Bill No. 357 In House as far as it applies to the persons listed in said order. Furthermore, you will recall that there is now pending in the Supreme Court of Illinois an original petition for writ of mandamus filed on behalf of the Commission and other public officials, said cause being entitled *The People of the State of Illinois ex rel. Stephen E. Hurley, et al.* v. *Joseph A. Graber, et al.,* Supreme Court No. 31147 which involves the question of the right to denote a Civil Service employee who was illegally certified and appointed under the

provisions of the 1947 amendments to Section 10½ of the Civil Service Act, said amendments being held unconstitutional in the case of *People ex rel. Duffy* v. *Hurley, et al.*, 402 Ill. 562. There is a possibility that Senate Bill No. 357 In House will become an issue in the Supreme Court case and if so the court might determine its constitutionality.

Due to these circumstances it might be advisable to refrain from revising or making certifications from any of the existing promotional eligible registers in accordance with the provisions of the Act until after we have secured an opinion from the Supreme Court of Illinois in the *Graber* case, or until the issues in the *Casey* case have been determined, except such certifications of individuals who would be entitled to certification without regard to the application of the provisions of the Act.

You also request our opinion as to whether, under the Act, military credits are allowable, in respect of an eligible list or certification of appointment therefrom to anyone whose name would not otherwise, and in the absence of such credit, appear on such eligible list.

Section 3 of Rule III of the Rules of the Civil Service Commission provides, in part, as follows:

> "Eligible registers shall be compiled from the averages computed according to the preceding section, and the name of no person shall be entered on an eligible register resulting from an examination whose general average shall be less than 70% of complete proficiency in the subjects of examination taken as a whole."

Under this provision any applicant who, on the examination, received a general average of less than 70% would be barred from having his name placed on the eligible register.

Senate Bill No. 357 In House provides, as to original examinations, as follows:

> "The Civil Service Commission on certifying from any existing register of eligibles resulting from the holding of an examination for original entrance or any register of eligibles that may be hereafter created of persons who have taken and successfully passed the examinations provided for in this Act for original entrance commencing prior to September 1, 1949, shall place the name or names of such persons at the head of any existing eligible register or list of eligibles that may hereafter be created under the provisions of this Act, to be certified for appointment. The Civil Service Commission shall give preference for original appointment to persons as hereinabove designated whose names appear on any register of eligibles resulting from an examination for original entrance held under the provisions of this Act and commenced on or after September 1, 1949, by adding to the final grade average which they received or will receive as the result of any examination held for original entrance, five points. The numerical result thus attained shall be applied by the Civil Service Commission in determining the position of such persons on any eligible list which has been created as the result of any examination for original entrance commenced on or after September 1, 1949, for purposes of preference in certification and appointment from such eligible list."

and as to promotional examinations as follows:

> "* * * and whose names appear on existing promotional eligible registers or any promotional eligible register that may hereafter be created, as provided for by this Act, shall be preferred for promotional appointment to civil offices, positions and places of employment in the classified civil service of any city, town, or village coming under the provisions of this act.

The Civil Service Commission shall give preference for promotional appointment to persons as hereinabove designated whose names appear on existing promotional eligible registers or promotional eligible registers that may hereafter be created by adding to the final grade average which they received or will receive as the result of any promotional examination commencing prior to September 1, 1949, six-tenths of one point for each 6 months or fraction thereof of military or naval service not exceeding 30 months, and by adding to the final grade average which they will receive as the result of any promotional examination held commencing on or after September 1, 1949, seven-tenths of one point for each 6 months or fraction thereof military or naval service not exceeding 30 months."

It is apparent that the provisions of Senate Bill No. 357 In House are not applicable to the examinations but only to eligible lists. Inasmuch as, under section 3 of Rule III of the Rules of the Civil Service Commission an applicant, who receives less than 70% on his examination is barred from having his name placed on an eligible register, it is our opinion that under the Act military credits are not allowable, in respect of any eligible list or certification or appointment therefrom to anyone whose name would not otherwise, and in the absence of such credit, appear on such eligible list.

PROOF OF MILITARY SERVICE

(No. 11178—Civil Service Commission—S. R. D.—September 26, 1949.)

We acknowledge receipt of your letter of August 17, 1949, requesting an opinion whether under Senate Bill 357, approved by the Governor on July 29, 1949, an applicant for a position in the classified civil service, whose name appears on either an original entrance or promotional register, must submit proof of military or naval service as a basis for receiving the military credit provided for in the Act before any certification or appointment is made from the eligible register, and whether military credit can be given after such certification and appointment if evidence of military credit had not been submitted prior thereto.

The Act provides, among other things, as follows:

"No person entitled to preference or credit for military or naval service hereunder shall be required to furnish evidence or record of honorable discharge from the armed forces before an examination held under the provisions of this Act but such preference shall be given after the posting or publication of the eligible list or register and before any certification or appointments are made from the eligible register."

It is apparent that the provision stating that no evidence of military service shall be required before examination does not deny power to the Commission to require evidence of military service after the posting of the eligible list and before any certification or appointments are made therefrom. It necessarily follows from the general powers of the Commission to prescribe rules and regulations to carry out its statutory purposes that it has the power to require proof of military service prior to any certification or appointment. An applicant, entitled to military credit, who refuses, fails or neglects to submit such evidence after reasonable notice and prior to any certification or appointment, would be barred from claiming or receiving military credit after a certification or appointment had been made from the eligible register.

Therefore, we are of the opinion that a person on an eligible list can be required to present evidence of military service within a reasonable time after the posting or publication of the eligible list or register and before any certification or appointments are made therefrom, without regard to the position which he occupies on said eligible list or register. We are also of the opinion that if such person, upon receipt of notice, refuses, fails or neglects to submit such evidence prior to the first certification or appointment, he cannot thereafter receive military credit because of the express provision of the statute that military preference "shall be given . . . before any certification or appointments are made * * *." However, we believe that the Commission may, by its rules, extend the time for the presentation of evidence of military service in cases of hardship, temporary incapacity or inability to present said evidence within the time specified, upon submission of proof thereof, provided no certification or appointment has been made from the eligible register.

We are further of the opinion that the Act is not retroactive and that it applies to uncancelled lists of persons eligible to promotion after July 29, 1949. (*O'Brien* v. *Frazier*, 228 Ill. App. 118; *People ex rel. Brady* v. *Gregory*, 331 Ill. App. 259; *People ex rel. Duffy* v. *Hurley*, 402 Ill. 562).

Applying the foregoing conclusions to the other provisions of the Act, we conclude as follows:

1. In regard to existing original examination registers evidence of military service submitted by a person on the register should not be accepted for military credit after the first certification or appointment therefrom, made after the lapse of a reasonable time from the effective date of the 1949 Act.

2. In regard to an eligible list or register, resulting from an original examination commenced on or after September 1, 1949, evidence of military service should not be accepted for the purpose of granting military credit after the first certification or appointment has been made therefrom, provided reasonable notice has been given to all persons on said eligible list prior to such certification or appointment.

3. In regard to existing promotional registers evidence of military service submitted by a person on the register should not be accepted for military credit after the first certification or appointment therefrom, made after the lapse of a reasonable time from the effective date of the 1949 Act.

4. In regard to a promotional register resulting from a promotional examination commenced on or after September 1, 1949, evidence of military service should not be accepted for the purpose of granting military credit after reasonable notice and after a certification and appointment has been made therefrom.

It should be noted that neither the Act nor the Rules of the Commission provide for the amount of time which should elapse between the posting of the eligible list and the making of the first certification therefrom, for the applicant or eligible to present evidence of naval or military service in order to secure the military preference provided for in the Act. Under such circumstances we are of the opinion that Section 4 of Rule III and Section 5 of Rule V, of the Civil Service Rules, should be amended to make provision for a lapse of a reasonable time after the date of the notice suggested in this letter in which to present proof of naval or military service. In the absence of any court decision of what might be a reasonable time we suggest that the Rules provide for approximately thirty days from the date of the notice and

before the first certification from the eligible list, during which time the eligible or applicant shall be required to present proof of naval or military service

This opinion is subject to our letter of August 15, 1949, in which we stated that it might be advisable to refrain from revising or making certifications from any of the existing promotional eligible registers in accordance with the provisions of the 1949 Act until after an opinion has been secured from the Supreme Court of Illinois in the case of *The People of the State of Illinois ex rel. Stephen E. Hurley et al.* v. *Joseph A. Graber et al.*, Supreme Court No. 31147, or until the issues in the case of *Alfred Casey et al.* v. *Stephen E. Hurley et al.*, Superior Court, Case No. 49-S-11468 have been determined, except such certifications of individuals who would be entitled to certification without regard to the application of the provisions of the Act.

SUSPENSION PERIOD

(No. 11183—Superintendent, House of Correction—C. H. L.—October 5, 1949.)

We are in receipt of your letter of September 29, 1949 re one of your employees and from it we gather the following pertinent facts.

1. He was suspended on June 23, 1949 pending filing of charges before the Civil Service Commission.
2. He signed a salary waiver for the entire suspension time up to the present date.
3. A hearing has been held and the Civil Service Commission has the case under advisement.
4. He has seven days left on his vacation time. Section 12 of the Civil Service Act provides:

> "* * * Nothing in this act shall limit the power of an officer to suspend a subordinate for a reasonable period, not exceeding thirty days * * *"

It is our opinion that nothing could extend the suspension period beyond the thirty day period mentioned, not even pending trial on charges before the Commission.

He was therefore entitled to reinstatement in his position on July 23, 1949. Having waived the salary for an indefinite period, however, he is not entitled to the salary he would have received had he been reinstated.

He is, however, now entitled to immediate reinstatement and to his vacation time as provided by ordinance.

CANCELLING DISCHARGE

(No. 11184—President, Civil Service Commission—C. H. L.—October 6, 1949.)

We acknowledge receipt of your letter dated October 1, 1949 in regard to the discharge of a probationer employed as a punch and machine operator by the Board of Health.

You ask our advice as to whether or not your Commission has the power, if it so determines, to grant a request for cancellation of her discharge on the basis of a letter sent you by the President of the Board of Health on September 27, 1949.

We note that she was appointed on April 1, 1949, suspended on September 10, 1949 and that you granted authority for her discharge on September 12, 1949; also that Dr. Bundesen in his letter of September 27, 1949 states:

> "Attached is a copy of a letter from the employee explaining her situation. Due to her many years of temporary service, we do not wish to create a hardship on her, and, therefore, if consistent with your policy, we would like your permission to withdraw the authority for the probation discharge of the employee so that her name may be returned to the eligible list."

In *Blake* v. *Lindblom*, 225 Ill. 555 the court held that the probationary period is to enable the department head to determine the competency, character and discretion of the probationer.

Judging from the language of Dr. Bundesen's letter it seems that he is satisfied that the competency, character and discretion of the employee is satisfactory, wherefore we are of the opinion that you are required to give due consideration to his request that you withdraw the authority for her probation discharge so that her name may be returned to the eligible list.

We return herewith Dr. Bundesen's letter of September 27, 1949 and the employee's letter to Dr. Bundesen (photostat copy) dated September 8, 1949.

RETURN FROM LEAVE OF ABSENCE

(No. 11185—City Sealer—C. H. L.—October 7, 1949.)

We have before us your letter of July 21, 1949 in which you ask if it is mandatory that you re-employ Mr. Mudra, who is a civil service electric meter investigator, who was granted a leave of absence in 1945.

You say that the position of electric meter investigator is listed in the 1949 budget and appropriated for.

Section 5 of the annual appropriation ordinance for the year 1949 provides:

> "* * * In case of any vacancy in any office or position herein appropriated for, the head of the department in which any such vacancy occurs shall not be required to fill such office or position if in his judgment and discretion there is no necessity therefor."

If in your judgment you have enough civil service electric meter investigators employed it is, therefore, not mandatory that you re-employ Mr. Mudra.

PROMOTIONAL AND ORIGINAL ENTRANCE EXAMINATION

(No. 11191—President, Civil Service Commission—C. H. L.—October 19, 1949.)

We acknowledge receipt of Secretary Osborne's letter of October 13, 1949 attaching a notice and demand served upon the members of the Civil Service Commission by Attorney Michael F. Ryan, representing five temporary plumbing inspectors in the Department of Buildings of the City of Chicago in which demand is made upon you that you cancel the call for the promotional and original examination for Plumbing Inspector as contained in your Call No. 173 of September 12, 1949 and issue a new call for the filling of vacancies in the position of Plumbing Inspector (Branch III, Class O, Grade 3).

We note that in your minutes of September 12, 1949 you changed the classification of the position of plumber from Branch II, Class K, Grade 2 to Branch III, Class O, Grade 2 which you were empowered to do under the provisions of section 3 of the Civil Service Act and Rule I of your Commission's rules.

Under section 9 of the Civil Service Act the Commission is given authority to hold a promotional examination to fill vacancies and the courts have held that the holding of a promotional and original entrance examination at the same time does not violate Rule V, section 2 of the Commission's rules.

We therefore suggest that you take no action on the aforesaid demand.

WAIVER OF CERTIFICATION

(No. 11203—President, Civil Commission—C. H. L.—November 3, 1949.)

We have your communication dated October 13, 1949, re waivers of certification by eligibles on eligible registers and reinstatement lists.

In your letter you say:

> "As you know, our rules permit eligibles whose names appear on civil service eligible registers or reinstatement lists to waive certification for appointment from such lists, subject to the requisite approvals, for a period of not more than one year.
>
> Under existing practice an eligible who has filed such a waiver of certification with the Commission is dropped from the eligible register or reinstatement list in question if the waiver continues and is not withdrawn within one year."

Rule IV, section 4 of the Commission's rules provides as follows:

> "Sec. 4. WAIVER. A person certified or tendered reinstatement must report to the head of the department or appointing officer within five days from the date of certification and in case of failure to report, his name shall be removed from the eligible register. The Commission may permit an eligible to waive certifica-

tion or reinstatement within five days. If waiver is approved, the name of such eligible shall not be certified until the waiver has been withdrawn. Waivers whether continuous or otherwise, shall not be permitted for a period longer than one year, provided, however, that where an eligible enters the military or naval service of the United States or is holding an existing position in the classified service and for that reason waives certification, such waiver may stand during the life of such register, unless sooner withdrawn.

If an eligible list is exhausted or expires, or is cancelled during the term of any eligible called for military service under the Selective Service Act, the name of any such eligible shall not be stricken from said eligible list, and will be certified in the order of his original standing on the list to any available vacancy after expiration of said term of said military service. Such eligibles' names may remain for a period of one year only after their honorable discharge and each eligible must, therefore, make application promptly upon discharge. Eligibles will be certified to those positions to which they were certified during the life of the original list and where the failure of any eligible to accept such position was due to his military, naval or marine service, the said eligible, on proof of said fact may be accordingly certified to the position to which he was certified during the life of said register."

Your letter raises the question as to whether the Civil Service Commission, by virtue of the provisions of said Rule IV, section 4, has the right to strike the name of an eligible:

a.) from a reinstatement list as an eligible candidate for reinstatement to a civil service position;

b.) from an eligible list an an eligible for certification;

c.) from a special military eligible list an an eligible for certification.

and thereby separate him from all rights acquired by virtue of his examination, successfully passed, his certification and appointment as the case may be.

1. We shall first discuss the status of an eligible on a *reinstatement list* upon which only the names of those already in the civil service appear; names of civil service employees who have been laid off or whose positions have been abolished. Incidentally there is no limitation of time as to the life of such list, Opinion Corporation Counsel, No. 6978, Vol. XVIII, p. 217.

In our opinion No. 6810 to Hon. Carlos Ames, dated December 9, 1930 we said in regard to a civil service employe, who had been appointed and laid off and whose name was on a reinstatement list:

"The statement is made that 'waiver must be withdrawn within one year. This waiver was never withdrawn.' A civil service employe has the right to waive a particular certification at any time. This operates only to permit the certification of the person whose name appears next on the eligible list, and to permit certification to the next vacancy of the one who has already waived. And when the person next on the eligible list is certified and appointed the waiver thereupon cancels itself. It thereby becomes *functus officio*, by having served its sole legal purpose, namely: to have the one entitled to present certification and appointment waive or surrender his right thereof, so that the person next on such list may lawfully be certified. That such waiver, like an expired or cancelled eligible list, is *functus officio;* that is of no further force and effect is sustained by the opinion of the Corporation Counsel (Ettelson) directed to Hon. William Hale Thompson, June 1, 1928."

"Furthermore, the provision of section 4 of Rule IV of the Commission, if construed to mean such a waiver when not withdrawn within one year operates to discharge one from the classified civil service is null and void as in direct conflict with section 12 of the Civil Service Act, which provides that:

> 'No officer or employe in the classified service of any city who shall have been appointed under said rules and after said examination, shall be removed or discharged except for cause, upon written charges and after an opportunity to be heard in his own defense.' "

"The only provision for 'removals' from the service is that just quoted from section 12. Therefore, any such rule as that connected with waiver is wholly unauthorized and null and void, when its purpose or effect is to deprive one of his civil service rights.

As said by the Supreme Court in the case of *Peo. ex rel. Jacobs* v. *Coffiin,* 282 Ill. 599 * * *:

> 'The civil service law is necessarily a part of the contract of employment of every civil service employee, and such an employee can only be discharged in the manner provided by section 12 of said act.' "

We concur in the aforesaid opinion.

2. We shall now discuss the status of eligibles on an *eligible list* containing the names of persons who have not been certified or appointed, which list can be cancelled after two years, and this list involves two classes of persons, viz: non-veterans and veterans.

a.) A non-veteran whose name is on an eligible list has no civil service or military status. Section 12 of the Civil Service Act has therefore no application to him.

The first paragraph of section 4 of Rule IV provides:

> "* * * Waivers, whether continuous or otherwise, shall not be permitted for a period longer than one year * * *"

As to such an eligible the court said in *People ex rel. Cibic* v. *Geary,* 318 Ill. App. 231 (abst. op.), decided in March 1943:

> "but any one of the 11 who waived may within a year from the time of his certification withdraw his waiver and thus become eligible. Withdrawal may be made by any one of them any day prior to the expiration of one year from the date on which he **waived."**

A waiver for one year is not to be considered in the nature of a resignation to take effect at the end of the year; it is a voluntary relinquishment of a person's right to be certified for the period of a year.

It is therefore our opinion that if this eligible does not withdraw his waiver one year from the date on which he waived said waiver becomes *functus officio,* that is of no further force and effect, as stated in our opinion No. 6810 hereinabove, and it becomes the duty of the Civil Service Commission to reinstate his name in its proper place on the eligible register.

b.) The second paragraph of Rule IV, section 4 quoted above pertains to the status of eligibles called for military service in case an eligible list upon which their names appear "is exhausted or expires, or is cancelled" during his military service, and provides that:

"* * * Such eligibles' names may remain for a period of one year only after their honorable discharge and each eligible must, therefore, make application promptly upon discharge * * *."

In construing this section the Appellate Court in the case of *Peo. ex rel. Caslin* v. *Geary*, 330 Ill. App. 172 said:

"Section 4 of Rule 4 of the rules of the Commission provide that veterans are to be put on a special military eligible list and are to be certified to any available vacancy after the expiration of their service even though in the meantime the eligible list is exhausted or cancelled."

There is here no question of a waiver. This paragraph of Rule IV, section 4 gives a veteran the right to have his name remain on the eligible list even after the names of non-veterans have been stricken but:

"for a period of one year only after their honorable discharge."

It is our opinion that in his case it is the duty of the Civil Service Commission to strike his name from the eligible register at the end of the year.

We note from the copy of a letter sent you by attorney Michael F. Ryan on October 7, 1949, in regard to Robert Lee Murphy that:

a.) Mr. Murphy's name appeared as No. 1504 on an eligible list for patrolman posted on September 12, 1947, and that he was entitled to military preference by virtue of the fact that he was honorably discharged from the United States Army in October 1943.

b.) Mention is made of the fact that Mr. Murphy was in the Merchant Marine service after November 1943. This entitles him to no military credit as we are of the opinion that service in the Merchant Marine is not considered as being in the "Military Service of the United States" as contemplated by the provisions of Rule IV, section 4 of the rules of the Civil Service Commission. (Opinion Corporation Counsel No. 10748, Vol. XXII, p. 146.)

c.) Mr. Ryan's letter indicates that Mr. Murphy became ill and went to a hospital and later to a friend's home for recuperation until August of 1949; that his mother had secured a waiver for him for a period of one year expiring in August 1949; that in August 1949, Mr. Murphy visited the offices of the Civil Service Commission for the purpose of informing himself as to the status of the patrolmen's eligible list and was informed that "he" had waived certification April 28, 1949, and that his waiver had been in force over a year and his name was off the eligible list for patrolmen.

We are of the opinion that in Mr. Murphy's case his waiver became *functus officio* on April 28, 1949, as discussed in paragraph 2a.) hereinabove and that on that date his name should have been restored to the patrolmen's eligible list.

We return herewith the copy of Mr. Ryan's letter dated October 7, 1949.

SUFFICIENCY OF CHARGES

(No. 11214—President, Board of Health—E. R. D.—December 1, 1949.)

On or about November 1, 1949 your Mr. Hawthorne left the attached memorandum and copy of letter subscribed to by L. G. Donovan with me, requesting verbally that charges be brought against one of your employees.

From a close perusal of the attached documents it is my opinion that items 2 to 11 inclusive, of the document entitled "Charges re conduct of the employee are not conclusive enough to warrant a successful prosecution of charges against him. In respect to Item 1 of the document above mentioned, it is pointed out that action against him should have been instituted immediately if his offense was considered on June 1, 1949 to be as culpable as it is now regarded. It is to be inferred that no punishment, such as loss of time, was given him because of this charge.

The copy of the letter attached, subscribed to by L. G. Donovan, was dated August 23, 1949 and is in the nature of a general complaint against the employee, which evidently was not acted upon by its recipient Dr. Hess.

While you are not barred from bringing any of the charges mentioned in the documents attached, against the employee, they would be ineffectual in discharging him from the service because of their generality. Charges must be specific enough to acquaint the respondent with the nature of the charges against him, particularly as to dates of occurrence, nature of the offense, and the personnel involved.

I understand that the employee has been continuously absent from duty since September 1, 1949 without permission. Such an absence would constitute a charge against him exclusive of the time he was suspended from duty.

LIBRARIAN'S EXAMINATION

(No. 11242—President, Civil Service Commission—C. H. L.—A. F. G.—January 26, 1950.)

In your letter of August 11, 1949, you call attention to an amendment to section 8 of the Cities Civil Service Act adopted at the last session of the General Assembly. You state you have been requested to hold an original entrance examination for the position of Librarian of the Chicago Public Library and request our opinion as to the validity of the said amendment and as to whether your Commission may properly conduct an original entrance examination for such position of Librarian in conformity therewith.

Section 9 of the Civil Service Act provides that the commission shall by its rules, provide for promotions in the classified service, on the basis of ascertained merit and seniority in service and examination and shall provide, in all cases where it is practicable, that vacancies shall be filled by promotion. All examinations for promotion shall be competitive among such members of the next lower rank as desire to submit themselves to such examination. The section was amended in House Bill 1011, by adding the following proviso:

"Provided, however, that in cities of over 500,000 inhabitants when a vacancy occurs in the position of Librarian as classified by the Civil Service Commission of such city, such position must be filled by original entrance examination only. *No applicant shall be eligible to take such original examination unless he has resided in the State of Illinois continuously for at least two years immediately preceding the date of such examination.* In calling such an original examination for the position of Librarian, the Civil Service Commission shall waive all local residence requirements of any type or description."

This legislation was requested by the Directors of the Chicago Public Library. The bill was prepared by them after consultation with this office. We suggested an amendment to section 11 of the Civil Service Act including in the list of positions exempt from the classified service the position of Libarian in cities of over 500,000 inhabitants. The Library Board opposed this suggestion as they were of the opinion the position should be filled on the basis of ascertained merit, but because of the importance of the librarians' duties they felt it should not be filled by a promotional examination in which only the two or three members in the next lower rank would be eligible to take the examination, and recommend in their bill that vacancies in this position be filled by original entrance examination, thus greatly widening the field of eligibles.

The Senate by amendment inserted the sentence emphasized above which narrowed the field of eligibles somewhat but still left a much broader field than that afforded by a promotional examination.

All legislative power is vested in the General Assembly, subject to constitutional restriction, *Village of Kincade* v. *Vecchi,* 332 Ill. 586. While legislative power of state being conferred by Constitution upon General Assembly, every subject not withdrawn from its authority may be acted upon by it. *Board of Education of City of Chicago* v. *Upham,* 357 Ill. 263.

In your letter questioning the validity of this legislation you do not indicate what section or sections of the Constitution has withdrawn from the General Assembly the power to enact this legislation.

Because this amendment applies only to cities of over 500,000 inhabitants, and provides a different method of selecting librarians in cities of this size, than is providing for filling the same position in all other cities, we assume you deem it to be in violation of Section 22, Article IV, of the state constitution. This section prohibits the General Assembly from passing local or special laws in certain enumerated cases.

Classification of cities by population, which bears a reasonable relation to the purpose of the act of the legislature in question, has been held repeatedly not to be violative of Section 22 of Article IV of the Constitution of Illinois which prohibits the passage of local or special laws incorporating cities, towns or villages, or changing or amending their charters (*Cummings* v. *City of Chicago,* 144 Ill. 563; *Douglas* v. *The People, ex rel.,* 225 Ill. 536; *Northwestern University* v. *Wilmette,* 230 Ill. 80; *The People, ex rel.* v. *Grover,* 258 Ill. 124). The fact that Chicago is the only City in the State which, at this time has a population of more than 500,000 inhabitants does not render the act local or special legislation within the meaning of said section 22. This act does not purport to effect the City of Chicago alone but, by its terms, it may affect any city in the state of Illinois which may hereafter attain a population of more than 500,000 inhabitants. A law may be general and yet be operative in only one place (*Matthews* v. *City of Chicago,* 342 Ill. 120).

In the last case cited three acts of the legislature authorized the creation of a "working cash fund" in certain cities, counties and school districts. The bills were attacked on the grounds that they were unconstitutional because they were local and special laws in violation of said section 22. The Acts in question applied to cities having a population of 150,000

or more, to counties having a population of 500,000 or more and to school districts having a population exceeding 100,000, and Chicago is the only city, Cook the only county and the City of Chicago the only school district included within those terms. In overruling the contention that these acts violated said section 22 the court said at page 128:

> "The prohibition contained in section 22 of article 4 of the constitution against the passage of local or special laws in certain enumerated cases does not mean that every law shall affect alike every place and every person in the State but it does mean that it shall operate alike in all places and on all persons in the same condition. When referring to legislation the term 'local' means laws relating to a portion, only, of the territory of the State, and the term 'special' laws which impose a particular burden or confer a special right, privilege or immunity upon a portion of the people of the state. (*People* v. *Wilcox*, 237 Ill. 421; *People* v. *Day*, 277 id. 543; *People* v. *Diekmann*, 285 *id.* 97.) Whether laws are general, local or special does not depend upon the number of those within the scope of their operation. They are general not because they operate in every place or upon every person in the State, but because every place or person brought within the relations or circumstances provided for is affected by the law. (*People* v. *Diekmann*, supra.) A new law general in its nature and uniform in its operation upon all persons coming within its scope is a general law. The legislature may impose limitations upon the action of individuals or classes of individuals but it may do so only by general laws, and if it imposes restrictions on some and not upon others the difference must be based upon a substantial difference of conditions having a reasonable relation to the object of the legislation which differentiates the one class from the other. (*People* v. *Kewanee Light Co.*, 262 Ill. 255.) All reasaonable doubts are to be resolved in favor of upholding the validity of the statute. (*People* v. *Gordon*, 274 Ill. 462.) An act is not local merely because it operates in but one place. We have repeatedly held that a law may be general and yet operative in a single place where the condition necessary to its operation exists. (*People* v. *Keelber*, 253 Ill. 552; *West Chicago Park Comrs.* v. *McMullen*, 134 *id.* 170; *Martens v. Brady*, 264 *id.* 178.) Whether the condition exists in one place or many, if the classification is reasonable and just it does not violate the constitution and it applies to all places now within its terms and to all that may hereafter come within its terms."

Section 22 of Article IV of the Constitution prohibits the General Assembly from passing local or special laws in certain enumerated cases. The regulation of the civil service of cities is not enumerated in the cases prohibited.

House Bill 1011 amends "An Act to regulate the civil service of cities". Our Supreme Court has repeatedly held that when the General Assembly concludes that a special law is necessary on a subject not expressly enumerated in this section and with reference to which the constitution does not elsewhere forbid special laws, its determination is final and not subject to review by the courts. *Herschbach* v. *Kaskaskia Island Sanitary and Levee District*, 265 Ill. 388; *Commissioners of Lincoln Park* v. *Fahrney*, 250 Ill. 256; *People* v. *Bowman*, 247 Ill. 276; *Owners of Lands* v. *People*, 113 Ill. 296).

In comparison with the ten largest public libraries in the United States, The Chicago Public Library, to which this legislation only applies, ranks first, in the number of books circulated; first, in the number of employees; second, in the number of volumes; second, in total expenditures, and in 1950 as a result of a substantial increase in tax income will rank first in this particular in libraries of the nation; and, third, in the number of branches maintained. No other city in the State of Illinois maintains a public library even approaching in size and importance the Public Library

of the City of Chicago, nor are librarians in those smaller communities required to possess the technical knowledge or the executive capacity of the librarian of the Chicago Public Library.

The Librarian of the Chicago Public Library is the chief executive officer who is solely responsible to the Board of Directors for the management and operation of the Library. Since the position of Librarian is of such vital importance involving the supervision of approximately 1,000 persons and directing the expenditure of millions of dollars, the Legislature has acted with sound reason and logic in providing a different method of filling vacancies in this position.

The position of the Librarian is a distinctive one in that it is responsible for initiating and advising the Board on all Library policies. The position of Librarian requires an executive of high administrative skill and profound professional knowledge which is not found in the ordinary ranks of personnel so that the Legislature acted with commendable judgment in providing a method of filling vacancies in the position of Librarian by greatly enlarging the field of eligible and allowing the Civil Service Commission greater latitude in filling them.

The adoption of this act has made available as possible candidates for this position, the librarians of such recognized institutions as the Newberry Library, the John Crerar Library, the libraries of the University of Illinois, and the University of Chicago and the libraries of the other great universities of the State of Illinois. The persons eligible to examination under the act prior to amendment, are still eligible under the amended act, but probably will meet wider competition, which was the purpose of the act.

All laws are presumptively valid. Any doubt as to the validity of an act must yield to the legal presumption in favor of its validity. (*Soble* v. *Gill*, 358 Ill. 261.) In order to declare an act in violation of the Constitution the conflict must be plain and obvious. (*The People* v. *Exton*, 298 Ill. 119, 122.) Here, there is no constitutional limitation imposed on the legislature with reference to subject matter of this act, and it may provide any type of examination, either original or promotional or provide no examination in certain cases, as it deems best for the public interest, subject only to constitutional limitations.

We are, therefore, of the opinion the amendment to section 9 of the Civil Service Act is valid and the examination to fill the vacancy of Librarian of the Chicago Public Library should be an original examination, in conformity with the said amended act.

PROBATIONARY PERIOD FOR BLANKETED EMPLOYEES

(No. 11264—President, Civil Service Commission—A. F. G.—March 9, 1950.)

This will acknowledge receipt of your letter of March 6, 1950 in which you refer to a recent amendment to Section 10 of the Cities Civil Service Act, which amendment authorizes the placing upon eligible registers and certifying without examination, laborers under temporary authority at the time and for the minimum period or periods specified, such laborers to be certified before other laborers are given positions.

You ask our opinion "as to whether in the case of an employee of the City who has under this provision been placed upon such an eligible register without examination and is subsequently certified for appoint-

ment therefrom and appointed to a permanent position as a laborer his appointment is on probation for the period of six months fixed by our rules in ordinary cases of an original entrance appointment."

Said section 10 was amended by the insertion of new language, the substance of which is set out in the first paragraph of this letter. The balance of the section remains unchanged. The following language was part of section 10 prior to amendment and still is contained in that section:

> "The appointing officer shall notify said commission of each position to be filled, separately, and shall fill such place by the appointment of the person certified to him by said commission therefor, which appointment shall be on probation for a period to be fixed by said rules. * * * At or before the expiration of the period of probation, the head of the department or office in which a candidate is employed may, by and with the consent of said commission, discharge him upon assigning in writing his reason therefor to said commission. If he is not then discharged, his appointment shall be deemed complete."

There is nothing in the amended section which indicates any intention on the part of the legislature to exempt from the foregoing probation provisions the new class of eligibles created by the amendment. If it had been the legislative intent to exempt this new class from probation it would have been a simple matter to make that intention manifest, not having done so, we must assume that there was no intention to do so.

We see no good reason in principle why a person placed on an eligible list without examination, and certified for appointment, solely by reason of temporary employment, should be exempt from the salutary probation provision to which all others appointed from eligible lists are required to submit.

HOISTING ENGINEERS REINSTATEMENT BY COURT ORDER

(No. 11290—President, Civil Service Commission—C. H. L.—April 18, 1950.)

We acknowledge receipt of your communication dated March 22, 1950, attaching a letter from Attorney James N. Grace, dated March 10, 1950; a demand signed by George Rogers, Ed Sullivan and Attorney James N. Grace, dated March 10, 1950 and your reply to Attorney Grace, dated March 22, 1950.

You request our opinion as to the course the Commission should pursue with reference to the demand in which George Rogers and Ed Sullivan demand that:

> "you reinstate and appoint each of us to the positions of Hoisting Engineers now filled by temporary appointees in the Bureau of Sewers under the title of 'Operator of Air Compressor' "

In the case of *Peo. ex rel. Fleming* v. *Geary*, 322 Ill. App. 338, p. 348 the court held:

> "We are impelled to hold that plaintiffs' complaint established a clear legal right to the issuance of a writ of mandamus, that they were entitled to appointment from the reinstatement list in the order of their seniority to the positions designated under the 1940 and

1941 appropriation ordinances as 'Chauffeurs (when acting as Hoisting Engineers on Air Compressors)' and that certifications from the civil service chauffeurs' eligible list to fill said positions and the employment of the persons so certified by the commissioner of public works were in violation of the provisions of the Civil Service Act and the rules of the Civil Service Commission."

The abstract of decision in the case of *Peo. ex rel. David King, et al.* v. *Walter L. Gregory, et al.*, 335 Ill. App. 570 reads:

"Where civil service commission's rule provided that no person should be eligible for promotion from a position in any rank or grade to fill a vacancy in next higher rank unless position in which he was employed at time of examination was in same branch and class of service as position to be filled. Commission could not, by classifying position of operator of combination truck and air compressor units in water pipe extension division of department of public works of City of Chicago in same branch, class and grade in which hoisting engineers were classified, render eligible for the position motor truck drivers and chauffeurs, who were classified in a different and lower class and grade."

On December 17, 1948, after the decision in the said King case was handed down, we wrote to Hon. Oscar E. Hewitt, Commissioner of Public Works:

"It is therefore your duty to comply with the order of the court requiring the appointment of hoisting engineers to the position of 'operator of combination truck and air compressor.' "

The question of a hoisting engineer's right to operate air compressors has been litigated in favor of the hoisting engineers and in our opinion George Rogers and Ed Sullivan are entitled to certification and appointment from the hoisting engineers' reinstatement list in the order of their seniority to replace any temporary appointees operating air compressors in the Bureau of Sewers.

RETURN FROM LEAVE OF ABSENCE

(No. 11293—President, Civil Service Commission—C. H. L.—April 19, 1950.)

We acknowledge receipt of your communication dated March 21, 1950 with attached letter addressed to you by Hon. Paul Gerhardt, City Architect, dated March 13, 1950, re the above subject.

You request our opinion as to Mrs. Doyle's rights with respect to returning to the position from which she has been on leave of absence since September 16, 1948 and which leave expires on September 15, 1950.

From the two communications above mentioned and the notations in ink thereon we are informed that Mrs. Doyle was certified as a telephone operator on October 2, 1947, appointed as a telephone operator in the City Architect's office on October 2, 1947, granted a leave of absence for twelve months, expiring September 15, 1949, granted a leave of absence for twelve months, expiring on September 15, 1950.

We note that the position Mrs. Doyle formerly occupied as a telephone operator is now filled by a permanent civil service appointee and that during a portion of the period of Mrs. Doyle's leave of absence as

extended she was on disability and that she ceased to receive disability benefits on January 10, 1949.

There is no mention made in the correspondence at hand of any demand made by Mrs. Doyle to be returned to active service after the discontinuance of payment to her of ordinary disability benefits on January 10, 1949, but we note that on February 28, 1950, more than a year after her disability benefits ended (January 10, 1949,) Mrs. Doyle wrote:

> "Having returned from California in much improved health and wishing to resume my former duties as Civil Service Telephone Operator in City Hall. Will you kindly advise as to the procedure to follow, after my disability leave of absence has been terminated."

In our opinion Mrs. Doyle is now on extended leave of absence until September 15, 1950. Should she desire to terminate this leave of absence she should before September 15, 1950 notify her department head that she is ready and willing to assume work in the position from which she took leave, viz: telephone operator.

It will then become the duty of the department head to assign her to work if there is a vacancy in the position, or if the position is being held by a temporary appointee who is not in the classified service.

If there is no vacancy and the position has been filled by a civil service employee from the classified register or the reinstatement list, as you say the facts are in this case, Mrs. Doyle is then entitled to have her name put on the reinstatement list for telephone operator in the order of her seniority by the Civil Service Commission upon a report of the facts by the department head. (Civil Service Commission's Rule VIII, Sec. 3; Rule IX, Sec. 3; Opinion Corporation Counsel No. 9467 and No. 11134.)

We return herewith Mr. Gerhardt's letter to you dated March 13, 1950.

CANCELLATION OF RESIGNATION

(No. 11292—President, Civil Service Commission—C. H. L.—April 19, 1950.)

We are in receipt of your communication dated March 30, 1950, in regard to the above subject to which you attach a certified copy of an order of the County Court of Cook County dated June 27, 1949, committing Willie Hines to the Chicago State Hospital as a mentally ill person; a certified copy of Letters of Conservatorship, dated December 27, 1949, appointing Janie Hines conservatrix of the estate of said Willie Hines and a letter from Janie Hines to Hon. L. M. Johnson, Commissioner of Streets and Electricity, dated March 24, 1950.

You ask our advice as to whether you are empowered to cancel the resignation of Mr. Willie Hines, dated October 7, 1949, from his position as Laborer in the Bureau of Streets because of his mental condition and that he be given a leave of absence as to that date.

At the time Mr. Hines signed the resignation on October 7, 1949, he had been declared incompetent by the County Court. His resignation is therefore void and should be cancelled by the Commissioner of Streets and Electricity and your Commission.

His wife Janie, who was thereafter appointed his conservatrix by the County Court, now requests that he be placed on leave of absence as of October 7, 1949, "so that, upon his recovery and restoration he may return to work."

We have held that a resignation of an employee who is mentally ill can be made by his conservator (Opinion Corporation Counsel No. 9288).

We are of the opinion that the conservatrix in this case has authority to make this request for a leave of absence in lieu of the void resignation as there is a possibility that her husband's disability may be removed, in which case his rights to his position should be preserved. We therefore suggest that her request be granted by the Commissioner of Streets and Electricity and your Commission.

We return herewith the certified copies of court documents and Janie Hines' letter to Commissioner Johnson.

TRANSFER TO LOWER GRADE

(No. 11359—Secretary, Civil Service Commission—C. H. L.—January 26, 1951.)

We have before us your letter dated January 18, 1951, to which you attach a letter from Roy Nelson, Engineer-Custodian, Grade 5, dated January 13, 1951, addressed to Mr. Thomas J. Brett, Acting Chief Engineer, Board of Education and a letter from Mr. Edward E. Keener, Assistant Superintendent in charge of Personnel, Board of Education, addressed to Mr. Stephen E. Hurley, President Civil Service Commission, dated January 16, 1951.

We are informed by the Civil Service Commission by notations on Mr. Keener's letter, that Mr. Nelson was appointed Engineer-Custodian (Grade 2) on November 2, 1925; that he was promoted to Engineer-Custodian (Grade 3) on March 16, 1927; that he was promoted to Engineer-Custodian (Grade 4) on December 22, 1929, and to Engineer-Custodian (Grade 5) on May 22, 1933; that on December 11, 1950 he took a leave of absence for one month.

We quote from Mr. Keener's letter:

> "Mr. Roy Nelson, Engineer Custodian Grade 5 assigned to the LeMoyne elementary school, has proven to be unable to meet the standards set by the Board of Education for Grade 5 Engineer Custodians.
>
> The Board of Education, therefore, requests the Civil Service Commission to grant authority to reinstate Mr. Nelson as an Engineer Custodian Grade 3 so that he may be assigned to a smaller building where his fitness to continue as an Engineer Custodian can be more readily determined.
>
> Mr. Nelson has consented to return to a smaller building where he feels he can perform more efficiently."

We note from Mr. Nelson's letter that he desires a

"transfer into a grade three or four building"

A transfer from one civil service position to another can only be made by an express provision of the Civil Service law or by a rule of the Commission in conformity with said law. The question here presented is therefore whether a transfer such as here requested may legally be made in the situation as it now exists.

It would appear that the purpose of the proposed transfer of Mr. Nelson from Grade 5 to Grade 3 is to "more readily determine his fitness to continue as an Engineer-Custodian" as stated by Mr. Keener, and the specific written consent to this transfer by Mr. Nelson indicates that the transfer is agreeable to him.

We are, however, required to apply the general civil service law to the solution of the question here submitted, irrespective of the fact that we have here the specific written consent of Mr. Nelson.

In *People ex rel Jacobs* v. *Coffin*, 282 Ill. 599, 610, the Supreme Court held that:

> "The Civil Service Law is necessarily a part of the contract of the employment of every Civil Service employee."

The rights of all civil service employees, as well as the duties of all administrative officers are therefore governed by the civil service law.

It is true that in *People* v. *Errant*, 229 Ill. 56, 61 the court said:

> "So long as the administrative agents are making an honest effort to carry out the provisions of the law in its true spirit, they should be left free to exercise a reasonable discretion in all matters, depending on information of details and local conditions."

We have therefore held that:

> "Departmental work should be assigned as nearly as may be in accordance with the spirit and purpose of the Civil Service Commission's classification, and the work properly assignable to a particular class of employees should not arbitrarily or except in case of emergency be otherwise assigned, but we assume there is no particular class specifically designated in the Commission's classification to perform the duties mentioned. (Op. Corp. Counsel, Vol. 13, p. 138.)

In the case under consideration we have certain definite facts which must be taken into account. The positions here involved, Engineer-Custodian, Grade 5 and Engineer-Custodian, Grade 3 were created by ordinance, and the duties pertaining to them are specifically or by necessary implication indicated in the Commission's files; and the fact that the Civil Service Commission has deemed it necessary to hold examinations for Grade 5 and Grade 3 is evidence that there is a clear distinction between the two sets of duties of these grades.

Should the proposed transfer be made it would allow the head of the department to take away from Mr. Nelson, holding the Grade 5 position, all of the duties properly belonging to him and assign him to the different duties of the lower Grade 3. We are of the opinion that this would nullify the purpose and spirit of the Civil Service Act.

The "reinstatement" of Mr. Nelson as an Engineer-Custodian, Grade 3, would in our opinion be a demotion from Grade 5 to Grade 3.

In *Hurley* v. *Graber*, 400 Ill. 331, 343, the Supreme Court held that:

> "There is no provision in the Cities Civil Service Act granting the Civil Service Commission power to reconsider an appointment or to demote for cause after the appointment is completed upon certification by the Commission, it has no power to demote employees under Civil Service who have been promoted on certification by it, no fraud, deception or mistake in certification being claimed."

Furthermore, we are not advised as to whether or not there now exists an eligible register for the position of Engineer-Custodian, Grade 3. If such list exists we are of the opinion that the rights of the persons now on said list would be detrimentally affected by the placing of Mr. Nelson's name at the top of said list and they would have cause to complain.

In *Peo. ex rel. Caslin* v. *Geary*, 330 Ill. App. 172, 178, 179 the court said:

> "Section 8 provides for the preparation of eligible registers of persons who pass the examination, and specifies that such persons shall rank upon the register in the order of their relative excellence as determined by the examination. Section 10 deals with the manner of making appointments to the classified service. It provides that the head of the department or office in which a position classified under the Act is to be filled, shall notify the commission of that fact, and the commission shall certify to the appointing officer the name and address of the candidate standing highest upon the register for the class or grade to which said position belongs."

We note from Mr. Keener's letter that Mr. Nelson:

> "has proven to be unable to meet the standards set by the Board of Education for Grade 5, Engineer-Custodians."

We are not informed what the standards are as set by the Board of Education for Grade 5 Engineer-Custodians, nor when these standards were promulgated. If they were in force at the time Mr. Nelson took the promotional examination for Engineer-Custodian, Grade 5, and he is unable to meet them now, then action can be taken against him under Section 12 of the Civil Service Act which reads:

> "Excepting as hereinafter provided in this section, no officer or employe in the classified civil service of any city who shall have been appointed under said rules and after said examination, shall be removed or discharged except for cause, upon written charges and after an opportunity to be heard in his own defense."

We return herewith the two letters referred to in the first paragraph hereof.

RESIGNATION WHILE INCOMPETENT

(No. 11360—Fire Commissioner—C. H. L.—January 29, 1951.)

We have before us your communication dated June 21st, 1950, re the above in which you say:

> "On April 25th, 1950, John R. Smith, a fireman, failed to report to the Department Drill School, his assignment, and has been absent from duty since that time without permission.
>
> On May 3rd, 1950, Chief James Furlong, Drillmaster, received a communication from Smith, posted at St. Louis, Mo., reading in part as follows:
>
> > 'I always told you when I went on a bender I would never be at the Drill School, so you can tell the Commissioner and the Chief Fire Marshal you done all you (could) for me and you did, and I state I was stiff or even had a drink while was with you.
> >
> > I think you are one of the nicest guys I ever met. I am sending my badge and shield to you so turn them in for me.'
>
> We are informed that John R. Smith is now confined in the Hospital for the Insane at Kankakee, Illinois, having been sent there as a result of court action."

You say that you desire to file charges before the Civil Service Commission in respect to Smith's absence from duty on April 25th, 1950.

Service upon an accused, who has been adjusted insane and is confined to a Hospital for the Insane would not, in our opinion, be considered legal service owing to the fact that he would not be capable to appear in his own defense under Section 12 of the Civil Service Act.

You also ask whether or not the letter from Smith, received by your department on May 3rd, 1950, and quoted hereinabove, could be construed to be a resignation from service.

In view of the facts, as we see them, that Mr. Smith was confined to the Hospital for the Insane at Kankakee, Illinois, shortly after said letter was written by him, there rises the question as to whether or not he was in his right mind when he wrote it. We are of the opinion that if this were held to be a resignation it might well be voided or annulled by the courts.

It is suggested that under the circumstances Mr. Smith's absence from his duties in the Fire Department should be treated as if he had voluntarily requested a leave of absence. It is, of course, possible that his disability may be removed, and that he will, by appropriate request on his part, be restored to active fire duty, or that he may voluntarily resign.

A complete history of this case should be forwarded to the Civil Service Commission for its files.

ABANDONMENT OF POSITIONS

(No. 11378—President, Civil Service Commission—C. H. L.—April 18, 1951.)

We have before us your letter of March 26, 1951, attaching a letter sent you under date of March 21, 1951 by Joseph C. Murphy, Director of Civil Service Personnel of the Board of Education, in which you request our opinion as to any action you may properly take in regard to individuals who left their civil service positions with the Board of Education some years ago, and who did not resign or request leaves of absence.

We note from Mr. Murphy's letter that:

> "There are several such positions involved. The Records Division of the Civil Service Commission has asked for reports indicating termination of service. The Board of Education has attempted to communicate with these individuals by personal visitations to the addresses shown on the records, by telephone calls to the numbers listed, and by registered mail. In each case, these communications failed because the person no longer resided at the address shown on the Board of Education records."

Mr. Murphy then cites three specific instances, in order that:

> "you may issue us a directive covering all of these people so that we may close our records."

The three instances cited are civil service lunchroom attendants who have passed the probationary period having been certified in the years 1941 and 1942.

Two of them left their positions within a year of certification and never returned.

The other one, who was certified on December 2, 1942, worked continuously until June 27, 1943. She did not appear for duty at the opening of schools in September 1943. She returned to work October 21, 1943, but stayed only a few days. Then Mr. Murphy advises:

> "We contacted her again, and leaves of absence were granted to cover the time from 1943 until she was reinstated on April 30, 1945. She worked during the months of May and June and left at the close of schools, June 25, 1945. She has not been heard from since."

Mr. Murphy concludes by writing:

> "Inasmuch as the probationary period has been completed, it is not possible to request the Civil Service Commission to order the discharges of these persons. The Board of Education cannot proceed to hear charges of abandonment of duties as they cannot be reached for service."

There is no presumption of jurisdiction in favor of a body exercising a limited or statutory jurisdiction such as the Civil Service Commission. Under the Civil Service Act the Commission has no power to act arbitrarily and remove an officer without cause and without notice of the charge and an opportunity to be heard, and proceedings must be in strict accordance with the provisions of the act. *Funkhouser* v. *Coffin*, 301 Ill. 257.

The power to discharge a civil service employee is found only in Section 12 of the Cities Civil Service Act. *Gilbert* v. *Hurley*, 336 Ill. App. 205; *People* v. *Coffin*, 282 Ill. 599.

Section 12 provides:

> "* * * no officer or employe in the classified service of any city who shall have been appointed under said rules and after said examination, shall be removed or discharged except for cause, upon written charges and after an opportunity to be heard in his own defense. * * *"

The Civil Service Commission has no power to discharge an employee. This is the prerogative of the Head of a department. *People ex rel. Bergquist* v. *Gregory*, 337 Ill. App. 661.

Section 4 of the Cities Civil Service Act authorizes the Civil Service Commission to make rules to carry out the purposes of the act and for examinations, appointments and removals in accordance with the provisions of the statute. *People ex rel. Caslin* v. *Geary*, 330 Ill. App. 172.

A valid rule of the Civil Service Commission is as binding as if made directly by the legislature. *City of Chicago* v. *Bullis*, 124 Ill. 7, 17 (affirmed in 221 Ill. 379).

Rule III, Sec. 5 of the Civil Service Commission provides:

> "Sec. 5. *CHANGE OF ADDRESS.* It is incumbent upon applicants and persons whose names are placed on an eligible register to notify the Commission of any change of address while they are applicants or their names remain on such register, or while they are employed in the classified service, or awaiting reinstatement."

The statute is silent as to what constitutes cause for removal. Manifestly the right to determine that question is left with the Civil Service Commission. *Kammann* v. *City of Chicago*, 222 Ill. 62.

In *Heaney* v. *City of Chicago*, 117 Ill. App. 405, 412 the court quotes from *People ex rel.* v. *The Mayor, etc.*, 19 Hun. 441:

> " 'For cause' means that a reason must exist which is personal to the individual sought to be removed, which the law and a sound public opinion will recognize as a good cause for his no longer occupying the place."

A violation of Rule III, Sec. 5 quoted above would in our opinion be sufficient cause for removal in the cases here in question, but notice to the accused is a jurisdictional point in discharge cases and we understand that none of these employees can now be reached by service of notice. They cannot therefore now be discharged under the provisions of Section 12 the Civil Service Act.

The immediate question before us is whether or not in view of the circumstances the Board of Education and the Civil Service Commission can eliminate the names of these persons from their respective records.

The Civil Service Act and the rules of the Civil Service Commission do not provide for a contingency such as the one here under discussion.

The Commission and the Board of Education cannot do by indirection what they cannot do directly. *People ex rel. Bergquist* v. *Gregory*, 318 Ill. App. 231.

While the statutes are positive in form, it is clearly not their intent to give to occupants of civil service positions a life tenure in such positions.

When they accepted their positions, they entered into a contractual obligation with the understanding that their right to hold the position would cease if they failed to comply with the rules of the Commission, which they have apparently done.

We can find no case in point, nor any opinion written in the matter, but it is our opinion that there is no question but that there is here a wilful absence from the position by these persons for a sufficient length of time to justify a legal presumption of abandonment of the position by them, and we therefre hold that the Board of Education and the Civil Service Commission are justified in eliminating the names of these persons from their respective records.

Should they, or any of them, in the future make known their proper address, charges can then be brought against them for violation of said Rule III. Sec. 5 and they may be discharged.

We return herewith Mr. Murphy's letter to you dated March 21, 1951.

POLICE EFFICIENCY RATINGS

(No. 11394—Police Commissioner—C. H. L.—June 9, 1951.)

We have before us your communication of June 7, 1951, in which you ask us to express our views pertaining to the efficiency ratings on patrolmen furnished by former Commissioner of Police John C. Prendergast to the Civil Service Commission approximately two and one-half years ago.

You state in your letter:

> "In view of the above, it is my firm belief due to the length of time elapsing, the many changes in police personnel, the many incidents and police services arising in the meantime, that this efficiency

rating should be revised and that the Civil Service Commission should return the ratings furnished by Commissioner Prendergast to the undersigned for revision."

In *People ex rel. Bloch et al.* v. *Stephen E. Hurley et al.*, No. 50-S-11036, a mandamus action wherein plaintiffs, patrolmen in the Department of Police, who took the promotional examination for sergeant of police under the Civil Service Commission's Call No. 157, dated April 26, 1948 and amended July 22, 1948, alleged that it was and is the duty of the Civil Service Commission to ascertain the records of efficiency of appointees in the classified service including the Police Department of the City of Chicago under the rules and regulations of the Civil Service Commission and seek to cancel said examination:

"* * * because of the Commission's failure to mark, grade or compute efficiency on the basis as fixed under its own rules and regulations and as required by statute in such case made and provided, is null and void and of no legal force and effect."

The law department takes issue with the many conclusions of the plaintiffs in said case, and has filed an answer, the allegations of which, pertaining to efficiency markings should be of interest to you.

In paragraph IV of our answer filed in said case we say:

"There is presently existing in full force and effect an eligible list for the position of Sergeant of Police from which certifications have been made in the past and from which certifications may be made in the future. This list resulted from an examination given previously to the one which is here under attack.

The examination for the same position which is the subject of attack in this cause has been held but no eligible list resulting therefrom has yet been created, prepared or posted. No such list will be created or posted until the earlier list is exhausted by the certifications and appointments therefrom or until it is stricken or abolished by the defendant Civil Service Commission. Obviously there is no need to create such a new list until the earlier one has become *functus officio*."

and in paragraph VIII of our answer filed in said case we say:

"Defendants deny the allegations of paragraph VIII of the complaint to the effect that the defendants have failed or neglected to follow the law applicable in the conducting of the examination here in question and deny that said defendants have a duty to conduct their marking of efficiency records of patrolmen under the now obsolete version of Regulation XII of the Commission.

Defendants further answering say that the police department has for years ascertained, kept and maintained a record of the efficiency of each member of the said department; that said system of efficiency grading is a thoroughly recognized, accredited and well-ordered system, based upon facts, under which, in addition to general attributes of character and deportment of police personnel, special items such as extra compensations, creditable mentions, suspensions, discharges, reprimands and reinstatements into the service by court order upon reviews of discharges are all taken into account.

The system of efficiency marking and grading is such that it is capable of being computed and brought down to any given time of the tenure of police personnel and as such is available to and is utilized by the Civil Service Commission in arriving at efficiency marks for personnel taking promotional examinations, including the plaintiffs herein.

The defendant Civil Service Commission has, and undoubtedly will avail itself of, recourse to the said system of efficiency grading maintained by the police department when the proper time arrives for it to create and constitute the eligible list resulting from the examination for Sergeant here involved, as is more particularly explained and set forth in paragraph IV of this answer.

Defendants, further answering the allegations of paragraph VIII of the complaint, point out to the Court that *plaintiffs therein admit that the Commissioner of Police does furnish reports of efficiency of police personnel to the defendant Commission and that he did so furnish such reports as to the plaintiffs in this case* which admission of plaintiffs is distinctly at odds and inconsistent with other allegations and the many mere conclusions of the pleader throughout said paragraph VIII of the complaint.

Defendants particularly deny that the examination here involved was lacking in any respect as to its legally competitive character and deny that the efficiency grading is in any way discriminatory against plaintiffs herein.

The system used in the police department for efficiency marking is automatic in its maintenance and operation such as to fully satisfy the law in said respect and it is uniform in its application throughout the entire personnel of the Force.

Defendants deny emphatically that the examination here in question was null and void or of no legal force or effect for any reason whatsoever and affirm that the very opposite is true thereof for the reasons set out in this answer, more particularly in this paragraph VIII hereof and paragraph IV hereof.

Defendants say as to the allegations of paragraph VIII of the complaint, and particularly as to the allegation therein (on page 16) that "it was and is the duty of the Chicago Civil Service Commission to ascertain the records of efficiency of appointees in the classified service including the Police Department of the City of Chicago," *that they did, or will at the proper time, exactly and precisely discharge said duty and did, or will at the proper time, ascertain such records of efficiency for the purpose of giving an efficiency marking in said promotional examination for Sergeant of Police and further say that if and when an eligible list is created as result of said examination said efficiency markings will then be computed, re-examined, checked and rechecked before said list is made or posted in the regular order of events as they always have done in the past on all examinations."*

In conformity with the allegations of the last paragraph of our answer quoted above, and which we have sworn to be true, it is the duty of the Civil Service Commission to see to it that, when the eligible list resulting from the Sergeants examination here in question is created, the efficiency markings will be computed, re-examined, checked and rechecked before said list is made or posted in the regular order of events as they always have done in the past on all examinations.

In conclusion, and in answer to your request for our views in the premise, we wish to express our view that efficiency ratings which were prepared two and one-half years ago by your predecessor in office cannot, of course, by any stretch of the imagination represent the present status of efficiency of the patrolmen of your department, who took the Sergeant's examination in 1948, and in view of the fact that the Civil Service Commission has not yet posted the new Sergeant's list nor marked or graded the papers, we are of the opinion that it is not only entirely proper but your duty to request that the Civil Service Commission return to you the old efficiency ratings sent them, that they may be revised by you and be brought up-to-date for use by the Commission shortly before the said list is to be posted.

CERTIFICATION OF POLICE CAPTAINS

(No. 11413—President, Civil Service Commission—C. H. L.—August 10, 1951.)

We have before us your letter dated July 31, 1951 in which you advise that:

> "On July 20, 1951, this Commission established a new promotional eligible register for the above position (Captain (Police) Branch IV, Class S, Grade 6) in the City's classified service having on the same day struck off the names of all eligibles on the then existing promotional register for such position."

On May 6, 1950 you wrote Mr. Osborne:

> "Will you please inform our people that from now on the Commission is not to certify anyone for appointment from the following existing promotional lists: Sergeant (Police), Lieutenant (Police), Captain (Police) until you and I have had a chance to discuss the specific request for certification with Mr. Lundquist."

Since that date, as you know, we have not discussed any requests for certification from the old Captains' list, presumably because no requests for certification had been received by the Commission from the Commissioner of Police before the cancellation of the Captains' list on July 20, 1951.

In your letter of July 31, 1951 you now say:

> "In anticipation of requests for certifications for appointment from the register so established on July 20, 1951 your opinion is requested as to whether there is any circumstance in respect of pending litigation which would operate to prevent the Commission from making such certifications in order of merit and in the usual manner?"

Before answering your specific question we wish to call your attention to two Appellate Court cases which have a bearing upon the question at hand.

The statute creating the Civil Service Commission and granting it power, in Section 10½ of the Cities Civil Service Act provides that:

> "Said Commission may strike off names of candidates from the register after they have remained thereon more than two years."

In the case of *Peo. ex rel.* v. *City of Chicago*, 271 Ill. App. 360 the court, speaking of a Police Sergeant's eligible list from which all names had been stricken, held that:

> "When said old eligible list was cancelled it became *functus officio*, that is, it 'had become of no virtue whatsoever' (2 Bouvier's Dict., Rawle's 3rd ed., p. 1323), and petitioner's name, not being on any list, could not legally be certified by the commission for the position of sergeant."

This question of a cancelled list arose again in the case of *Peo. ex rel. Jahn v. City of Chicago, et al.* 279 Ill. App. 624 in which case the court quoted with approval, the aforesaid opinion in the Lynch case and said:

> "We agree with the views expressed in that opinion. The fact that there was a vacancy at the time the list was cancelled, in our opinion, does not vitiate the right of the Civil Service Commission to cancel the list and to require a new examination. There may have

been very good reason for not filling the vacancy. It may have been for financial reasons and the desire to make retrenchments in the cost of government. The matter of cancellation was one within the power of the Civil Service Commission and we will not interfere with the discretionary right of the Civil Service Commission to take such action."

There are at present pending in the Superior Court of Cook County two cases involving three men whose names were on the Captain's list, cancelled on July 30, 1951, these cases being:

Gorman et al. v. *O'Connor*, 50-S-21145

Vojtech et al. v. *O'Connor*, 51-S-8866

and the men involved are:

No. on list when stricken	Name	Orig. No.	Orig. Av.	Average with Mil. Cr.
1	John M. Scherping	57	77.27	79.11
2	Robert E. Welling	51	78.65	
4	Joseph J. Vojtech	54	78.27	

On June 26, 1951 (before the Captains' list was cancelled) judgments were entered in favor of said plaintiffs, ordering the Commissioner of Police to make requisition and to fill all vacancies then existing in the position of Captain of Police and ordering the Civil Service Commission to certify Scherping as No. 1 on the Captains' list, and Welling and Vojtech in the order of their relative standing on said list.

On July 25, 1951 defendants moved to vacate said orders, which motions were entered and continued to September 10th before Judge Sbarbaro.

The day before, on July 24, 1951, Mr. Michael F. Ryan, their attorney, had writs of mandamus issued by the Superior Court Clerk, and we were served with said writs on July 26th and 27th, 1951.

There is at this time no final order in these cases, wherefore the writs issued are not valid; a final finding for plaintiffs, if this could be accomplished, would, of course validate the orders of June 26, 1951, and they would have to be obeyed.

At the present time there is in our opinion no litigation which prevents you from making certifications from the new Captains' list in the usual manner.

BLANKETING SIDEWALK INSPECTORS

(No. 11412—President, Civil Service Commission—C. H. L.—August 10, 1951.)

We have before us your letter dated July 31, 1951, requesting our opinion as to the validity of the provisions of House Bill No. 672 as amended, which amendment provides as follows:

Sec. 10¼. In any city subject to this Act having a population of 500,000 or more, all sidewalk inspectors, chief street inspector, supervisors of payrolls and supervisors of pavement repairs who on

the effective date of this amendatory Act have served in such capacity for two years or more shall have certified civil service status."

You say that you are informally advised that said amendment "has been permitted to become law without the Governor's signature."

You advise us that on June 1, 1951 there were in the Chicago civil service system 27,361 individuals in such competitive classified service of whom 23,959 had permanent civil service status, the others being temporary employes and that the enactment in question relates to but four job titles (three: Chief Street Inspector, Supervisor of Payrolls and Assignments, and Supervisor of Pavement Repairs for promotional positions and one Sidewalk Inspector for an original entrance position) out of a total of more than a thousand job titles in the City's competitive classified service.

Your query indicates that you might consider this amendment a violation of Section 22 Article IV of the state constitution which prohibits the General Assembly from passing local or special laws in certain enumerated cases.

In an opinion rendered to you on January 26, 1950 we said:

"Classification of cities by population, which bears a reasonable relation to the purpose of the act of the legislature in question, has been held repeatedly not to be violative of Section 22 of Article IV of the Constitution of Illinois which prohibits the passage of local or special laws incorporating cities, towns or villages, or changing or amending their charters (*Cummings* v. *City of Chicago*, 144 Ill. 563; *Douglas* v. *The People ex rel.*, 225 Ill. 536; *Northwestern University* v. *Wilmette*, 230 Ill. 80; *The People, ex rel.* v. *Grover*, 258 Ill. 124.) The fact that Chicago is the only City in the State which, at this time has a population of more than 500,000 inhabitants, does not render the act local or special legislation within the meaning of said section 22. This act does not purport to affect the City of Chicago alone but, by its terms, it may affect any city in the state of Illinois which may hereafter attain a population of more than 500,000 inhabitants. A law may be general and yet be operative in only one place *Matthews* v. *City of Chicago*, 342 Ill. 120).

"In the last case cited three acts of the legislature authorized the creation of a "working cash fund" in certain cities, counties and school districts. The bills were attacked on the grounds that they were unconstitutional because they were local and special laws in violation of said section 22. The Acts in question applied to cities having a population of 150,000 or more, to counties having a population of 500,000 or more and to school districts having a population exceeding 100,000, and Chicago is the only city, Cook the only county and City of Chicago the only school district included within those terms. In overruling the contention that these acts violated said section 22 the court said at page 128:

'The prohibition contained in section 22 of article 4 of the constitution against the passage of local or special laws in certain enumerated cases does not mean that every law shall affect alike every place and every person in the State but it does mean that it shall operate alike in all places and on all persons in the same condition. When referring to legislation the term 'local' means laws relating to a portion, only, of the territory of the State, and the term 'special' laws which impose a particular burden or confer a special right, privilege or immunity upon a portion of the people of the State. *People* v. *Wilcox*, 237 Ill. 421: *People* v. *Day* 277 id. 543; *People* v. *Diekmann*, 285 id. 97.) Whether laws are general, local or special does not depend upon the number of those within the scope of their operation. They are general not because they operate in every place or upon every person in the State but because every place or person brought within the relations or circumstances provided for

is affected by the law. (*People* v. *Diekmann,* supra.) A law general in its nature and uniform in its operation upon all persons coming within its scope is a general law. The legislature may impose limitatations upon the action of individuals or classes of individuals but it may do so only by general law, and if it imposes restrictions on some and not upon others the difference must be based upon a substantial difference of conditions having a reasonable relation to the object of the legislation which differentiates the one class from the other. (*People* v. *Kewanee Light Co.* 262 Ill. 255.) All reasonable doubts are to be resolved in favor of upholding the validity of the statute. (*People* v. *Gordon,* 274 Ill. 462.) An act is not local merely because it operates in but one place. We have repeatedly held that a law may be general and yet operative in a single place where the condition necessary to its operation exists. (*People* v. *Kaelber* 253 Ill. 552; *West Chicago Park Comrs.* v. *McMullen,* 134 id. 170; *Martens* v. *Brady,* 264 id. 178.) Whether the condition exist in one place or many, if the classification is reasonable and just it does not violate the constitution and it applies to all places now within its terms and to all that may hereafter come within its terms.'

"Section 22 of Article IV of the Constitution prohibits the General Assembly from passing local or special laws in certain enumerated cases. The regulation of the civil service of cities is not enumerated in the cases prohibited."

"House Bill 1011 amends "An Act to regulate the civil service of cities." Our Supreme Court has repeatedly held that when the General Assembly concludes that a special law is necessary on a subject not expressly enumerated in this section and with reference to which the constitution does not elsewhere forbid special laws, its determination is final and not subject to review by the courts. *Herschbach* v. *Kaskaskia Island Sanitary and Levee District,* 265 Ill. 388; *Commissioners of Lincoln Park* v. *Fahrney,* 250 Ill. 256; *People* v. *Bowman,* 247 Ill. 276; *Owners of Lands* v. *People,* 113 Ill. 296).

"All laws are presumptively valid. Any doubt as to the validity of an act must yield to the legal presumption in favor of its validity. (*Soble* v. *Gill.* 358 Ill. 261). In order to declare an act in violation of the Constitution the conflict must be plain and obvious. (*The People* v. *Exton,* 298 Ill. 119, 122.) Here, there is no constitutional limitation imposed on the legislature with reference to subject matter of this act, and it may provide any type of examination, either original or promotional or provide no examination in certain cases, as it deems best for the public interest, subject only to constitutional limitations."

We are in full accord with the contents of said opinion and we are consequently of the opinion that the amendment to Section 10 of the Civil Service Act, provided for in House Bill 672, is valid, and it is your duty to give civil service status to the persons occupying the positions mentioned in the amendment for two years or more in conformity with said amended act.

FIREMEN'S ARBITRATION BOARD

(No. 11465—City Council—A. F. G.—January 3, 1952.)

With your letter of December 18, 1951 you sent a communication from the Firemen's Association of Chicago, dated November 19, 1951 relative to the appointment of an Arbitration Board in compliance with Article 13-A of the Revised Cities and Villages Act.

You ask our opinion of the City's obligation in this matter.

Article 13 was added to the Cities and Villages Act at the recent session of the General Assembly and may be found in the Session Laws of 1951 at page 1286, and in the Ill. Rev. Stats. 1951 Vol. 1, at page 471. For your convenience we enclose House Bill No. 812 which is identical with the Act.

Four of the five members of the Board shall be appointed by the "corporate authorities". "Corporate authorities" means the city council or similar body when the reference is to cities. (Section 1-2 (2) Revised Cities and Villages Act).

After its appointment the Board shall conduct hearings for the purpose of hearing evidence relevant to the subject of the dispute and report its findings and recommendations to the city council and to any organization of firemen of the municipality. "The Board's recommedation shall be advisory only and shall not be binding upon the municipality or upon members of the fire department." (Sec. 13 A-3).

Members of the Board shall serve without compensation but the expenses of any hearings by the Board shall be borne by the municipality. (Sec. 13 A-4).

EXPIRATION OF DISABILITY BENEFITS

(No. 11467—Fire Commissioner—C. H. L.—January 9, 1952.)

Replying to your request for an opinion as to the procedure to be employed in the case of this disabled fireman, whose ordinary disability benefits expired on December 22, 1951, as per information you received from the Secretary of the Retirement Board the following is submitted:

In your letter you state that fireman Maholy was granted ordinary disability benefits beginning as of December 23, 1946 and that these benefits expired on December 22, 1951.

This five year disability period is in accordance with the provisions of Section 944.47 of the Firemen's Annuity and Benefit Fund Act—Cities over 500,000, Chap. 24 of Ill. Rev. Stats. 1949-I, pg. 703 which provides:

> "944.47 ORDINARY DISABILITY BENEFIT. § 47. * * * Any fireman, included under the provisions of this section, and less than fifty-seven years (57) of age, who shall become disabled subsequent to the date upon which this Act shall come in force and effect in such city as the result of any cause other than the performance of an act or acts of duty, and other than as the result of alcoholism or venereal infection, shall have a right to receive ordinary disability benefit during any period or periods of any such disability, after the first thirty (30) days of any such period which shall not exceed, in the aggregate, throughout the entire period of such fireman's service, a period of time equal to one half (½) of the entire period of service rendered by such fireman prior to the time he shall have become so disabled, and which shall not exceed five (5) years in any case."

Said Section 944.47 further provides:

"When the disability of any such fireman shall cease, the said retirement board shall discontinue payment of ordinary disability benefit to such fireman and such fireman shall be returned to active service as a fireman in his proper rank or grade."

In an opinion rendered to Hon. John C. Prendergast on May 11, 1949 we quoted with concurrence the following from our opinion No. 9467 to the then Commissioner of Police, dated March 30, 1937:

"When a civil service employee returns from a leave of absence and within the proper time notifies his department head that he is ready and willing to assume work in the position from which he took leave, it is the duty of his department head to assign him to work if there is a vacancy in the position, or if the position is being held by a temporary appointee who is not in the classified service. If there is no vacancy in the position, or the position has been filled by a civil service employee from the classified register or the reinstatement list, the returned employee is entitled to have his name put on the reinstatement list for the position from which he took leave in the order of his seniority by the Civil Service Commission upon a report of the facts by the department head.

Despite the fact that a person who has returned from a leave of of absence may be physically and mentally unfit and unsafe to serve as a policeman he is nevertheless entitled to reinstatement to his position as policeman or to have his name certified for listing on the reinstatement list. He cannot lose his civil service status or his right to his position because of illness or disability until there is a finding to that effect by the Civil Service Commission after a hearing on charges at which he has an opportunity to be heard."

In your letter you say that your department physician, Dr. Harold P. Sullivan, on December 10, 1951 informed you that for four years Mr. Maholy was under treatment of pulmonary tuberculosis and that he had received a collapse of lung and that Dr. Sullivan expressed himself in writing that:

"in my opinion, it is not advisable to consider this type of patient for return to active duty. Reason being pulmonary tuberculosis, even though in an arrested state, because slight exposure or lowering resistance would encourage another and more serious flare-up * * * previous collapse of the lung does not warrant return to active duty in the Fire Department."

You say that fireman Maholy has not asked to be returned to the regular payroll as an active member of the department.

There is no provision in the Fireman's Annuity and Benefit Fund Act which requires that a disabled fireman, upon recovery from his disability, or when his disability benefits have been ordered stopped must apply to the Civil Service Commission or to the head of his department or any one else for reinstatement to his former position in the fire service.

In the first paragraph of your letter you state that the Secretary of the Retirement Board informed you that Mr. Maholy's:

"* * * benefits expired on December 22, 1951 at which time *it was proposed to remove* Mr. Maholy from the ordinary disability Beneficiary payroll."

A proposal to remove is not a removal and you should be advised by the Retirement Board when disability benefits were actually ordered stopped.

It is your mandatory duty under Section 944.47 of the Fireman's Annuity and Benefit Fund Act herein above quoted to restore fireman

Maholy to his position in the fire service immediately upon notification from the Retirement Board that further payment of disability benefits or disability pension has been ordered stopped.

If, upon the restoration of Maholy to his former position in the fire service, it is found, as the case here seems to be by you that he is unable to fittingly perform the duties of his position, then there is only one alternative left for you and that is to prefer written charges before the Civil Service Commission against fireman Maholy of incapacity, inefficiency and failure to discharge his duties as a fireman and of his physical incapacity, by reason of the condition of his lungs which render him permanently disabled and no longer fit for the performance of fire duty.

REFUSAL TO ANSWER ALARM

(No. 11471—Fire Commissioner—E. R. D.—January 28, 1952.)

We are in receipt of your communication of March 25, 1952, in which you ask for advice as to the charge that may be placed against a fireman, who refused to respond with his company to an alarm of fire.

We may at once rule out the supposition that the fire department is in any respect a military organization, or its members subject to the same rules of conduct, assigned to organizaion of that nature.

The only consideration in this matter is whether or not a crime or misdemeanor was committed by the fireman in his refusal to perform his duty. We find no support in the Statutes of Illinois or the Municipal Code of Chicago, to fortify us in an opinion that a crime or misdemeanor could be charged against the fireman, under the circumstances as set forth in your communication.

You, however, have the right to discipline the fireman for refusing to perform his duty, in accordance with the rules, regulations, practices and procedures of the Fire Department.

CRIMINAL RECORD

(No. 11505—Commissioner of Streets and Electricity—C. H. L.—April 2, 1952.)

We have before us your communication dated March 27, 1952 in which you ask to be advised as to the position of your department with respect to the continued employment of a civil service employee.

You say that he was employed by the Bureau of Sanitation as a Temporary Laborer on September 9, 1948 and that he resigned to accept a higher position on June 22, 1949, that during his period of employment he performed his duties, for the most part, in a satisfactory manner.

You then state that:

"It has been said that he has a long criminal record, having served two prison sentences, the first one for 10 years in the State of Wisconsin for Bank Robbery, and the second for a period of 9 months, in the Federal Penitentiary at Leavenworth for dealing in counterfeit sugar ration stamps, all of which occured before his certification by the Civil Service Commission."

Prefacing our opinion in this matter we desire to call your attention to the following sections of the Cities Civil Service Law and Rules of the Civil Service Commission:

Section 4 of the Cities Civil Service Act authorizes the Civil Service Commission to make rules to carry out the purposes of the Act for examinations, appointments and removals in accordance with the provisions of the statute (*Peo. ex rel. Carton* v. *Gregory*, 330 Ill. App. 172, December 31, 1946).

Section 6 of the Cities Civil Service Act provides that:

"All applicants for offices or places in said classified service, except those mentioned in Section 11, shall be subject to examination, which shall be * * * open to all citizens of the United States, with specified limitations as to residence, age, health, habits and moral character."

Section 12 of the Cities Civil Service Act provides:

"* * * No officer or employee in the classified civil service of any city who shall have been appointed under said rules and after said examination, shall be removed or discharged except for cause, upon written charges and after an opportunity to be heard in his own defense. Such charges shall be investigated by or before said Civil Service Commission, or by or before some officer or board appointed by said commission, to conduct such investigation. The finding and decision of such commission or investigating officer or board, when approved by said commission, shall be certified to the appointing officer, and shall forthwith be enforced by such officer * * *."

Rule II, Sec. 6 of the Civil Service Commission's Rules passed pursuant to authority conferred by Section 4 of the Cities Civil Service Act reads as follows:

"Sec. 6. *Disqualifications.* Proof of false statements in any applications, * * * shall be grounds for * * * dismissal from the service after certification, provided that any such applicant or eligible or appointee shall be given an opportunity to be heard in his own defense before final action by the Commission."

Rule VI, Sec. 1 of the Civil Service Commission's Rules provides:

"Section 1. *Charges.* Charges shall be filed with the Commission and shall state specifically the facts alleged to constitute the cause for discharge. Investigations of charges may be broad in their character and evidence may be heard upon any facts or circumstances pertinent or applicable to such charges."

We have examined the application filled out and signed by the employee on February 21, 1949, when he applied to take the examination for the higher position and find that question No. 8 thereof read as follows:

"8. Have you ever been convicted of, or indicted for, any crime?

If so, enclose herewith a certified copy of the court proceedings, showing the essential facts in the case."

The answer to said question 8 of the application was: No.

In *Peo. ex rel. Bergquist et al.* v. *Gregory*, 337 Ill. App. 661 the court held that:

> "Rule 2, Section 6 provides for dismissal from service for false statements in application but only after the appointee has been given an opportunity to be heard in his own defense."

Should what you say about the employee's criminal record be true, it would appear from the records of the Civil Service Commission that he made a false statement in his application by answering question No. 8 as he did.

Under the provisions of the aforesaid section 12 of the Cities Civil Service Act and Rule 2, Section 6 and Rule VI, Section I of the Civil Service Commission's Rules you would then therefore have the necessary authority to file charges against him with Civil Service Commission, stating specifically the facts alleged to constitute the cause for discharge.

MISCONDUCT ON FURLOUGH

(No. 11511—Police Commissioner—E. R. D.—April 3, 1952.)

We are in receipt of your communication of March 27, 1952 in which you inquire as to your authority to discipline a policeman who, while on furlough, outside of the City of Chicago, became involved in an altercation, which resulted in the policeman being found guilty of intoxication and disorderly conduct, by a court in Boone, Iowa.

As to disciplinary action the status of the policeman during his furlough period and the propriety of his actions, while outside of the police limits of the City of Chicago, during that period, is a matter for you to decide from factual evidence, after determining the degree of culpability involved.

If in your opinion, the policeman has conducted himself in a manner unbecoming a policeman in the service of the City of Chicago, whether he was on furlough outside the limits of the City of Chicago or not and has cast a detrimental reflection upon the Chicago Police Department by his actions, you may file charges against him before the Civil Service Commission. However, it may be difficult in this case to sustain such charges if witnesses cannot be produced.

In the alternative, the policeman may be disciplined by invoking your authority under Section 12 of the Act regulating the Civil Service of Cities, which follows in part:

> "Nothing in this act shall limit the power of any officer to suspend a subordinate for a reasonable period not exceeding thirty days."

It is our opinion that the words "any Officer," as used in the foregoing quotation should be interpreted as meaning "any appointing officer."

LEGAL RESIDENCE

(No. 11518—President, Civil Service Commission—C. H. L.—April 21, 1952.)

We have before us for consideration your communication dated April 16, 1952, attaching a letter addressed to you by the Hon. Michael J. Corrigan, Fire Commissioner, dated March 21, last transmitting copies of letters in which Mrs. John D. Foley of Mokena, Illinois, states that certain members of the Chicago Fire Department with permanent civil service status live outside of Chicago.

You suggest that the law department investigate the matter and determine what should be done or advise the Fire Department or your commission what should be done by either.

As to your suggestion that the law department investigate the matter we wish to say that nowhere in the Cities Civil Service Act are we empowered to investigate any civil service matter.

We shall now "advise the Department or this Commission what should be done by either" as you suggest.

The Municipal Code of Chicago contains the following provisions:

"25-4. The head of a deparment, board or agency, of the city government shall have the power to appoint and remove all subordinate officers and employees of his department, board or agency according to law.

25-13. Any officer violating any provision of this chapter shall be deemed guilty of misconduct in office and shall be liable to removal from office therefor.

25-30. All officers and employees in the classified civil service of the city shall be actual residents of the City. Any officer or employee in the classified civil service of the city who shall fail to comply with the provisions of the section shall be discharged from the service of the city in the manner provided by law."

Rule II of the Civil Service Commission Rules provides:

"Section 3. Residence. No person shall be admitted to examination for any position in the classified service who has not been an actual resident of the City of Chicago for at least one year next preceding date of examination; provided, however, that in examinations for offices or places requiring technical, professional or scientific knowledge and experience or manual skill of a high order, this rule may be waived by the Commission by an order entered in its minutes."

Under the aforesaid provisions of the Municipal Code of Chicago and the rule of the Civil Service Commission a civil service fireman must be an actual resident of the City of Chicago and if he is not, under the provisions of section 25-30 of the Code, it is mandatory that he be "discharged from the service of the City in the manner provided by law."

You say that: "This Commission is quite willing to talk to those involved if you so advise."

In *Peo. ex rel. Gilbert* v. *Hurley et al.*, 336 Ill. App. 205 the court held:

"Nowhere in this section (section 14) is the Commission given power to hear or determine charges, nor is it authorized to remove, discharge, retire or suspend a civil service employee; such powers are to be found only in section 12."

It is therefore our opinion that you are not authorized to hold a hearing in this matter before charges are filed against these men.

Section 12 of the Cities Civil Service Act provides as follows:

> "Sec. 12. Removals. Excepting as hereinafter provided in this section, no officer or employee in the classified civil service of any city who shall have been appointed under said rules and after said examination, shall be removed or discharged except for cause, upon written charges and after an opportunity to be heard in his own defense. Such charges shall be investigated by or before said civil service commission, or by or before some officer or board appointed by said commission, to conduct such investigation. The finding and decision of such commission or investigating officer or board, when approved by said commission, shall be certified to the appointing officer, and shall forthwith be enforced by such officer. Nothing in this act shall limit the power of any officer to suspend a subordinate for a reasonable period, not exceeding thirty days."

In conclusion, it is our opinion, that if upon investigation by the Fire Commissioner it is found that the firemen mentioned are not actual residents of the City of Chicago, it is his duty under the law to file charges against them with the Civil Service Commission.

We return herewith Fire Commissioner Corrigan's letter to you dated March 21, 1952 and the copies of communications received by him from Mrs. John D. Foley of Mokena, Illinois.

CRIMINAL RECORD

(No. 11521—President, Civil Service Commission—C. H. L.—April 24, 1952.)

We have before us your communication of April 16, 1952, re the above, also two letters dated March 26th and April 9, 1952, addressed to you by the Hon. L. M. Johnson, Commissioner of Streets and Electricity concerning the previous record of one of his employees.

You ask to be advised as to the procedure which may be followed by all concerned in connection with the subject matter.

From Commissioner Johnson's letter of March 26, 1952 we quote:

> "The employee was picked up by the Chicago Police on March 24th and held overnight for the show-up on March 25th. He appeared on March 26th in the Narcotics Court. The Police advised us that he is definitely a confirmed narcotic."

and from Commissioner Johnson's letter of April 9, 1952:

> "On Monday, March 24th the Police picked this man up at the 6th Ward Yard and held him for the 'Show-up' on Tuesday evening, March 25th. On Wednesday he appeared in Narcotic Court as a 'user,' but was discharged."

Commissioner Johnson's letter of April 9, 1952 further advises:

> "Ward Superintendent Patrick McGrath, in conversation with Officer Valma of the robbery detail, has been informed that the employee was convicted of 'Armed Robbery' in November of 1936, was sentenced to ten years, served a total of seven years and three months,

at which time he was paroled. He was finally discharged from this parole in December of 1946.

This man has been put back to work inasmuch as his work has been performed in a satisfactory manner as far as this Bureau is concerned."

Prefacing our opinion in this manner we desire to call your attention to the following sections of the Cities Civil Service Law and Rules of the Civil Service Commission:

Section 4 of the Cities Civil Service Act authorizes the Civil Service Commission to make rules to carry out the purposes of the Act and for examinations, appointments and removals in accordance with the provisions of the statute (*Peo. ex rel. Carton* v. *Gregory*, 330 Ill. App. 172, December 31, 1946).

Section 6 of the Cities Civil Service Act provides that:

"All applicants for offices or places in said classified service, except those mentioned in Section 11, shall be subject to examination, which shall be * * * open to all citizens of the United States with specified limitations as to residence, age, health, habits and moral character."

Section 12 of the Cities Civil Service Act provides:

" * * * No officer or employee in the classified civil service of any city who shall have been appointed under said rules and after said examination, shall be removed or discharged except for cause, upon written charges and after an opportunity to be heard in his own defense. Such charges shall be investigated by or before said Civil Service Commission, or by or before some officer or board appointed by said commission, to conduct such investigation. The finding and decision of such commission or investigating officer or board, when approved by said commission, shall be certified to the appointing officer, and shall forthwith be enforced by such officer * * *."

Rule II, Sec. 6 of the Civil Service Commission's Rules passed pursuant to authority conferred by Section 4 of the Cities Civil Service Act reads as follows:

"Sec. 6. *Disqualifications.* Proof of false statements in any applications, * * * shall be grounds for * * * dismissal from the service after certification, provided that any such applicant or eligible or appointee shall be given an opportunity to be heard in his own defense before final action by the Commission."

Rule VI, Sec. 1 of the Civil Service Commission's Rules provides:

"Section 1. *Charges.* Charges shall be filed with the Commission and shall state specifically the facts alleged to constitute the cause for discharge. Investigations of charges may be broad in their character and evidence may be heard upon any facts or circumstances pertinent or applicable to such charges."

In your letter you state:

"The application which the employee filed for this position January 30, 1950, contains a statement by him to the effect that he had never been convicted of or indicted for any crime."

In *Peo. ex rel. Bergquist et al.* v. *Gregory*, 337 Ill. App. 661 the court held that:

"Rule 2, Section 6 provides for dismissal from service for false statements in application but only after the appointee has been given an opportunity to be heard in his own defense."

Should what Commissioner Johnson's letter of April 9, 1952, indicates be true, it is apparent that he made a false statement in his application.

Under the provisions of the aforesaid section 12 of the Cities Civil Service Act and Rule 2, Section 6 and Rule VI, Section 1 of the Civil Service Commission's Rules Commissioner Johnson, would then therefore have the necessary authority to file charges against him with the Civil Service Commission, stating specifically the facts alleged to constitute the cause for discharge.

We return herewith Commissioner Johnson's letters dated March 26th and April 9, 1952.

STRIKING BATTALION CHIEF'S REGISTER

(No. 11522—President, Civil Service Commission—C. H. L.—April 24, 1952.)

We have before us your communication of April 24, 1952 in which you ask for our opinion as to whether or not the pending of the suit *Peo. ex rel. Mikkelson et al.* v. *Hurley et al.*, No. 52 S 5991 is any bar to the striking of names off the existing eligible register for the position of Chief of Battalion (Fire Department) Branch IV, Class T, Grade 6 and the establishing of a new eligible register for that position based upon an examination therefor recently held by the Commission.

In the case of *Peo. ex rel. Mikkelson et al.* v. *Hurley et al.*, plaintiffs Mikkelson et al. sue in mandamus to compel defendants Civil Service Commissioners Stephen E. Hurley, Albert W. Williams and Charles A. Lahey and James S. Osborne, Secretary of the Commission:

(a) to expunge from the records of the Commission all records pertaining to the holding of a purported promotional examination for Chief of Battalion, (Branch IV, Class T, Grade 6);

(b) to cancel and expunge and hold for naught all acts done or suffered to be done in the holding of said promotional examination for Chief of Battalion under Call No. 207 dated July 19, 1951;

(c) to hold a promotional examination for Chief of Battalion to be limited to those in the next lower rank and grade, to wit: Fire Captains (Branch IV, Class T, Grade 5) on the basis of ascertained merit (efficiency) and seniority in service and examination: and

(d) to ascertain the merit (efficiency) of appointees in the classified service of the Fire Department of the City of Chicago, including those occupying the rank of Fire Captain, on a basis uniform and standard to permit Fire Captains (Branch IV, Class T, Grade 5), in the next lower rank and grade to that of Chief of Battalion (Branch IV, Class T, Grade 6), to participate in a competitive promotional examination for Chief of Battalion in compliance with the provisions of Section 9 of "An Act to Regulate the Civil Service of Cities" and the Rules of the Chicago Civil Service Commission pertaining thereto.

This case was filed by attorney Michael F. Ryan on April 18, 1952, and the return day is May 5, 1952. It is a mandamus suit, not an injunction or Writ of Prohibition suit. No pleading has been filed by the defendants, and there is no restraining order entered.

The statute creating the Civil Service Commission and granting it power, Section 10½ of the Cities Civil Service Act provides that:

> "Said Commission may strike off names of candidates from the register after they have remained thereon more than two years."

In the case of *Peo. ex rel. Lynch* v. *City of Chicago*, 271 Ill. App. 360 the court, speaking of a Police Sergeants' eligible list from which all names had been stricken, held that:

> "When said old eligible list was cancelled it became *functus officio*, that is, it "had become of no virtue whatsoever" (2 Bouvier's Dict. Rawle's 3rd ed., p. 1323), and petitioner's name, not being on any list, could not legally be certified by the commission for the position of sergeant."

This question of a cancelled list arose again in the case of *Peo. ex rel. John* v. *City of Chicago et al.*, 279 Ill. App. 624 in which case the court quoted with approval, the aforesaid opinion in the Lynch case and said:

> "We agree with the views expressed in that opinion. The fact that there was a vacancy at the time the list was cancelled, in our opinion, does not vitiate the right of the Civil Service Commission to cancel the list and to require a new examination. There may have been very good reasons for not filling the vacancy. It may have been for financial reasons and the desire to make retrenchments in the cost of government. The matter of cancellation was one within the power of the Civil Service Commission and we will not interfere with the discretionary right of the Civil Service Commisson to take such action."

Section 6 of the Cities Civil Service Act which governs examinations held by the Civil Service Commission provides:

> "Such examinations shall be practical in their character, and shall relate to those matters which will fairly test the relative capacity of the persons examined to discharge the duties of the position to which they seek to be appointed, and shall include tests of physical qualifications and health, and when appropriate of manual skill; * * *
>
> The commission shall control all examinations. * * * "

Rule V. Section 4 of the Civil Service Commission Rules provides:

> "Section 4. Efficiency. Records of efficiency of appointees in the classified service shall be ascertained by the Commission in such manner as it may determine as evidenced by its action and may include reports derived from heads of departments or bureaus or from investigations made by the Commission."

Regulation XII of the Civil Service Commission Regulations provides:

> "Efficiency Markings. The rating of the efficiency markings of any competitor in any promotional examination shall be in such manner as the Commission may determine with respect to such examination, and upon the posting of a promotional eligible list based upon such examination the action of the Commission with reference to the efficiency markings for that examination shall be conclusive evidence of such determination."

In conclusion, we are of the opinion that the filing of suit *Peo. ex rel. Mikkelson et al.* v. *Hurley et al.* No. 52 S 5991 is no bar to the striking of names off the existing eligible register for the position of Chief of Battalion (Fire Department) if the names have remained thereon more than two years, nor is it any bar to the establishing of a new eligible register for that position based upon an examination therefor recently held

by the Commission in compliance with the Cities Civil Service Act and the Rules and Regulations of the Civil Service Commission therein above set forth.

REGISTRATION REQUIREMENT FOR NURSES

(No. 11536—Medical Director, M. T. S.—C. H. L.—May 16, 1952.)

We have before us your letter of April 10, 1952 to which are attached the following letters;

1. From C. Hobart Engle, Director of Registration to Anna Patterson, dated November 29, 1951;
2. From C. Hobart Engle, Director of Registration to Anna Patterson, dated March 11, 1952;
3. From Anna Patterson to Mrs. Phelps, Director of Nurses, dated April 3, 1952;
4. From Mrs. Eloise T. Phelps, Director of Nurses to Dr. O. L. Bettag, Medical Director, dated April 4, 1952.

In your letter you state that Mrs. Anna K. Patterson has been employed by the Municipal Tuberculosis Sanitarium since 1915.

From Mrs. Phelps' letter of April 4, 1952 we gather that Mrs. Patterson was certified by the Civil Service Commission as hospital nurse on May 23, 1916 and as field nurse on November 15, 1921; that she has never been a registered nurse, but was certified by the Illinois State Department of Registration and Education under waiver, as a Public Health Nurse; that her present assignment is assisting in the Collapse Therapy Clinic and her work is satisfactory.

You ask our advice in the matter of Mrs. Patterson's status. We have checked the records of the Civil Service Commission and find that Rule II, Section 5 of the Civil Service Commission's Rules was the same in 1916 as it is today and reads:

> "Section 5. Special Qualifications. In examinations for positions requiring technical, professional or scientific knowledge or experience, or for positions where special qualifications are prescribed by laws or ordinances, or where certificates or licenses are required for the practice of the profession, art or trade involved, the *Commission may demand satisfactory proof of such special qualifications upon the part of applicants.*"

We are also informed that Commission made no demand of Mrs. Patterson for any certificate or license at the time of her examination or at any time thereafter.

It is therefor our opinion that Mrs. Patterson was legally certified and appointed to her civil service position and is entitled to retain her status and can only be removed by lawful authority, *Peo. ex rel. Bergquist* v. *Gregory*, 337 Ill. App. 661; *Gilbert* v. *Hurley*, 336 Ill. App. 205; *Lindblom* v. *Doherty*, 102 Ill. App. 14, 29; *Hurley* v. *Graber*, 405 Ill. 331; *Laist* v. *Lower*, 251 Ill. 527; *McCabe* v. *Gregory*, 328 Ill. App. 513.

In conclusion and based upon the above authorities it is our opinion that Mrs. Patterson cannot now be separated from her position merely because she does not possess and cannot qualify for a certificate as a Regis-

tered Nurse. The Civil Service Commission under its Rule II, Section 5 above referred to had the power to exact such a certificate from her before her certification and appointment, but it failed to do so.

We return herewith the letters above referred to which were attached to your letter of April 10, 1952.

RESIDENCE OF EMPLOYEES

(No. 11545—Alderman, 36th Ward—J. C. M.—May 20, 1952.)

In your letter of May 14, 1952 you inquire as to whether temporary and civil service employees are required to reside within the territorial limits of the City.

On April 21, 1952* we rendered an opinion to the President of the Civil Service Commission relating to the required residence of city firemen. A copy of that opinion is enclosed and the conclusions apply to all officers and civil service employees.

While the Code does not specifically provide that non-civil service employees are required to reside within the city limits, those temporary employees appointed for not exceeding sixty days, with the approval of the Civil Service Commission as provided by Section 10 of the Civil Service Act, (Chap. 24½, Ill. Rev. Stats.) are in a limited sense under the Civil Service Act and subject to control. The Civil Service Commission could well refuse to approve such temporary employees not residents of the City of Chicago. This would not apply to the employees of the Corporation Counsel's office, the Municipal Court Clerk and the Bailiff's offices as they are not classified as temporary or civil service employees.

In addition to the requirement of the Code that all officers and employees in the classified civil service shall be actual residents of the city (Section 25-30), the statute (Chap. 24, Article 9-87, Ill. Rev. Stats.) provides that "No person shall be eligible to any municipal office unless he is a qualified elector of the municipality and has resided therein at least one year next preceding his election or appointment."

It will be seen that the legislature and the City Council have given consideration to the residence of its officers and employees. There probably are instances where the services of a non-resident possessing special or exceptional skill, professional or otherwise, is not only advisable but necessary in the conduct of the city's business. Under the present code provisions, such a person could be employed without making him an independent contractor. If all employees of the city were required to be residents, such a person could not be so employed.

If it is desired that there be no question as to the requirement of residence of city employees of all classes, Section 25-30 of the Code should be amended by striking out the words "in the classified civil service" in the first, second and third lines thereof.

POLICEMAN EMPLOYED AS REFEREE

(No. 11537—Police Commissioner—C. H. L.—May 29, 1952.)

We are in receipt of your communication dated May 14, 1952, in which you say:

* Opinion No. 11518, page 167.

"We have been informed that a member of this Department, Officer Walter Brightmore, is a licensed referee, licensed by the Illinois Athletic Commission, enabling him to referee at boxing matches."

and you ask our opinion as to whether his acting as a referee at boxing matches would be considered a violation of the Rules and Regulations of your department.

In order to arrive at a proper conclusion it will be necessary for us to refer to applicable code provisions as well as the Rules and Regulations of the Department of Police.

The provisions of the Municipal Code of Chicago pertinent to the question raised here are as follows:

"11-24. The members of the police force of the City, when on duty, shall devote their time and attention to the discharge of the duties of their stations, according to the laws of the state and ordinances of the city and the rules and regulations of the department to preserve order, peace, and quiet and enforce the laws and ordinances throughout the city."

"11-31. Any member of the police force who shall refuse or neglect to perform any duty required of him, when such refusal or neglect to perform any such duty shall tend to hinder, obstruct, or impair in any way the proper and strict enforcement of any law or provision of this code or the efficiency of the police force, is hereby declared to be no longer qualified to be a member of the police force, and shall be discharged from said police force and the service of the city in the manner provided by law."

"11-32. Any member of the police department who shall neglect or refuse to perform any duty required of him by the provisions of this code or the rules and regulations of the department, * * * may, in addition to any other penalty or punishment imposed by law, be fined not more than one hundred dollars for each offense."

"25-8. Eight hours of labor shall be and constitute a day's work for all employees performing manual labor for the city. The provisions of this section shall not be construed to apply to or govern the police or fire departments, * * * where constant operation is necessary * * * "

"25-27. The head of each department, * * * shall prescribe such rules and regulations for the governance of his department * * * as he shall deem necessary and proper * * * and employees shall be subject to such rules and regulations so prescribed and to the provisions of this code."

Pursuant to the authority vested in the Commissioner of Police by Chapter 25 of the Municipal Code of Chicago Rules and Regulations of the Department of Police are now in full force and effect, and the rules pertinent to the question raised here provide as follows:

"Rule 112. Duties — General: * * * a patrolman * * * shall hold himself in readiness at all times to answer the calls and obey the orders of his superiors. * * * and shall have such regular hours of duty as may be prescribed by the Commissioner of Police."

"Rule 373. Always on Duty: A member of the department, for disciplinary purposes, shall be considered as being on duty at all times. Although certain hours are allotted to a respective member for the performance of duty on ordinary occasions, yet he is required to respond immediately day or night in any emergency, on notice that his services are needed.

"Rule 378. Other Business Prohibited: A member of the department shall devote his whole time and attention to his duties. He is expressly prohibited from following any other calling or occupation, or being engaged in any other business.

"Rule 390. Penalties:

(a) Reprimand.

(b) Fine not exceeding the pay due or to become due for a period of thirty days.

(c) Suspension without pay for a term not exceeding thirty days.

(d) Discharge from the police department and the service of the City of Chicago."

Rule 112 states specifically that a patrolman shall have such regular hours of duty as may be prescribed by the Commissioner of Police, and we are informed that those regular hours consist of forty-eight (48) hours per week.

Said rule also provides that he shall hold himself in readiness at all times to answer the calls and obey the orders of his superiors.

These two provisions are emphasized in Rule 373 in different words but with the same meaning. This rule mentions "certain" hours instead of "regular" hours in Rule 112, and the words in Rule 373 that a patrolman:

"for disciplinary purposes, shall be considered as being on duty at all times * * * he is required to respond immediately day or night in any emergency, on notice that his services are needed"

adds nothing to the wording in Rule 112 that a patolman:

"shall hold himself in readiness at all times to answer the calls and obey the orders of his superiors."

It is apparent from these two rules that a policeman no matter where he is or what he is doing, whether he is performing his duties during his regular hours, or during the other hours of the day is resting, eating or sleeping; when he receives notice that his services are needed he must respond immediately. This does not prevent him from seeking relaxation, eating or sleeping. It does not prevent him from attending a boxing match or other recreation, just so that he is available on notice to respond immediately when called by a superior officer.

As to the provisions of Rule 378 which provides that a member of the department shall devote his whole time and attention to his duties and is expressly prohibited from following any other calling or occupation, or being engaged in any other business we quote from an opinion written by this department to Hon. Nicholas R. Finn, President, Civil Service Commission on September 22, 1926, Corp. Coun. Op. Vol. XV. page 339, in which opinion we now concur:

"Complying with your request for an opinion in the matter of the right of Civil Service employees to engage in outside employment while filling an office, position or place of employment in the service of the City, we state it as our opinion that, unless the ordinances defining the service and appropriating the compensation therefor, or the Civil Service Commissions' classification of, or examination for, the service indicates otherwise, the presumption of law is such employee must devote his entire time to the city during its regular business and working hours. Such employee cannot, therefore, engage in outside employment at the same time."

It appears to us that the occasional participation as a referee of a boxing contest, which is a recognized healthful sport in Illinois, does not come within the language used in Rule 378, and is not a "calling or occupation or being engaged in any other business." In our view, it would seem that this function might be considered to be in the same category as lecturing, with the compensation classed as an honorarium.

In conclusion we are of the opinion that if Officer Brightmore should be called upon to referee boxing matches outside of his regular working hours and holds himself in readiness at all times to answer the calls and obey the orders of his superiors, he cannot be said to violate the rules of the department.

MISCONDUCT WHILE ON LEAVE

(No. 11555—Police Commissioner—E. R. H.—June 27, 1952.)

We acknowledge your letter of June 23, 1952, enclosing a report from your Inspector Daly relative to the conduct of a policeman in connection with the cashing of a check by one Daniel W. Rice, to which the officer lent his assistance and for which Rice was found guilty in our Criminal Court of confidence game. You state that the policeman is on leave of absence from your Department and you ask our advice as to whether or not you have authority to prefer charges against the officer based upon his conduct as reported by Inspector Daly.

In the case of *Joyce* v. *The City of Chicago*, 216 Ill. 466, the charges against the defendant, a Lieutenant of Police, pertained to misconduct on his part while acting as a Notary Public and not due to his misconduct while acting as a Lieutenant of Police and it was contended that such charge could not be a basis for his discharge from office as a Lieutenant of Police. It appeared that the Lieutenant, in connection with two other officers of the Chicago Police, rendered false and fraudulent "Messengers Expense Account" to the Secretary of State for the return of a fugitive from justice from Cleveland, Ohio to Chicago, thereby obtaining from the State $48.80 in excess of the amount allowed by law. The Supreme Court said, page 470:

> "We * * * do not agree with the contention that no cause is sufficient for the removal of an officer in the classified civil service unless the offense is committed while the officer is acting strictly within the line of his duty as an officer. It would hardly be urged that a construction of the statute would be justified which would require the commission to retain a murderer or burglar in the classified civil service simply because he was off duty at the time the murder or burglary was committed and was not acting in the line of his duty at the time he committed one or both of said crimes."

To the same effect as the cases of *Bloomquist* v. *Rehnberg*, 280 Ill. App. 1, 2, and *Coane* v. *Geary*, 298 Ill. App. 199, 204.

It is our opinion that the fact that the policeman is on leave of absence is no legal barrier to the filing of charges against him with the Civil Service Commission based upon his conduct as set forth in the submitted report of Inspector Daly.

FURLOUGH FOR MILITARY SERVICE

(No. 11564—Police Commissioner—C. H. L.—July 21, 1952.)

We have before us your communication dated March 21, 1952 attaching your Circular Order No. 150 to Commanding Officers in which you quote an order passed by the City Council of the City of Chicago on January 30, 1952, reading as follows:

> "Ordered, That all police officers and firemen of the City of Chicago who were entitled to leaves of absence or furloughs of twenty-five days with full pay during the year 1951, and while the military draft is being enforced, and entered into the land or naval forces of the United States before having taken advantage of their right to a furlough, shall be paid their salaries for the twenty-five days of furlough, and the City Comptroller and the City Treasurer hereby are authorized and directed to pay all such police officers and firemen their furlough salaries when certified by the Commissioner of Police or Fire Commissioner, as the case may be."

You ask to be advised what action your department should take in regard to the subject matter of said Council Order.

The Council Order provides for the payment of twenty-five days pay to members of your departmentt for leaves of absence or furloughs during the year 1951 when they were in military service, although they performed no police duties during the entire year of 1951.

The orders of the City Council which apply during the year 1951 were passed December 13, 1950 and are found at page 7271 of the Journal of Proceedings of the City Council of said date. Said orders provide, in part, as follows:

> "Ordered, The executives of the various departments of the City of Chicago shall arrange and designate vacation periods for the year 1951 as follows:
>
> > 'All employees who have served the City for at least one year prior to the beginning of the vacation period, * * * shall be given a vacation with pay during the year 1951 of two (2) weeks, and those employees compensated on a monthly or annual basis who have served the City fifteen years or more shall be granted a vacation of three weeks with pay.' * * *"

In our opinion No. 8114, addressed to the Commissioner of Public Works, Vol. XVIII, p. 146 set out at pg. 1215 in Chapters II-III of the opinions in full of the Corporation Counsel, which opinion involved the interpretation of the City Council's annual vacation and sick leave order for the year 1933, we held:

> "There is much to be said in favor of relaxing the rule in question to the extent of authorizing the provision for vacation to apply in case of employees whose absence is due to injuries received in the course of their employment. But if such change is to be made it should be done by the City Council, which is clothed with the exclusive authority to take the proposed action. It will not be proper for the heads of departments to take it upon themselves to vary the terms of the order of the council in case they see fit to extend its provisions. Vacations with pay may be granted by order of the City Council, but not by the unauthorized direction of the head of the department."

We concur in aforesaid opinion and say that the City Council is clothed with the exclusive authority of relaxing the provisions of the order quoted above pertaining to vacation periods for the year 1951 and advise you to act according to the provisions of the Council order of January 30, 1952.

SPECIAL POLICEMEN

(No. 11596—C. H. L.—October 9, 1952.)

Your letter dated October 4, 1952 addressed to Hon. Martin J. Kennelly, Mayor of the City of Chicago, attaching a petition signed by citizens of your community relative to the use of Mr. Eddie Preston as a special policeman has been turned over to this department for reply.

It is apparent from several communications received by the Mayor's office that Mr. Preston is highly thought of in his community, but this matter does not come within the scope of the Mayor's authority as will be readily seen from the following section of the Civil Service law and Rules of the Civil Service Commission of the City of Chicago:

Sections 3, 4 and 6 of the Civil Service Act pertaining to cities provide:

> "Sec. 3. Classification. Said commissioners shall classify all the offices and places of employment in such city with reference to the examinations hereinafter provided for, except those offices and places mentioned in Section II of this act. The offices and places so classified by the commission shall constitute the classified civil service of such city; and *no appointments to any of such offices or places shall be made except under and according to the rules hereinafter mentioned.*" (Emphasis ours.)
>
> "Sec. 4. Rules. Said commission shall make rules to carry out the purposes of this act, and for examinations, appointments and removals in accordance with its provisions, and the commission may, from time to time, make changes in the original rules."
>
> "Sec. 6. Examinations. All applicants for offices or places in said classified service, except those mentioned in Section 11, shall be subject to examination, which shall be public, competitive, and open to all citizens of the United States, with specified limitations as to residence, age, health, habits and moral character. * * * "

Rule III, Section 9 of the Civil Service Commission Rules passed in accordance with the provisions of said Section 4 of the Civil Service Act provides:

> "Section 9. Police and Fire Service. In original entrance examinations for firemen and patrolmen in the Police Department, applicants in addition to the requirements of Rule II, at the time of examination must be between the ages of 21 and 28 years (that is must not have reached their twenty-eighth birthdays), provided, however, that persons entitled to military preference in accordance with the provisions of Section 10½ of the Civil Service Act shall not be subject to limitations specifying age unless they are applicants for a position as a fireman or a policeman having no previous employment status as a fireman or policeman in the regularly constituted fire or police department of the City of Chicago, in which case they must be under 35 years of age.
>
> The physical schedule for patrolmen in the Police Department shall be as follows:

Height	Minimum Weight	Maximum Weight	Minimum Circumference of Chest
5 feet 9 in.	145 pounds	190 pounds	35 inches
5 feet 10 in.	150 pounds	195 pounds	35½ inches
5 feet 11 in	155 pounds	205 pounds	36 inches
6 feet 0 in.	160 pounds	210 pounds	36½ inches
6 feet 1 in.	160 pounds	215 pounds	37 inches
6 feet 2 in.	170 pounds	225 pounds	37½ inches
6 feet 3 in.	175 pounds	230 pounds	38 inches
6 feet 4 in.	180 pounds	235 pounds	38½ inches
6 feet 5 in.	185 pounds	235 pounds	39 inches
6 feet 6 in.	190 pounds	235 pounds	39½ inches

Failure to conform to these schedules shall cause rejection. Applicants must have a chest expansion of not less than three inches."

We regret that Mr. Preston's age alone under the law prevents him from taking a patrolman's examination.

SUBPOENA POWER

(No. 11711—President, Civil Service Commission—C. H. L.—July 7, 1953.)

We acknowledge receipt of your communication dated April 29, 1953, in regard to subpoenas issued and to be issued by the Civil Service Commission of the City of Chicago, also of the copy of the form of subpoena currently used by the Commission.

Before answering the specific queries propounded in your communication we desire to call your attention to certain sections of the Cities Civil Service Act pertinent to subpoenas issued by the Civil Service Commission of the City of Chicago and a judge of the Circuit Court and they are:

"Sec. 12. Removals. * * * In the course of an investigation of charges, each member of the commission, and of any board so appointed by it, and any officer so appointed, shall have the power to administer oaths and shall have power to secure by its subpoena both the attendance and testimony of witnesses, and the production of books and papers relevant to such investigation. * * *"

"Sec. 14. Investigations. The commission shall investigate the enforcement of this act and of its rules, and the action of the examiners herein provided for, and the conduct and action of the appointees in the classified service in its city, and may inquire as to the nature, tenure and compensation of all offices and places in the public service thereof. In the course of such investigations each commissioner shall have power to administer oaths, and said commission shall have power to secure by its subpoena both the attendance and testimony of witnesses and the production of books and papers relevant to such investigations."

"Sec. 33. Compelling Testimony of Witnesses. Production of Books and Papers. Any person who shall be served with a subpoena to appear and testify or to produce books and papers, issued by the commission or by any commissioner or by any board or person act-

ing under the orders of the commission in the course of an investigation conducted either under the provisions of Section 12 or Section 14 of this act, and who shall refuse or neglect to appear or to testify or to produce books and papers relevant to said investigation, as commanded in such subpoena, shall be guilty of a misdemeanor, and shall, on conviction, be punished as provided in Section 34 of this act. The fees of witnesses for attendance and travel shall be the same as the fees of witnesses before the circuit courts of this State and shall be paid from the appropriation for the expenses of the commission. Any circuit court of this State, or any judge thereof, either in term, time or vacation, upon application of any such commissioner, or officer or board may in his discretion compel the attendance of witnesses, the production of books and papers, and giving of testimony before the commission, or before any such commissioner, investigating board or officer, by attachment for contempt or otherwise in the same manner as the production of evidence may be compelled before said court. Every person who, having taken an oath or made affirmation before a commissioner or officer appointed by the commission authorized to administer oaths, shall swear or affirm wilfully, corruptly and falsely shall be guilty of perjury and upon conviction shall be punished accordingly."

"Sec. 34 Penalties. Any person who shall wilfully, or through culpable negligence, violate any of the provisions of this act, of any rule promulgated in accordance with the provisions thereof, shall be guilty of a misdemeanor, and shall, on conviction thereof, be punished by a fine of not less than fifty dollars and not exceeding one thousand dollars, or by imprisonment in the county jail for a term not exceeding six months, or both such fine and imprisonment in the discretion of the court."

The legislature has thus in sections 12, 14 and 33 of the Cities Civil Service Act made certain specific provisions for compelling the attendance of witnesses and the production of books and papers at hearings of the Civil Service Commission, either by a) subpoenae issued by the Civil Service Commissioners or b) subpoenae issued by a judge of the Circuit Court.

It will here be noted that affecting either case Section 33 provides that:

"The fees of witnesses for attendance and travel shall be the same as the fees of witnesses before the circuit courts of this State and shall be paid from the appropriation for the expenses of the Commission."

The question of witness fees is also dealt with in Section 62 of the Civil Practice Act and under the provisions of these legislative Acts it is our opinion that a subpoena served upon a witness either by authority of the Civil Service Service Commission or by the Court, without the payment to him, at the time of service, of the prescribed fees will have no legal effect.

Referring specifically to the subpoena powers of the Civil Service Commission you ask our opinion as to.

"1. The manner in which its subpoena in disciplinary proceedings may be properly issued and personally served and, if service thereof may be made by mail, in what manner this may be done and with what effect."

Section 33 of the Cities Civil Service Act gives the Civil Service Commission the power to issue subpoenae to witnesses to appear before it at a hearing, it is true, but it is silent as to the manner in which its subpoenas shall be served, whether by personal service or by mail.

In our opinion your subpoena should be served personally by your agent who, when he serves the subpoena, shall tender the appropriate witness fee to the person served, whereafter he shall return to you an affidavit showing that service has been had, and the witness fee accepted or refused.

In Illinois the rule is that service of a subpoena is valid if the witness actually receives it, no matter by what means, even if sent to him by mail. *Chicago and Aurora Railroad Co.* v. *Dunning,* 18 Ill. 494; *Ferriman, et al.* v. *People,* 128 Ill. App. 230; *People* v. *Ryan,* 410 Ill. 378.

We do not, however, recommend service by mail, the main reason for this being the difficulty in proving that the prescribed witness fee was actually received by the witness.

At this point we wish to say that the form of subpoena currently used by the Commission meets with our approval, providing your agent reads the original thereof to the witness, delivers a copy thereof to him, together with the prescribed witness fee and returns to you his affidavit of service thereof.

Your second question reads:

"2. Whether and how effective personal service of its subpoenas may be made in all or parts of Cook County outside of the City of Chicago or in counties of Illinois other than Cook."

Answering this question we wish to say that the Cities Civil Service Act is wholly devoid of any expression of limitation upon the geographical jurisdiction of the Civil Service Commission in the matter of subpoena process.

The courts of Illinois have held that the Civil Service Commission is a branch of the government of the City of Chicago, *Jacobs* v. *Coffin,* 282 Ill. 599; it is a statutory body deriving from the Cities Civil Service Act the warrant or authority it seeks to exercise, *Gilbert* v. *Hurley,* 336 Ill. app. 205; *Hurley* v. *Graber,* 405 Ill. 331; and there is no presumption of jurisdiction in a Commission exercising a limited or statutory jurisdiction such as the Civil Service Commission, *Funkhouser* v. *Coffin,* 301 Ill. 257, 260.

It is therefore our opinion that the jurisdiction of the Commission in this and all matters is limited within the boundaries of the City of Chicago, which precludes effective service of its subpoenas outside the City of Chicago.

Should the Commission desire the appearance of witnesses at a hearing, who reside outside of the City of Chicago or in counties of Illinois other than Cook we are of the opinion that you should avail yourself of the provisions of Section 33 of the Cities Civil Service Act, that part which provides:

> "Any Circuit Court of this State, or any judge thereof, either in term time or vacation, upon application of any such Commissioner, or officer or board, may in his discretion compel the attendance of witnesses, the production of books and papers, and giving of testimony before the Commission, or before any such Commissioner, investigating board or officer, by attachment for contempt or otherwise in the same manner as the production of evidence may be compelled before said court."

Should such an appropriate application be filed by the Commission in any Circuit Court of this state requesting an order compelling the attendance of witnesses, and such order is signed by the judge of the court, it is the duty of the clerk of the court to issue subpoenas compelling the witnesses to appear and the sheriff to serve and execute the subpoenas.

Section 62 of the Civil Practice Act of Illinois (I.R.S. '49 Ch. 110 Sec. 186) provides:

"Section 62—Subpoenas. The clerk of any court in which an action is pending shall, from time to time, issue subpoenas for such witnesses and to such counties in the State as may be required by either party, and every clerk who shall refuse so to do shall be fined, at the discretion of the court, in any sum not to exceed $100.00. An order of court shall not be required to obtain the issuance by the Clerk of a subpoena duces tecum. (Amended by Act approved May 16, 1945.)

Par. 15 of Chapter 125 of the Ill. Rev. Stats. of 1951 provides:

CERTIFICATION FROM TWO LISTS

(No. 11740—Civil Service Commission—C. H. L.—September 13, 1953.)

We have your letter of August 24, 1953 in which you state that the Commissioner of Police has requested you to certify 400 eligibles for appointment as patrolmen, in four equal groups, the certifications of each such group to be effective on specified dates; that 231 eligibles remain on the list for Patrolmen posted by your Commission on July 14, 1952, exclusive of 63 who have waived certification, the waivers of 17 of whom expire on September 24, 1953 and the balance on various later dates; that a second list for the same position posted April 20, 1953 is constituted of the names of 517 eligibles, and you request as follows respecting this matter:

"Your opinion is requested as to when, under what circumstances and in what order this Commission may certify

(a) Eligibles for Patrolman from the eligible list posted by it on April 20, 1953; and

(b) Those on the eligible list posted on July 14, 1952, who have waived or waive certification and whose waivers hereafter expire or are withdrawn."

The Cities Civil Service Act makes no provision for waivers of certification or appointment to positions in the classified civil service.

Such waivers and practice with respect thereto are, however, authorized by Rule IV—Certifications, of the Rules of your Commission, as follows:

"Section 4. Waiver. A person certified or tendered reinstatement must report to the head of the department or appointing officer within five days from the date of certification and in case of failure to report, his name shall be removed from the eligible register. The Commission may permit an eligible to waive certification or reinstatement within five days. If the waiver is approved, the name of such eligible shall not be certified until the waiver has been withdrawn or ceases to be in effect. Waivers, whether continuous or otherwise, shall not be permitted for a period longer than one year, and if the waiver is not witdrawn within one year from the date on which such eligible waived, it shall cease to be in effect and the Commission shall reinstate his name in its proper place

on the eligible register, provided, however, that where an eligible enters the military or naval service of the United States or is holding an existing position in the classified service and for that reason waives certification, such waiver may stand during the life of such register, unless sooner withdrawn."

The decisions in Illinois have held that the Rules of the Commission, being made pursuant to authority granted by the Civil Service Act, are entitled to the same force and effect as the statute. (*City* v. *Bullis*, 124 Ill. App. 7, decided in 1905, and numerous other cases decided in the Appellate and Supreme Courts since then.)

The question of waivers has been subject to decision by the courts and the rule of the Commission interpreted *(Peo. ex. rel. Cibic* v. *Geary*, 318 Ill. App. 231, decided in March 1943; *Peo. ex rel. Caslin* v. *Geary*, 330 Ill. App. 172, decided in December, 1946. See our opinion dated November 3, 1949 addressed to you.) In the latter case the court held:

"Section 4 of rule 4 of the rules of the Civil Service Commission provides that veterans are to be put on a special military eligible list and are to be certified to any available vacancy after the expiration of their service, even though in the meantime the eligible list is exhausted or cancelled, and in addition thereto, section 10½ of the Civil Service statute gives preference to veterans for appointments and promotions in the classified service."

The aforesaid language referred to your Rule IV, Section 4 as it read at that time. It is to be noted that your Commission has since then eliminated the part of Section 4 pertaining to a special military eligible list. We have cited the aforesaid case to show that the courts recognize the rule of the Commission pertaining to waivers.

It is our opinion that the present Section 4 of Rule IV of the Commission is entirely permissive in its terms and operation; that the power to permit or approve waivers, or not to, resides exclusively in the Civil Service Commission.

We are informed by the Secretary of your Commission, Mr. James Osborne, that since writing your letter of August 24, 1953 your Commission has certified 235 eligibles from the patrolman's list posted on July 14, 1952 and 18 from a reinstatement list for patrolmen, making a total of 253 certifications, and that you now have 57 eligibles who have waived.

These 57 have all, on their own volition, refused to accept certification by signing waivers, stating in their said Waiver of Certification that:

"I have been notified that my name has been reached for certification on the eligible list for patrolman. I desire to waive appointment, and ask you not to certify my name until such time as I shall notify you in writing that I wish to be certified."

The Civil Service Commission, under Section 4, accepted these waivers in good faith and these waivers are now in full force and effect until those who waived shall notify the Commission in writing that they wish to be certified, providing that if waivers are not withdrawn within one year, the Commission shall reinstate their names on the eligible register, and in the case of persons who entered the military or naval service or are holding existing positions in the classified service, such waivers may stand during the life of such register, unless sooner withdrawn.

It is, therefore, our opinion that the 57 men who waived cannot now be certified, and that, in view of the fact that there are now no names that can be certified from the patrolman's eligible list posted on July 14, 1952, and the Commission, having anticipated the present emer-

gency by creating a new patrolman's list, posted on April 20, 1953, it is the duty of the Commission to certify the balance of the 400 eligibles requested by the Hon. Timothy J. O'Connor, Commissioner of Police, to be certified on September 16, September 17, September 18 and September 21, 1953, or 147 men from the new eligible list posted on April 20, 1953.

Eligibles from the 1952 register, whose waivers expire, are withdrawn or cancelled, should be certified in the order of their standing when, thereafter, the Commissioner of Police requests the certification of additional names.

RETIRED POLICE OFFICERS AS CROSSING GUARDS

(No. 11751—Alderman, 47th Ward—October 1, 1953.)

We have before us your letter dated September 16, 1953, in which you write:

> "Your opinion is requested as to the possibility of the City of Chicago hiring retired police officers as school crossing guards.
>
> As you are, no doubt, aware many police officers have retired with the inadequate pension of $104.00 per month. Some are anxious to supplement this inadequate pension with further earnings. It occurred to me that the City of Chicago would reap such benefit through the use of physically capable retired police officers as school crossing guards. In order to have full facts before me for presentation at the next Council meeting I would greatly appreciate your advice on this important matter."

The men you speak of have been legally retired from the police force of the City of Chicago, and your question is now whether or not these men may be hired by the City as Crossing Guards.

The Municipal Code of Chicago provides:

> "Chapter II
>
> Department of Police
>
> * * *
>
> Organization and Functions
>
> * * *
>
> 11-2. There are hereby created the offices of commissioner of police, chief of the uniformed force, supervisors of police divisions, chief of detectives, deputy chief of detectives, chief of traffic, director of personnel, chief surgeon, poundmaster, chief operator, department inspector, custodian of lost and stolen property, secretary of the department, and such number of captains, lieutenants, sergeants, patrolmen, patrolwomen, patrolmen operators, police surgeons, matrons, assistant identification inspectors, and photographer and identification inspectors as may be provided for in the annual appropriation ordinance. These, together with all kennelmen, dog catchers and hostlers, shall be known and are hereby designated as 'policemen' and shall constitute the police force of the city.

To supplement the police force the commissioner of police may appoint such number of civilian crossing guards to regulate traffic in the vicinity of grade schools during such hours of school days as may be required for that purpose. (Amend. Coun. J. 12-13-48, p. 3255.)"

The Annual Appropriation ordinance for 1953 passed by the City Council of the City of Chicago provides:

"Department of police

* * *

Uniformed Force

General Police Division

* * *

Salaries and Wages

* * *

Crossing Guards as needed at $1.50 per hour."

* * *

In compliance with Section 3 and 10 of the Cities Civil Service Act the Civil Service Commission of the City of Chicago has classified the position of Crossing Guards (Female) in Branch IV, Class S and in Grade 3 in the Classified Service of the City of Chicago which classification embraces "positions in the active ranks of the Police Department and positions directly relative to the performance of police duty."

In the case of *Malloy* v. *City of Chicago*, 369 Ill. 97 at page 102 the Court held that Section 12 of the Cities Civil Service Act as amended in 1935 which provides for the retirement of policemen from the service of the City of Chicago at the age of 63 years and the ordinance passed by the City Council of the City of Chicago, Municipal Code of Chicago, Sec. 25-37 providing for their retirement at that age "manifestly refers only to those in the classified service." Branch IV, Class S, embraces "positions in the active ranks of the Police Department and positions directly relative to the performance of police duty" which includes all grades in said classification, including the position of Crossing Guard.

Section 978 of Chapter 24 of the Cities and Villages Act pertaining to the Policemen's Annuity and Benefit Fund—Cities over 200,000 (Ill. Rev. Stats. 1951—I, pg. 743) provides:

"(b) When any such policeman shall re-enter the service after he shall have attained an age of fifty-seven (57) or more years, payments on account of any annuity previously granted to much policeman shall be suspended during the time thereafter that he shall be in the service, and when he shall again resign or be discharged therefrom, payments upon the Annuity previously shall be resumed. * * *"

We are of the opinion that in enacting the above pension act the legislature intended that if a policeman re-enters the police service after receiving a pension under that act his annuity shall be suspended during the time thereafter that he shall be in the police service.

In our opinion No. 9876, dated August 22, 1938, Op. Corp. Counsel, Vol. XX, p. 58, we held that a pensioner of the city, who re-entered the services of the city as a non-civil service appointee, is not entitled to be paid his pension for any of the time he was so employed by the city, since such pensioner is prohibited from claiming his pension by an order of the City Council and that the provisions of the order relative to the signing of a waiver and action by the head of the department employing the pensioner

are solely for the purpose of advising the pension board concerned and are not necessary to carry into effect the order of the City Council. (Referring to *Kelly* v. *Retirement Board,* 292 Ill. App. 390 (1937), *Peo. ex rel. Luthardt* v. *Retirement Board,* 273 Ill. App. 387 and Coun. J. June 10, 1931 (Order) 67 C. J. 305).

In our opinion No. 10985, dated August 8, 1947 (Op. Corp. Counsel, Vol. XXII, p. 191) we held:

> "Sec. 944-34 of the Firemen's Annuity and Benefit Fund Act (Ill. Rev. Stats. 1945, Ch. 24, Sec. 944.34, page 619) provides:
>
> > '944.34. Re-entry into service 34 (a). When any fireman who shall resign or be discharged from the service after the date upon which this act shall come in force and effect in such city, shall re-enter the service before he shall have attained an age of fifty-seven (57) years, any annuity previously granted to such fireman and any annuity fixed for the wife of such fireman shall be cancelled.'
>
> In the case of *Kelly* v. *Retirement Board of the Firemen's Annuity and Benefit Fund of Chicago,* 292 Ill. App. 390, the Court in discussing the above mentioned Section 34, said:
>
> > 'The provision in this statute relating to the suspension of pensions appears to us to be clear and unambiguous, and it therefore requires no construction. It provides that when an applicant becomes a pensioner and re-enters the fire service the board has power to suspend payment of his pension during the time he was re-employed in the service; and this clearly refers only to service in the fire department.'
>
> > 'It is our opinion that a person on the fireman's reinstatement list is not re-employed in the service within the meaning of section 34 above referred to and that he is therefore entitled to his service pension.' "

In our opinion No. 11085, dated November 29, 1948, (Op. Corp. Coun., Vol. XXII, p. 213) we held:

> "We are therefore of the opinion that a retired Fire Department employee who is receiving a pension has the right to be employed and draw his salary from the Municipal Tuberculosis Sanitarium while receiving such pension."

The aforesaid two opinions are based upon the fact that the retired firemen were *not* re-employed "in the same service."

In your letter you suggest that the retired police officers be employed "in the same service."

The classification of Crossing Guards by the Civil Service Commission shows that they perform police duties, and we are informed by the City Comptroller that they, as well as policemen of all ranks in the same classification, Branch IV, Class S, are paid from the Police Force payroll of the City of Chicago. We are therefore of the opinion that it would be incongruous and against public policy to permit a retired policeman to draw a salary as a civil service Crossing Guard in the service of the Police Force of the City of Chicago at the same time that he receives a pension annuity from his previous service as a member of the Police Force of the City of Chicago.

FIREMEN'S ARBITRATION BOARD

(No. 11772—City Council—J. C. M.—November 25, 1953.)

Pursuant to your verbal request to be advised as to the necessity for the creation of a Firemen's Arbitration Board as provided by Article 13A of the Revised Cities and Villages Act (Chap. 24, Ill. Rev. Stats. 1953), be advised that on January 3, 1952 this office, upon a similar request by the then chairman of the Finance Committee, analyzed the statute and prepared a formal order providing for the creation of such a Board, a copy of that letter, the order and the statute being attached hereto. As far as we are able to discern, the order was not passed by the City Council. You will note that under the statute the necessity for the creation of such a Board is the existence of a dispute concerning wages, hours of work or conditions of employment of members of the fire department. If such a dispute exists, the Board as provided by the statute should be created.

On July 2, 1953 (C. J. P. 5063) the City Council, upon recommendation of the Finance Committee, passed a resolution providing for the appointment "of a special committee to give consideration to hours of work and working conditions for city firemen and to advise His Honor, the Mayor, and the Committee on Finance as to its conclusions in these matters."

On August 6, 1953 the Mayor appointed the following persons as members of that special committee (C. J. p. 5270):

Fire Commissioner Michael J. Corrigan.

Assistant Fire Commissioner, Anthony J. Mullaney.

Fire Marshal John J. Haberkorn, representing the Fire Department;

Captain Thomas O'Brien.

Lieutenant James T. McGuire, representing the Fire Fighter's Association;

Mr. Elmer Bjurstrom, representing International Union of Operating Engineers, Local 587;

Alderman P. J. Cullerton, as Chairman;

Alderman John Egan, representing the City Council;

Mr. Arthur Lindell, Budget Director.

The statute provides for a Board of five members, four of whom shall be oppointed by the corporate authority who in turn shall select the fifth member. In making two of the four appointments by the corporate authority, it shall give due consideration to the recommendations of members of the fire department. The Board's recommendations shall be advisory only and shall not be binding upon the municipality or upon the members of the fire department.

On November 24, 1953 the Firemen's Association of Chicago, by James T. McGuire, President, served a notice and demand upon the City to appoint a Firemen's Arbitration Board under the statute and submit the names of six members to the Board to represent the firemen. We are advised that you have a copy of this notice and demand.

If there exists a dispute as provided by statute, the Firemen's Arbitration Board should be created as provided therein, to consider the particular dispute. The present special committee referred to above is not such an Arbitration Board.

RETURN FROM DISABILITY LEAVE

(No. 11777—Fire Commissioner—C. H. L.—December 9, 1953.)

Answering your communication dated November 16, 1953, we are informed by the Civil Service Commission that Mary H. Brault is a Principal Clerk, promoted to that position on December 29, 1951, and that she has been on leave of absence from that position since January 1, 1953, drawing disability.

We are also informed that Marie Adams is a Senior Stenographer, promoted to that position on January 26, 1948 and that she is now No. 11 on the promotional list for Principal Stenographer.

You ask our opinion as to the following:

> "In the event the Civil Service Commission would honor a requisition for one (1) Principal Stenographer, to be certified from the list of Principal Clerk, which would result in the promotion of Marie O. Adams, will you be kind enough to advise the status of Mary H. Brault and Marie O. Adams in the event Mary H. Brault returned to duty from her disability leave."

It is our opinion that in order for the Civil Service Commision to certify Miss Adams as Principal Clerk under your Account 51-A-3 of the Annual Appropriation Ordinance it will be necessary for you as Fire Commissioner to receive authorization from the Committee on Finance of the City of Chicago for such employment.

Should Miss Adams then be employed and Mary H. Brault later return after her disability leave of absence, and there no longer exists a vacancy in the position of Principal Clerk, her name would have to be restored to the reninstatement list under the provisions of Rule VIII of the Civil Service Commission Rules which provides:

> "Section 5. Holding Position Open. Upon the expiration of a leave of absence, an officer or employe shall report to the head of his department and be reinstated in his position, unless the position in the meantime has been filled by certification from an eligible register, then he shall be reinstated only when a vacancy in a position of the same branch, class, grade or rank and character of work and approximate salary exists, and in order of his seniority of certification."

B. SALARIES

WAGE ASSIGNMENT

(No. 11121—City Comptroller—C. N.—January 27, 1949.)

We have your letter of January 19, 1949, with which you transmit what you describe as a complete file relating to an assignment of wages by Paul Goossens, an employee of the Bureau of Streets. The main document submitted, consisting of an assignment of wages in triplicate, shows than an order was entered in the Juvenile Court of Cook County, Illinois, setting forth that the said Paul Goossens' minor son was committed to the care and guardianship of a paternal uncle; and that this city employee was ordered to contribute $20.00 per month for the care and maintenance of the child, the said amount being payable to the clerk of the court aforesaid. The assignment goes on to state that in order to secure the payments of such installments as they fall due, the said employee assigns to John E. Conroy, Clerk of the Circuit Court of Cook County, $20.00 per month from each month's salary to be received from the City of Chicago, Bureau of Streets, computed from December 10, 1948, the date of the assignment. The assignment of wages is signed by the city employee and witnessed by a Cook County Probation Officer, who forwarded multiple copies of the assignment to your office, together with a letter from the Chief Probation Officer informing you of the order and assignment.

You state that upon the advice of this department you have heretofore refused to recognize wage assignments. You ask for an opinion as to whether, inasmuch as this is a court order, you are obliged to recognize it.

In numerous previous opinions on this subject matter compiled for your office, including our Opinion No. 8774 of May 23, 1935 (a digest of which can be found at page 160, volume XVIII, Opinions of the Corporation Counsel and Assistants), we set forth that an assignment of salary by a city employee is void as against public policy. Among the citations given supporting these opinions was that of *Merwin* v. *City of Chicago*, 45 Ill. 133 (1867), in which the Supreme Court of Illinois held that to use the facilities of your office for the collection and payment of private debts would result in added hardship for taxpayers.

Although no copy of the actual court order is included in the file submitted to us, in view of the correspondence revealed, there is no reason to doubt that the references contained in the assignment are authentic. It is clear, therefore, that any such court order in so far as it calls upon your office to make the payments described is void as against public policy. The court order should have confined itself to instructing the employee to make the payment described to the clerk of the court.

After careful examination of all the documents submitted to us by you, we are of the opinion that no duty is imposed upon you to recognize this assignment of wages.

UNION WELFARE PAYMENTS

(No. 11334—Public Works Commissioner—A. F. G.—September 1, 1950.)

In your letter of August 16, 1950, you state in accordance with the Prevailing Wage Act, bidders on proposed sewer construction are notified that not less than the prevailing rate of wages may be paid

to laborers, mechanics and workmen on public works. For this purpose, you state it is part of your standard procedure to include in your specifications, a tabulation of wage rates for all classes of labor involved in sewer construction contracts.

You call attention to the fact that an increasing number of unions in negotiating employment contracts have included in such contracts provisions for payment by the employer, of fixed amounts per hour of labor, into a union welfare or retirement fund.

You ask our opinion "as to whether the employer's contribution to the welfare fund can be considered as an obligatory payment to workmen employed on public works construction, and whether in our specifications such additional payment should be added to and considered part of the hourly wage rate or tabulated separately as an additional obligatory payment or omitted from our tabulation and considered as separate from direct wages as is the case of Social Security."

Section 2 of the Prevailing Wage Act covers "Definitions." The last paragraph of that section is as follows:

> "The terms 'general prevailing rate of per diem wages' or 'general prevailing rate of wages' or 'prevailing rate of wages' when used in this Act shall be the wages paid generally, in the locality in which the work is being performed, *to employees* engaged in work of a similar character."

Section 3 of the said Act is in part as follows:

> "not less than the general prevailing per diem wages for work of a similar character in the locality in which the work is performed, and not less than the general prevailing rate of per diem wages for legal holiday and overtime work, *shall be paid to all laborers, workmen and mechanics* employed in the construction of public works, exclusive of maintenance work."

Section 5 of the said Act is as follows:

> "The contractor and each sub-contractor shall keep or cause to be kept, an accurate record showing the names and occupation of all laborers, workmen and mechanics employed by them in connection with said public work, showing also the *actual per diem wages paid to each such workers,* which record shall be open to the public body awarding the contract, its officers and agents, and to the Director of Labor and his deputies and agents."

Section 6 of the said Act provides a penalty for failure to keep the aforesaid record.

Section 4 of the Act provides in part as follows:

> "The public body awarding any contract for public work on behalf of the State, or on behalf of any County, city and county, city, town, township, district or other political subdivision thereof, or otherwise undertaking any public works, shall ascertain the general prevailing rate of per diem wages in the locality in which the work is to be performed, for each craft or type of workman or mechanic needed to execute the contract, and shall specify in the call for bids for said contract what the general prevailing rate of per diem wages in the said locality is for each craft or type of workman or mechanic needed to execute the contract, also the general prevailing rate for legal holiday and overtime work, and it shall be mandatory upon the contractor to whom the contract is awarded and upon any contractor under him, to pay not less than the said specified rates *to all laborers, workmen and mechanics employed by them in the execution of the contract.* * * *"

From a study of the cited sections of the Prevailing Wage Act it is apparent that the legislature intended the wages mentioned in the Act, to be the wages actually paid to the laborer or mechanic, and not that wage plus contributions made by the employer to some welfare or security fund for the future benefit of the employee.

The contribution by the employer to the welfare and retirement fund of the union is no different from his contribution to Social Security, except that one is made by voluntary agreement and the other by compulsion of law.

It is our opinion, therefore, in carrying out the provisions of section 4 above quoted you should specify in the call for bids the general prevailing rate of wages actually paid to workmen and not include the aforesaid contributions which are not paid directly to the workmen, but as contributions to a fund for his benefit. In the example cited in your letter, re common labor, if you were to specify the rate of wages $1.90 per hour when the rate actually is $1.85, the successful bidder under the law would be required to pay to the laborer the rate specified, and the contractor under his agreement with the union, would have to pay in addition 5 cents per hour into the union welfare fund. We do not believe such was the intent of the law and would impose on the municipality letting such a contract additional burdens not contemplated by the Act.

This office has held that the Prevailing Wages Law does not apply to workmen employed directly by the city. (Ops. Corp. Coun., Vol. XXI, p. 66.) In fixing the wage scale of employees paid on a per diem basis, we do not believe the City is limited to pay only the amount paid by private contractors for the same kind of work. The city council has no authority to appropriate any sum as a contribution to a private welfare fund established by the unions by agreement with certain contractors' associations.

Our Supreme Court has repeatedly held that a municipal corporation in this State has no power in the absence of express authority to donate or loan money to private enterprises. (*Bissel* v. *City of Kankakee,* 64 Ill. 249; *Mather* v. *City of Ottawa,* 114 Ill. 659; *City of Fulton* v. *Northern Illinois College,* 158 Ill. 333; *Washingtonian Home* v. *City of Chicago,* 157 Ill. 414.)

In making adjustments in wage rates of certain per diem employees by ordinance of June 14, 1950 to which you refer, the city council evidently being aware of its constitutional inability to contribute directly to the welfare fund, fixed the per diem wages at a rate which would be equivalent to the prevailing rate of wages paid by private contractors plus their contributions to the welfare fund.

In preparing the tabulation of prevailing wages paid to workmen generally in the locality we are of the opinion you may disregard this action of the city council.

BACK SALARY SET-OFFS

(No. 11376—City Council—J. B. P.—April 12, 1951.)

On March 22, 1951, the Supreme Court of Illinois handed down a decision of special importance to municipalities, in the case of *Kelly et al.* v. *Chicago Park District,* Superior Court No. 31697, in which the City of Chicago appeared as *amicus curiae.* The Supreme Court in sustaining

the position taken by the City clarified two principles of law: first, that in the absence of a statute expressly making the position of a policeman a public office, the policeman is not a public officer in the same sense in which an elective official is a public officer; and, second, that a city may set-off against the reinstatement pay of policemen and other civil service employees amounts earned from other employment during their illegal ouster.

The *Kelly* case involved an action by 14 Park District policemen to recover back salaries aggregating $279,000 pursuant to an order of the court directing their reinstatement to positions from which they had been unlawfully excluded. During their ouster they had earned $110,000 from outside employment. Both the trial court and the Appellate Court had held that the policemen were entitled to the full compensation without regard for outside earnings. The primary position taken by the Park District was that the entire claim was barred by limitation and by the failure of the policemen to prove the legal existence of the positions claimed. The City of Chicago was interested particularly in the issue of the reduction of damages because of the case of *Bergquist et al.* v. *Gregory, et al.*, Appellate Court No. 45154, in which the City Comptroller was appealing from a judgment citing him for contempt because in tendering certain policewomen their reinstatement back-pay he had withheld amounts they had earned in the meantime on other jobs with the City.

In both the *Kelly* and the *Bergquist* cases, the City took the position that policemen and policewomen are not public officers whose salaries, like those of elective officials, are immune from set-off.

The Supreme Court, in the *Kelly* case, held that the policemen were not governmental officers, that upon reinstatement their salaries are subject to the application of the doctrine of "avoidable consequences", and that the back-salaries due them should be reduced by the $110,000 they had earned in outside employment.

The following excerpt from the opinion, is pertinent:

> "In determining that plaintiffs were entitled to their salaries for the period they were wrongfully prevented from working, the Appellate Court followed the familiar rule of law pertaining to public officers, which recognizes that if one is lawfully entitled to a public office the right to salary attaches to the office and that it may be recovered in full, irrespective of any service rendered and without regard to the fact that he may have earned money elsewhere in private employment. While the rule undoubtedly applies to the holders of public office, we think the Appellate Court erred in extending the rule to the plaintiffs in this case. As a general proposition, this State, including others where the question has arisen, has rejected the idea of classifying all civil service employees as officers. * * *
>
> "While plaintiffs' right of compensation does not grow out of a contractual relation, it does, unlike that of an officer, grow out of a rendition of services. We see no basis for a finding that plaintiffs are entitled to be paid for their services twice, when none were rendered. It is our view that the Appellate Court erroneously held that plaintiffs' salaries could not be reduced by earnings from outside employment. * * *"

The effect of this decision is to overrule certain prior decisions which had caused the Appellate Court a great deal of difficulty and which had preserved an antiquated fiction of law that served no useful purpose in modern, municipal employer-employee relations. Reinstated policemen may hereafter expect to receive only the difference between the reinstatement salaries and the amounts they otherwise earned during their removal.

This decision of the Supreme Court will bring about large savings for municipal governments in Illinois. It represents a substantial victory for the legal department of the City of Chicago.

EFFECTIVE DATE OF WAGE INCREASE

(No. 11550—Budget Director—R. J. N.—June 20, 1952.)

Your letter of June 6, 1952, requests our opinion as to the effective date of wage increases provided in a supplemental appropriation ordinance to be introduced to the City Council on July 16, 1952, and passed on July 30, 1952.

Your letter indicates that publication of this ordinance could be had on July 31, 1952. Senate Bill 562 which authorized supplemental appropriation ordinances and tax levies and also authorized increases in pay of city employees by amendment of Sections 22-1, 16-1 and 999 of the Cities and Villages Act, also requires that such supplemental appropriation ordinance be published. Section 10-3 of the Cities and Villages Act (Chapter 24, Section 10-3, Ill. Rev. Stat. 1951) provides in part as follows:

> * * * "No such ordinance shall take effect until 10 days after it is so published." * * *

Since the authority to increase the pay depends upon the passage of an appropriation therefor, the increases cannot be made effective until the ordinance takes effect.

We are therefore of the opinion that pay increases authorized by the proposed supplemental budget cannot take effect until August 10, 1952, under the present schedule as outlined in your letter.

SALARY DURING SUSPENSION PERIOD

(No. 11557—Acting President, Board of Health—C. H. L.—June 30, 1952.)

We have before us your communication dated May 14, 1952 in which you ask our opinion as the procedure to be followed by the Health Department relative to the payment of salary to an employee during the period of his suspension from March 5 to May 12, 1952 during which time he did not perform any functions or duties for the Health Department.

The portion of Section 12 of the Cities Civil Service Act which pertains to suspension reads:

> "* * * nothing in this Act shall limit the power of an officer to suspend a subordinate for a reasonable period not exceeding thirty days. * * *"

We are of the opinion that nothing could extend the suspension period in McGah's case beyond the thirty day period provided for in said

section 12, not even trial on charges before the Civil Service Commission had they been filed.

We can see no escape from the liability of the City for payment to the employee for the period of his suspension March 5 to May 12, 1952, less the first thirty days thereof; unless it can be proved that he had other employment and drew pay therefor during the period beyond the thirty day period.

If he drew no such other pay you have no recourse but to pay him for that period beyond the thirty days.

In a case of this kind where the City is plainly liable for payment of back salary for any period beyond the thirty day suspension period, where there is no waiver of said back salary, the person suspended should be put back to work and the City thereby get the benefit of his services.

SALARY DURING SUSPENSION PERIOD

(No. 11559—Acting President, Board of Health—C. H. L.—July 9, 1952.)

We have your letter dated June 23, 1952, attaching a Notice and Demand received by you from Attorney Michael F. Ryan in which it is claimed that the claimant, formerly employed in the Health Department as a food inspector, and who was discharged on June 11, 1952 after a hearing before the Civil Service Commission, claims that he is entitled to be paid back salary withheld from him during his suspenson period.

You ask to be advised as to what action, if any is necessary on the part of the Health Department regarding this Notice and Demand.

We have checked the facts relating to Schenker's suspension and discharge with the office of the Civil Service Commission and find them to be as follows:

August 1, 1948—Appointed food inspector;

January 16, 1952—Suspended pending charges;

February 1, 1952—Charges filed with the Civil Service Commission;

March 19, 1952—Hearing set for this date and continued at employee's request to April 16, 1952; employee signing a salary waiver for the period March 19, 1952 to April 16, 1952.

April 16, 1952—Hearing continued at the request of the Commission to April 30, 1952;

April 30, 1952—The hearing was again continued at the request of the Commission to May 14, 1952;

May 14, 1952—The hearing was had.

June 11, 1952—Finding of guilt and employee ordered discharged.

Section 12 of the Cities Civil Service Act provides:

"* * * Nothing in this Act shall limit the power of an officer to suspend a subordinate for a reasonable period not exceeding thirty days. * * *"

Under the provisions of said Act the employee is clearly not entitled to any back salary for the first thirty days of his suspension period (and which he does not claim).

Furthermore, he is not entitled to any back salary beyond the first thirty days of suspension for the period March 19, 1952 to April 16, 1952, the back salary for which he waived in consideration of his requested continuance of the hearing before the Civil Service Commission (and which back salary he does not claim).

The question here involved is whether or not a person who has been discharged after a hearing before the Civil Service Commission has any legitimate claim for back salary beyond the thirty day suspension period allowed by Section 12 of the Civil Service Act.

We can find no case in point on this question.

We have, however, rendered opinions covering this question and refer to the following:

In our opinion No. 7061, dated August 7, 1931 and addressed to Dr. Herman N. Bundesen we wrote:

> "In view of the explicit and unqualified declaration of the legislature in section 12 of the Civil Service Act, and the terse statement of the Supreme Court that "the Civil Service law is necessarily a part of the contract of employment of every civil service employee * * *", we can see no escape from the liability of the City to the employee for the salary of his position for the period of time in excess of thirty days that he is kept in suspension or lay-off. *People ex rel. Jacobs* v. *Coffin*, 282 Ill. 599, 610.
>
> However, there are other reasons why in this particular case the employee cannot recover for the time exceeding the thirty-day period of suspension. He has been discharged from the service, and he cannot now be reinstated and render the service for which alone he would be entitled to his salary. No demand for reinstatement in the service or for a place on the payroll was made after his right thereto had accrued. There was no refusal by the head of the department to reinstate the employee, nor did he report in person for reinstatement and for reassignment to the work of his position, and there was no offer to perform the services for which he now demands payment. Having failed before his dismissal to do all these things which are conditions precedent to any rights of recovery for salary, no right of action which he would otherwise have had can now be successfully maintained in his behalf.
>
> One cannot sue for the salary of an office or place of employment until he has by some direct action, in this case *mandamus*, been restored to such office or place, for the reason that during the time for which he seeks to recover, such salary may have been paid to a *de facto* incumbent who performed the duties of the office or place. *City of Chicago* v. *People*, 210 Ill., 84, 93; *Kenyon* v. *City of Chicago*, 135 Ill., App. 227; *Bullis* v. *City of Chicago*, 235 Ill., 472, 480; *Kenneally* v. *City of Chicago*, 220 Ill., 485.
>
> Payment to a *de facto* officer of the salary of the office, made while he is in possession and discharging the duties of the office is a good defense to an action brought by the *de jure* officer upon his reinstatement to recover the same salary. *O'Connor* v. *City of Chicago*, 327 Ill., 586. * * * The right of compensation grows out of the rendition of service and not out of any contractional relation. *Mitchell* v. *City of Chicago*, 259 Ill., App. 301; *Cathemann* v. *City of Chicago*, 263 Ill., 292, 295.

Had the suspended employee reported for reinstatement in his position and demanded that he be reassigned to duty, and had the head of the department refused so to reinstate him, and had he then availed himself of his right of action in *mandamus* thereby establishing his *de jure* right to his position, he would now have his right of action in assumpsit for the recovery of the salary for the eighteen days of his suspension in excess of the thirty day limit, but having failed in all this and having rendered no services in the position, and havng been discharged by the civil service commission, he cannot successfully prosecute his claim for this salary."

And in our opinion No. 7798 dated November 3, 1932 and addressed to Hon. James P. Allman, Commissioner of Police we wrote:

"Since the period of suspension by the department head is limited to thirty days, at the expiration of that period a suspended employee may return to the department and demand reinstatement in his position with right to render service therein and to be paid the salary therefor. But such one is not entitled to recover salary for services not rendered. On this point the Appellate Court in the case of *Kenyon* v. *City of Chicago*, 135 Ill. App. 227, at page 231, said: 'During the time for which plaintiff claims salary he was not in the employ of the defendant and did not work and performed no service entitling him to compensation. On the reasonable theory that he who demands pay for his service must perform the service for which he demands payment, there can be no such thing as constructive service. The work of a department of a municipality must be done by the actual labor of the servant.'

The discharged patrolman cannot recover salary for the period from August 3rd, the date of the expiration of his suspension period, to August 26th, the date of his discharge by the civil service commission, unless he actually performed the services of a patrolman during that period. At the expiration of the lawful period of suspension, the employee has the right to immediate reinstatement in his position upon the condition, however, that he personally appear before the department head and demand such reinstatement, be ready, able and willing to enter upon the discharge of his duties and actually offer to do so. If this was not done by the claimant, Kerrigan, he may not recover the salary for the period from August 3rd to August 26th. In such event there can be no right of recovery on this claim for any part of the period for which salary is demanded."

We concur in the aforementioned opinions, and in answer to your query advise you not to take any action regarding the Notice and Demand, which we return herewith.

FEDERAL TAX LIENS

(No. 11592—H. H. P.—October 1, 1952.)

We have your letter of July 29, 1952, together with a copy of the letter sent you by the city attorney of Grand Rapids, Michigan, in which letter a ruling is requested from NIMLO's Executive Committee upon its position on the question of a federal income tax levy and distraint on salaries and wages of municipal employees.

You request our advice on the position which NIMLO as a body should take on this matter.

In the published volumes of "Opinions of The Corporation Counsel and Assistants" of the City of Chicago law department there are two opinions on the subject under discussion.

Both these opinions were written by Mr. Joseph F. Grossman, now a special assistant corporation counsel of the City of Chicago.

The first opinion, dated October 28, 1941, appears in volume 21, page 64.

The gist of the opinion is that although salaries of city officers and employees are not usually subject to attachment, garnishment or creditor's suits for payment of their debts, this local rule may not be used to defeat a federal tax lien.

In support of the opinion the follow are cited:

Statute: 26 U. S. C. A. secs. 3690, 3710.

Cases: *Merwin* v. *City of Chicago*, 45 Ill. 133 (1867).

Goodwine State Bank v. *Wise*, 263 Ill. App. 291 (1931).

U. S. v. *City of New York*, 82 F. (2d) 242 (1936).

U. S. v. *American Exchange Irving Trust Co.*, 43 F. (2d) 829 (1930).

Karno-Smith Co. v. *Maloney*, 28 F. Supp. 907 (1939).

The second opinion, dated June 16, 1948, appears in volume 22, page 226.

That opinion states that the City of Chicago or any of its agencies is obliged to withhold the salary of an employee and pay it over to the Collector of Internal Revenue in response to a tax levy for delinquent federal income tax owed by said employee.

The opinion cites the same authorities as the previous opinion.

We have read *Helvering* v. *Gerhardt*, 304 U. S. 405 (1938) and other cases and agree that they do not bear on the issue in question and we have been unable to find a case directly deciding this point, but since the establishment of and deductions of income taxes on municipal employees the immunity in this respect has vanished.

It appears to us that the collection of income taxes by levy and distraint falls within the above category and cannot be construed to be such as falls within the immunity afforded by the rule that the national taxing power cannot be used to destroy the states or their political subdivisions.

EXTRA COMPENSATION

(No. 11618—Charman, Committee on Finance—C. N.—November 25, 1952.)

The above claim was submitted to us by you for an opinion as to the City's liability.

Statement of facts.

Claimant, engaged as a building inspector, because of exceptional ability as an amateur photographer was assigned the task of taking special photographs of alley shacks in an emergency drive, sponsored by the Mayor, to clean up bad living conditions in congested areas. In the course of this work, claimant took 459 front and rear photographs of these garages and shacks used for living quarters, which pictures were of great value in court actions based on violations of the building code. Claimant provided these pictures at considerable expense to him and it is set forth that the amounts requested therefore are about one-third of what would have been charged by a professional photographer for similar services. The photos were widely used by metropolitan newspapers. The claim is sponsored by Commissioner of Buildings, who, in agreement with other executives of his department, believe the work was of great value to the department and should be compensated for in the amount claimed.

This is the second time that this claim has received the attention of this department. Previously, it was submitted to John Ward, City Purchasing Agent, who requested an opinion as to whether the City may award a contract for photographic services to an employe of the City of Chicago. In an opinion dated February 11, 1952, compiled in response to this request, this department reached the conclusion, based upon legal citations, that the City cannot legally enter into a contract with a City employe for services of the nature described.

Conclusion.

It is clearly established that no City employe can secure extra compensation not authorized in the appropriation ordinance for the position filled. It is clearly shown that these services, admittedly of great value to his department were performed while claimant was regularly engaged as a building inspector and could be deemed an auxiliary function of claimant's work as an inspector. If the Department of Buildings intended otherwise, he should have been severed from the departmental roll for the period during which the work was done, in which case his special services could have been contracted for on an independent basis.

We are of the opinion, therefore, that this claim should be denied.

VACATION TIME EARNED PRIOR TO DEATH

(No. 11623—C. H. L.—December 8, 1952.)

Replying to your letter to Corporation Counsel John J. Mortimer under date of November 29, 1952 and your request for an opinion therein contained we note you say that:

> "1. For example, a police officer died in the month of July and did not have a furlough for that year. Private industry would give the widow a salary check for the furlough time the deceased did not receive. What would have to be done so that the City could do likewise?
>
> 2. For example, a police officer died on the 12th of the month. Under the present policy the check for the days worked is frequently held, for a long period, on the widow. In cases where she has a number of children, this sometimes works a hardship. What could

be done to make this check available immediately, or at least on the regular pay date?"

First as to your point 1. You appreciate of course that the City of Chicago can take no cognizance of nor be governed by what private industry might or might not do under the circumstance you recite.

In our opinion No. 8826 rendered to Hon. R. B. Upham, dated July 24, 1935 we held:

> "John E. Ericsson died June 29, 1934. The request is based upon the fact that prior to his death John E. Ericsson had earned a vacation period which would be equal to the time for which pay is requested.
>
> We regret to inform you that there is no warrant of authority in law for extending payment of salary after the death of an officer. Death terminates the incumbency of office and payment of compensation for the supposed vacation period after death would be considered an unlawful diversion of public funds in aid for an individual and therefore beyond the corporate power of the City."

We concur in this opinion and say that nothing can be done by the City to act as you suggest private industry would act under the circumstances.

Second as to your point 2 in which you state that:

> "Under the present policy the check for the days worked is frequently held, for a long period, on the widow."

Upon inquiry in the City Comptroller's office we find that any undue long delay in receipt of a check is caused by the widow or administrator.

We are informed that the routine in matters of this kind in the Comptroller's office is as follows:

> "We make up the police checks a few days in advance presuming that the full time will be worked. Should an employe die or be suspended or resign before the completion of the period, his check is pulled out and the split time figured. The unearned monies are returned to the Treasurer and a check for the widow or the administrator, in case of an estate, is held for proper parties to pick up. There is no time lost in splitting the original check after we receive the official notification orders from the Police Commissioner's office."

SALARY FOR HOLIDAY WORK

(No. 11707—Alderman, 36th Ward—C. H. L.—June 30, 1953.)

We acknowledge receipt of your communication of June 24, 1953 to which you attach a mimeographed copy of a letter sent by Theodore O. Eppig, Superintendent of Sanitation, Bureau of Sanitation, to all division wards, all ward superintendants and all supervisory personnel, dated May 29, 1953 on the subject of "Memorial Day, 1953."

In his said letter Mr. Eppig says:

> "The City Council at the meeting on May 28, 1953 declared Monday, June 1, to be a legal holiday for all City Departments with

the exception of the *Police Department, Fire Department* and the *Department of Streets and Sanitation.* Therefore, all activities are to be conducted on June 1 as on any normal working day, this day will be worked by all personnel at straight time without any penalty overtime payments.

Saturday, May 30, is to be considered as Memorial Day. Any persons assigned to work on this day are to be paid according to the Union agreement of either time and a half or double time. However, no veterans are to be paid for this day. It has been ruled that payments to veterans are made only when Memorial Days occurs on a regular working day between Monday and Friday."

You say that you are interested in seeing that veterans working in the Department of Streets and Sanitation on last Memorial Day, May 30, 1953, are paid for that day and whether anything can be done in the matter.

We are advised by Commissioner L. M. Johnson of the Department of Streets and Sanitation that:

'Any daily worker of the Department of Streets and Sanitation, including veterans, *who did not work* received no pay for Memorial Day, May 30, 1953, which fell on Saturday."

A request similar to yours was received by this department from the Hon. R. B. Upham, Comptroller, on May 26, 1936 and which we answered as follows, in an opinion rendered on June 1, 1936:

"Reference is made to your letter of May 26, 1936 in which you request our opinion as to whether persons employed by the city on a daily rate of pay, who have served in the army during any war in which the United States has participated, are entitled to full pay for Saturday, May 30, 1936, Memorial day.

Section 666 of the Revised Chicago Code of 1931 provides:

'Each and every person employed by the city of Chicago who has served in the army of the United States during the period of any wars in which the United States has participated, shall have and shall be entitled to a vacation, with full pay, on the 30th day of May of each year, usually known as Memorial day.'

All city employes on a daily rate of pay are employed and reemployed each day. Since the employes to whom you refer do not regularly work on Saturdays, they are not within that class of persons employed by the city referred to in section 666 who are entitled to a vacation with full pay. There can be no vacation when there is no obligation to work."

We concur in the aforesaid opinion.

You will note that Section 25-10 of the Municipal Code of Chicago has the same provisions as the quoted Section 666 of the Revised Code of 1931.

"TIME-OFF" FOR OVERTIME WORKED

(No. 11720—Commissioner of Streets and Sanitation—M. I. W.—July 22, 1953.)

In your letter of June 18, you referred to an order passed by the city council, in regular meeting on September 10, 1948, page No. 2853, which instructed department heads to allow "time off" for overtime worked.

You request our opinion as to whether or not this order is currently in effect and still applies in the case of your clerks, section foremen and other monthly salaried employees.

The order you refer to reads as follows:

> "WHEREAS, it is the policy of the City to allow compensatory time off for all necessary overtime worked by City employees; and
>
> "WHEREAS, it has been the practice of a number of departments to permit overtime to accumulate without giving the employee time off earned by reason of overtime worked;
>
> "THEREFORE ORDERED that department heads be and they are hereby authorized and directed to allow time off for overtime worked as soon after overtime is performed as convenient, but in any event within three months of that time."

We have found no record of any action by the City Council rescinding, modifying or supplementing this order. It therefore is of the same validity and application as when passed.

If monetary compensation were involved an *ordinance* would have been necessary to effect the purposes the City Council sought to achieve. 9 Op. Corp. Coun. 290 (September 27, 1915). Since the order did not relate to payment of monies but rather to an adjustment of time factors and since it contravenes no ordinance a council order is an appropriate form for the above action.

It is therefore our opinion that this order is presently operative for those of your employees who are salaried on a monthly or weekly basis and for whom no provision for payment for overtime is made in the appropriation ordinance.

CHAPTER III—ANNUITIES AND BENEFITS FOR CITY EMPLOYEES

A. MUNICIPAL EMPLOYEES' ANNUITY AND BENEFIT FUND

MILITARY SERVICE DURING LEAVE OF ABSENCE

(No. 11217—Municipal Employees' A. & B. Fund—G. F. M., Jr.—December 7, 1949.)

In response to your request for an opinion concerning the granting of military service credit to temporary employees, the following is submitted:

Your letter states that, in accordance with the Act governing your Fund, on and after January 1, 1950, temporary or non-civil service employees who have rendered one hundred and twenty months of service to the City may apply for participation in your Fund. Your question is as to whether or not such temporary or non-civil service employees who have been on leave of absence from their positions in the service while on military leave during the period commonly known as World War II may have such period of time counted as a period of service.

Credit for military service for members of your Fund is provided for in Chapter 24¼, Sections 150-153 inclusive, of an Act entitled "An Act authorizing municipal corporations to preserve civil service and pension rights of their employees inducted into or enlisting in the land or naval forces of the United States or ordered to active duty in the military or naval forces of the State," approved March 26, 1941. This Act permitted municipal corporations to preserve civil service or pension rights by adoption of an ordinance, resolution, rule or order, and permitted the corporate authorities of any such municipal corporation to pay into the pension funds of which such persons were members the same amounts that would have been deducted from the salary of the employee on leave of absence for military purposes during the period of his service in the Armed Forces.

Such Act provides that these benefits can be paid only for those who are members of pension funds at the time of their entering the military service. No provision is made for the payment of such sums of money for municipal employees who shall enter the military service and upon returning from such service shall become members of a pension fund. Membership in a pension fund prior to entering the military or naval service would appear to be a prerequisite for obtaining credit for the period of time spent in military service.

Section 51 of the Act governing your Fund (Ill. Rev. Stats. 1949, Ch. 24, Sec. 1094, par. 3) provides in part thereof as follows:

> "In computing the term of service rendered by any municipal employee subsequent to the thirty-first day in the month of December of the year in which this Act shall come in force and effect in such city, the following periods of time shall be counted as periods of service for annuity purposes; . . . In the case of any person em-

ployed by any city or board of education of such city in which this Act shall have been in force and effect to January 1, 1950, from whose salary any sum shall be deducted for the purposes of this Act for the first time on or after January 1, 1950, any period of service rendered by any such employee subsequent to January 1, 1922, and prior to the date on which he became a municipal employee and contributor to the Fund, shall not, regardless of the provisions of any other section of this Act, he counted as a period of service for any purposes of this Act, excepting such period of service for which such person has the right to, and does, make payment for, in accord with the provisions of Section 42 of this Act, in which case such period of service shall be counted as a period of service for all annuity purposes of this Act.

The above provision of the Act governing your Fund further indicates that it was not the intention of the legislature to grant to employees who become members of your pension fund on and after January 1, 1950, the right or privilege of having counted as a period of service any period of time they may have spent in the military service of the United States, since such provision specified that "any period of service rendered by any such employee subsequent to January 1, 1922, and prior to the date on which he became a municipal employee and contributor to the Fund, shall not, regardless of the provisions of any other section of this Act, be counted as a period of service for any purposes of this Act, excepting such period of service for which such person has the right to, and does, make payment for, . . ."

Neither in the Act governing the Fund, nor in any Act relating to the Fund, is any provision made for the payment by the individual for any period of time during which he may have been in the military service, in the event such city shall not have made payment therefor.

We are therefore of the opinion that the period of time spent by a temporary or non-civil service employee in the military service of the United States prior to January 1, 1950, may not be counted as a period of service in determining whether or not such employee has the required one hundred and twenty months of service.

LABORERS

(No. 11221—Municipal Employees' A. & B. Fund—G. F. M., Jr.—December 12, 1949.)

In response to your request for an opinion concerning the status of certain members of your Fund who have now been certified as in the labor service of the City of Chicago, the following is submitted:

From your letter it appears that certain employees of the City of the City of Chicago or Board of Education who are contributors to your Fund have been certified to positions classified in the labor service; that because of the existence of the Fund known as the Laborers' and Retirement Board Employees' Annuity and Benefit Fund, the question has arisen as to whether or not such employee members of your Fund shall continue their participation in your Fund, or whether they shall be excluded from participation in your Fund in order that they might become contributors to and members of the Fund established for the benefit of those classified as being in the labor service of the City of Chicago.

Section 12 of the Act governing your Fund (Ill. Rev. Stats. 1949, Ch. 24, Sec. 1055) provides in part thereof as follows:

> " 'Municipal Employee': . . . : Provided, however, this definition shall not include and this Act shall not apply to . . . any person employed in a position classified by the civil service commission of such city as in the labor service unless such person employed in a position classified as in the labor service shall be a participant in a municipal pension fund (as defined hereinafter in this section) in operation in such city at the time this Act shall come in force and effect therein, or unless such person employed in a position classified as in the labor service, if he shall be in the service of such city or board of education at the time this Act shall come in force and effect in such city and shall not be a participant in any such pension fund shall within six months thereafter apply in writing to the Retirement Board to be included under the provisions of this Act."

The Laborers' and Retirement Board Employees' Annuity and Benefit Fund, to which an employee holding a civil service position classified in the labor department automatically belongs unless excluded by such Act, provides in Section 12 of said Act (Ill. Rev. Stats. 1949, Ch. 24, Sec. 1119) as follows:

> " 'Contributory'; 'Contributor to this fund', or 'Employee': Any person who was, is or shall be employed by such city or board of education of such city as in the labor service thereof and who has been or shall be appointed to such position under and by virtue of an Act entitled 'An Act to regulate the civil service of cities,' approved and in force March 20, 1895, as subsequently amended; . . . and provided further that this definition shall not include and this Act shall not apply to any employee of such city or board of education of such city or retirement of any such annuity and benefit fund now or hereafter in operation in such city who shall be a participant (by virtue of his being or having been an employee member) in any annuity and benefit fund, annuity and retirement fund or pension fund for the benefit of employees of such city or board of education or retirement board or board of trustees now or hereafter in operation in such city by authority of law, . . ."

The above quoted section of the Act pertaining to the Laborers' and Retirement Board Employees' Annuity and Benefit Fund would bar from membership in its Fund any person who is a participant in your Fund; on the other hand, the section of the Act which defines "Employee" in your Fund permitted civil service employees of the City of Chicago holding positions which were classified as being in the labor service to participate voluntarily in your Fund.

In view of the fact that at the time of the establishment of your Fund the Act governing the Fund permitted civil service employees of the City of Chicago who held positions in the labor service to participate voluntarily in your Fund, and the further fact that civil service employee members of your Fund may work in a position other than that to which they were certified by the Civil Service Commission of the City of Chicago and still remain participants of your Fund, we are of the opinion that an employee in the position described in your letter would have the right to continue his participation in your Fund.

SALARY DEDUCTIONS

(No. 11220—Municipal Employees' A. & B. Fund—G. F. M., Jr.—December 15, 1949.)

In response to your request for an opinion as to whether or not salary deductions for pension purposes should be made on an employee's actual salary earnings, or on the salary attached to his civil service position, the following is submitted:

Section 42 of the Act governing your Fund (Ill. Rev. Stats. 1949, Ch. 24, Sec. 1085) limited the amount of salary to be considered in making deductions for the purposes of your Fund to the salary attached to the civil service position of an employee who might be working in a temporary position at a higher salary.

This section must be considered to have been modified by reason of an amendatory Act passed by the General Assembly in 1949, wherein the definition contained in Section 12 of your Act was changed so as to permit municipal employees occupying temporary positions to become members of your Fund, and to have deductions made from their salaries upon the actual earnings of such employees, not to exceed, however, a salary of $4800.00 a year.

In order that the Act might be equitably applied, it must be held that it was the intention of the legislature that Section 42 of the Act governing your Fund was to be construed in connection with the newly amended Section 12 of the Act governing your Fund.

It must therefore be held that the amendments to the Act, which became effective July 1, 1949, permitting temporary employees to become members of your Fund under certain conditions, and requiring that deductions be made upon the actual salary received by such temporary employees (not to exceed the sum of $4800.00 annually) necessarily modifies Section 42 of the Act as to all civil service employee contributors to your Fund who are holding temporary positions, such modification to become effective as of January 1, 1950, the date upon which temporary appointees may become members of your Fund.

We are therefore of the opinion that from and after January 1, 1950, all members of your Fund should have deductions made from their salaries for the purposes of your Fund, based upon the amount actually received by them as salary, not to exceed a salary of $4800.00 per year.

The salary to be considered in determining the amount of any benefit should be the salary upon which deductions are being made at the time the right to such benefit accrues.

OFFICERS OR OFFICIALS

(No. 11324—Municipal Employees' A. & B. Fund—G. F. M., Jr.—August 1, 1950.)

In response to your request for an opinion concerning certain persons who have filed applications for membership in your fund, the following is submitted.

Your question as to each of these persons is whether or not each individual falls within the class designated by the term "Officer" or "Official", as used in Section 12 of the Act governing your fund, (Ill. Rev. Stats. 1949, Chap. 24, Sec. 1055) which provides in part thereof as follows:

> "Sec. 12. 'Municipal Employees' * * * this definition shall include and this Act shall apply to alderman and other officers and officials of such city and Board of Education of such city who shall within six months after January 1, 1950 * * * file a written application with the Retirement Board created by this act to be included under the provisions of this act."

Two of these persons are connected with the Municipal Tuberculosis Sanitarium. Dr. O. L. Bettag, as may be determined from his title of Tuberculosis Control Officer, Medical Director of the Municipal Tuberculosis Sanitarium, is an officer of the Sanitarium and occupies the appointive position. Thomas J. Cooney, General Superintendent, occupies the position of an officer in that he is responsible for the administrative functioning of the Sanitarium. Sec. 72-6 of the Cities and Villages Act (Ill. Rev. Stats. 1949, Chap. 24, Sec. 72-6) provides in part thereof (Par. 4) as follows:

> "All officers and employees of such a public Tuberculosis Sanitarium shall be deemed officers or employees as the case may be, of the City or Village which established the Sanitarium."

Another of these persons, Alvin E. Rose, first entered the City's service on November 1, 1937, as Division Director of the Department of Welfare and worked intermittently in such position until January 1, 1946, when he was appointed Commissioner of Welfare. Mr. Rose is head of the Department of Public Welfare of the City of Chicago, and as head of such Department of Welfare is an officer of the city proper.

The last of the four individuals about whom you requested an opinion, John T. Mehigan, is an Assistant Attorney of the Board of Education of the City of Chicago. The Board of Education is a branch of the City of Chicago, and any officer of such Board of Education must be considered to be an officer of the City. Mr. Mehigan's position in the law department is an appointive position provided for by Statute in Sec. 34-11 of the School Act (Ill. Rev. Stats. 1949, Chap. 122, Sec. 34-11). Mr. Mehigan further occupies the position of Division Head of the Court Division of the Bureau of School Attendance. This position is that of a junior officer as his duties and the manner of his appointment take him out of the classification of an employee.

It is therefore our opinion that all four of the parties about whom inquiry has been made are eligible for participation in your fund.

ALDERMAN AS PARTICIPANT

(No. 11364—Municipal Employees' A. & B. Fund—G. F. M., Jr.—February 15, 1951.)

In response to your request for an opinion concerning Alderman Mathias Bauler, a member of your Fund, the following is submitted:

Your letter states and your records disclose that Alderman Bauler became a member of your Fund on June 29, 1950, under the provisions

of Section 12 of the Act governing your Fund (Ill. Rev. Stats. 1949, Ch. 24, Sec. 1055); and that Alderman Bauler has now filed a request with your Fund that the deductions being made from his salary for annuity purposes be discontinued as of the date in 1951 upon which his term of service as an alderman of the City of Chicago shall terminate. Your question is as to whether or not it is permissible to comply with the request of Alderman Bauler.

Participation in your Fund by elected officials of the City of Chicago is purely voluntary. Unlike an employee who is a member of your Fund by reason of civil service appointment, and whose position may be terminated only by resignation, discharge, or death, elected officials hold their positions in the service of the City for a fixed term, at the expiration of which they are no longer officials of the City of Chicago.

Alderman Bauler is an elected official of the City of Chicago, elected for a fixed term of four years, at the expiration of which he ceases automatically to be a member of your Fund. In the event of his reelection he would, as a matter of course, again become a member of your Fund, but it is his privilege to request that at the expiration of his term of office his membership in your Fund be discontinued.

Such termination of his membership in your Fund would entitle him to receive a refund of his contributions, or if he were above the age limit for a refund, he would be entitled to receive an annuity when he retired from public office. This privilege of excluding himself from membership in your Fund at the expiration of his term of office is, of course, available to every elected official who becomes a member of your Fund.

We are therefore of the opinion that at the end of the term for which Alderman Bauler was elected, and during which he became a member of your Fund, he may discontinue his membership in your Fund.

REFUND TO WIDOW'S ESTATE

(No. 11401—Municipal Employees' A. & B. Fund—G. F. M., Jr.—July 13, 1951.)

In response to your request for an opinion concerning the request of the executor for the estate of Minnie Treloar, the following is submitted:

Your letter states and your records disclose that one Bennett Treloar, a principal clerk in the Municipal Tuberculosis Sanitarium of the City of Chicago, died on January 9, 1950, leaving surviving him his widow, Minnie Treloar; that Minnie Treloar died April 19, 1951, having received a widow's annuity from your Fund from the date of the death of her husband; that no children were born of the marriage of Bennett Treloar and Minnie Treloar; that no executor or administrator was ever appointed for the estate of Bennett Treloar; and that your question is whether or not the money refundable from your Fund under the provision of Section 39 (e) of the law governing your Fund, may be paid to the executor or administrator of the estate of Minnie Treloar, the widow of Bennett Treloar.

Section 39 (e) of the Act governing your Fund (Ill. Rev. Stats. 1949, Ch. 24, Sec. 1082 (e)) provides in part thereof as follows:

> Sec. 39 (e) "In any case in which an amount equal to the total amount accumulated and credited to the account of a deceased municipal employee from sums deducted from the salaries of such municipal employee for annuity purposes in accordance with the provisions of this act, * * * and in the case of a married male municipal employee to such municipal employee both together, in the form of annuity before the death of the last of such persons who shall die, an amount equal to the difference between the sum of such amounts, and the entire amount paid in the form of annuity or annuities, without interest upon either such amount, shall be refunded and paid, * * * to the administrator or executor of the estate of such deceased municipal employee."

In the case of In Re: Estate of Redmond Weldon, Dec'd., a somewhat similar question to this one arose, except that in the Weldon case there had been an estate opened for Redmond Weldon. The court in passing upon the question as to whether the proceeds of the estate of Redmond Weldon should go to his heirs or the heirs of his deceased wife said: (In Re: Estate of Redmond Weldon, Dec'd., 337 Ill. App. 270.)

> "The requirement under the Act that the refund be paid to the Administrator or executor means that the refund is the property of the employee that shall pass as testate or intestate property upon his death, the same as any other property belonging to him, and the further provision of the Act that in the absence of an administrator or executor, the balance, after burial expenses, shall be paid to the employee's heirs 'according to the law pertaining to the estates of deceased persons' emphasizes this meaning."
>
> "It is true that Redmond Weldon might have willed the property otherwise, but his failure to do so makes the property intestate property. His surviving widow takes as heir the intestate remainder in the same property in which she had been made a life tenant."

While such opinion of the Appellate Court requires the payment, by the administrator or executor of a deceased employee's estate, of moneys in such estate that have been paid to it by your Annuity and Benefit Fund, to the executor or administrator of the estate of the employee's wife, rather than to his heirs, the opinion does not in any way, modify the manner of payment of refunds from your fund to the executors or administrators of estates. The opinion does not direct payment into the employee's wife's estate of moneys from your fund but merely establishes who is the heir of a deceased municipal employee under circumstances such as are set out above.

However, Section 39 of the Act governing your Fund (Ill. Rev. Stats. 1949, Ch. 24, Sec. 1082 (e)) provides: (immediately after the portion hereinabove quoted)

> "and if there be no administrator or executor as aforesaid, then the money to be refunded may be applied toward the payment of the burial expenses of such deceased municipal employee, and any balance remaining after the payment of such burial expenses shall be paid to the heirs of such municipal employee according to the law pertaining to the estates of deceased persons:"

In this case there does not exist any person who can be appointed administrator of the estate of Bennett Treloar, except the public administrator. To require the executor or administrator of Minnie Treloar's estate to secure the services of the public administrator in order that the estate of Bennett Treloar may transfer the money paid to it by

your fund to the estate of Minnie Treloar, appears to be placing an unreasonable burden upon the executor or administrator of the estate of Minnie Treloar. The court has interpreted the law to be that Minnie Treloar (even though she has passed away) is the sole heir of the moneys held in your Fund to the credit of Bennett Treloar, her husband.

We are therefore of the opinion that under the circumstances in this case as hereinabove set out, you may pay to the executor or administrator of the estate of Minnie Treloar, the widow of Bennett Treloar, such moneys as may at this time be refundable to his heirs.

B. FIREMEN'S ANNUITY AND BENEFIT FUND

REFUNDING UNUSED DEDUCTIONS AFTER DEATH OF WIDOW

(No. 11133—Firemen's A. & B. Fund—G. F. M., Jr.—March 24, 1949.)

In response to your request for an opinion concerning the disposition of certain moneys in your Fund resulting from the accumulation of salary deductions made from the salary of Eugene T. Freemon, the following is submitted:

Your letter states and your records disclose that Eugene T. Freemon was a Battalion Chief of the Chicago Fire Department; that he died June 5, 1946, leaving him surviving Ann Freemon, his widow; that Ann Freemon died in November of 1947; that there remains in your Fund a partial pension in the sum of $20.83 for that portion of the month of November during which Mrs. Freemon lived; that there are certain other moneys, in the sum of approximately $550.00, remaining in your Fund representing the difference between the moneys paid to Ann Freemon as a pension and the accumulation standing to the credit of Eugene T. Freemon at the time of his death. You request advice as to what disposition is to be made of these moneys.

The partial pension, in the sum of $20.83, is payable to the estate of Ann Freemon. The sum of approximately $550.00, which is the difference between the amount of money received by Ann Freemon as pension and the accumulation standing to the credit of Eugene T. Freemon at the time of his death, should be disbursed in accordance with the provisions of Section 39 (e) of the Act governing your Fund.

Section 39 (e) of the Act governing your Fund (Ill. Rev. Stats. 1947, Ch. 24, Sec. 944.39 (e) provides in part thereof as follows:

> "In any case in which an amount equal to the total amount accumulated to the account of a deceased unmarried fireman from sums deducted after the date upon which this Act shall come in force and effect in such city, from the salary of such fireman for annuity purposes, shall not have been paid to such fireman and/or the parent or parents of such fireman, and in the case of a deceased married fireman to such fireman and the widow of such fireman, both together, in form of annuity before the death of the last of such persons who shall die, an amount equal to the difference between such total amount resulting from sums deducted from his salary and the entire amount paid in form of annuity or annuities, without interest upon either such amount shall be refunded and paid to the administrator or executor of the estate of such deceased fireman; and if there be no administrator or executor as aforesaid; then the money so to be refunded may be applied toward the payment of the burial expenses of such deceased fireman and any balance remaining after the payment of such burial

expenses shall be paid to the heirs of such fireman according to the law pertaining to estates of deceased persons; . . ."

The intent of the legislature in enacting this section of the Act was to provide for the payment of refunds to the heirs of the deceased fireman in cases such as this. When his widow dies her interest in her husband's salary deductions or in his annuity accumulation dies with her, and the salary deductions then to be refunded vest solely in the estate of the deceased fireman. The money did not vest in his estate during her lifetime and consequently no interest vested in her. Upon her death such moneys cannot be distributed to the heirs of the deceased widow of such fireman, inasmuch as she herself, at the time of her death, did not have a vested right in such moneys.

In the event of the death of such widow prior to her receiving, in the form of annuity, an amount equal to the amount standing to the credit of the deceased fireman at the time of his death, the balance remaining should be distributed to the heirs of such deceased fireman, according to the laws of descent of the State of Illinois.

There is at the present time pending in the Appellate Court of Illinois a similar matter concerning the construction and interpretation of Section 39 (e) of the Act governing the Municipal Employees' Annuity and Benefit (Ill. Rev. Stats. 1947, Ch. 24, Sec. 1082 (e), entitled "In re: Estate of Redmond Weldon, Deceased." In view of the fact that there is a possibility the Court might interpret this section in a manner at variance with the construction which is currently applied to such cases, it is respectfully suggested that the aforementioned $550.00 be retained in your Fund until such time as the Appellate Court has passed upon the matter. As suggested above, the sum of $20.83 should be paid at this time to the estate of Ann Freemon.

TERMINATION OF MILITARY SERVICE

(No. 11137—Firemen's A. & B. Fund—G. F. M., Jr.—April 14, 1949.)

In response to your request for an opinion concerning the date of termination of credit for military service of a certain individual under circumstances described in your letter, the following is submitted:

Your letter states that a man entered the fire service on March 3, 1935, when he was approximately twenty-seven years of age; that he entered the military service on December 29, 1942; that he resigned from the fire service on May 25, 1948, while still on leave of absence for military purposes. Your question is as to whether or not this man is entitled to receive credit for annuity purposes for the entire time spent in the military service or, is entitled to receive credit for annuity or refund purposes only for the period from March 3, 1935, to December 29, 1942.

In the year 1941 the General Assembly of the State of Illinois passed an Act permitting municipal corporations to preserve civil service and pension rights of their employees inducted into or enlisting in the land or naval forces of the United States (Ill. Rev. Stats. 1947, Ch. 24½, Sec. 150, et seq.).

On November 6, 1940, and again on September 29, 1943, the City Council of the City of Chicago adopted resolutions preserving the civil service and pension rights of civil service employees of the City of Chicago.

Under the Resolutions of the City Council and the statute of the State of Illinois, the person in question is entitled to credit for annuity purposes for the time he spent in military service, from December 29, 1942, until

May 25, 1948, at which time he resigned from the fire service. He would not be entitled to credit for any service in the armed forces of the United States subsequent to the date of his resignation from the fire service.

At such time as the above mentioned person applies for a refund of salary deductions, he will be entitled to receive only such amounts as were actually contributed by him in the form of salary deductions prior to his entry into the military service, together with interest thereon. Deduction paid into a pension fund under the requirement of the City Council Resolutions hereinabove referred to are not refundable to the employee concerned. The moneys so paid into your Fund are public moneys, and there is no provision in the Act governing your Fund for the payment of tax money or corporate money to a contributor to your Fund, other than in the form of an annuity or pension, when such moneys have been paid into your Fund solely to preserve the pension rights of the individual concerned.

REFUND OF UNUSED PENSION MONEY

(No. 11277—Firemen's A. & B. Fund—G. F. M., Jr.—March 28, 1950.)

In response to your request for an opinion concerning the disposal of certain moneys in your Fund resulting from the accumulation of salary deductions made from the salary of Eugene T. Freemon, the following is submitted:

Your records disclose that Eugene T. Freemon was a Battalion Chief of the Chicago Fire Department; that he died June 5, 1946, leaving him surviving Ann Freemon, his widow; that Ann Freemon died in November, 1947; that there is at the present time in the possession of your Fund the sum of approximately $550.00, representing the difference between the moneys paid to Ann Freemon as a pension and the accumulation standing to the credit of Eugene T. Freemon at the time of his death. Your request is for advice as to what disposition should be made of this $550.00.

On March 24, 1949, an opinion in this matter was rendered to your Board, which opinion set up the facts, and concluded with the suggestion that the moneys be retained in your Fund until the Appellate Court had passed upon a similar case which was at that time pending before it, entitled: *"In re: Estate of Redmond Weldon, Dec'd. Ellen A. Murray, etc. v. Continental Illinois National Bank and Trust Company, etc."* (337 Ill. App., 70.) The decision of the Appellate Court has now become final.

While it has always been the practice of your Fund under similar circumstances to pay any such refunds to the heirs of deceased employees, and not to the administrator, executor, or heirs of the widow, this method of payment must be changed by reason of the recent decision of the Appellate Court in the above-mentioned case. In that case the facts were practically identical with the facts in the Freemon case.

In the Weldon case the Court said:

> "The fact that Redmond Weldon's widow was the beneficiary of his pension payments in no way deprived her of her right as his heir at law, . . . His surviving widow takes as heir the intestate remainder in the same property in which she had been made a life tenant."

The Court thereupon ordered the refund payable from the pension fund (and which had been paid to the Administrator of the Estate of Redmond Weldon) to be paid by such Administrator to the Executor of the Will of Agnes Weldon. A petition for Leave to Appeal was denied by

the Supreme Court, thus making the holding of the Appellate Court final in the State of Illinois, and binding upon your Board.

In order to comply with the law, as laid down by the Appellate Court, it is therefore necessary that the refund in question be paid to the administrator or executor of the estate of Ann Freemon, upon such executor or administrator filing with your Board an affidavit setting up the facts, and further showing that Eugene T. Freemon died intestate, leaving no descendant other than a surviving spouse.

FIRE TELEPHONE OPERATOR

(No. 11294—Firemen's A. & B. Fund—G. F. M., Jr.—April 20, 1950.)

In response to your request for an opinion concerning Kenneth F. Gallagher, the following is submitted:

Your letter states and your records disclose that Kenneth F. Gallagher was born January 19, 1916; that he entered the fire service on August 23, 1943; and that he resigned from the fire service on April 4, 1950, to accept a civil service position as Fire Telephone Operator.

Your question is as to whether or not Mr. Gallagher may continue as a member of your Fund, in view of the fact that he is now a Fire Telephone Operator.

The position of Fire Telephone Operator is classified by the Civil Service Commission of the City of Chicago as being in Class T of the fire service, Grade 3 (IV-T-3).

Section 12 of the Act governing your Fund (Ill. Rev. Stats. 1949, Ch. 24, Sec. 944.12) provides in part thereof as follows:

> "The following words and terms as used in this Act shall mean as follows, respectively:
>
> " 'Fireman': Any person who was, is, or shall be employed by such city in the fire service thereof as a fireman, fire engineer, marine engineer, or fire pilot, and whose duty is to participate in the work of controlling and extinguishing fire at the location of any such fire, whether such person shall be assigned to duty within such fire service other than the actual extinguishing of fire or not; . . ."

While the position occupied by Mr. Gallagher is classified by the Civil Service Commission of the City of Chicago as being in the fire service, the fact alone does not entitle him to membership in your Fund. In order to participate in your Fund, a member of the fire department must be one who "participates in the work of controlling and extinguishing fire at the location of any such fire."

We are therefore of the opinion that Mr. Gallagher cannot be permitted to continue as a contributor to and participant in your Fund.

ADMINISTRATION OF PENSION FUNDS

(No. 11377—Chairman, Finance Committee—G. F. M., Jr.—April 17, 1951.)

In response to your letter of March 13, 1951, concerning the policy of the American National Bank with regard to administering certain trust funds held by the trustee bank for the Policemen's and Firemen's Death Benefit Fund, the following is submitted:

The letter of the American National Bank directed to the Board states that one Mary Peppard, beneficiary of the Fund, was remarried on March 2, 1946, to one Thomas; that while she is no longer a beneficiary of the trust fund, the fund is to be held for the benefit of her minor son, John Peppard; that during a recent conference with the Bank she indicated that her husband plans to adopt John Peppard; and that the Bank, after examination of the trust agreement, the Municipal Code, and the Statutes of the State of Illinois, has determined upon a policy which it contemplates following in this and similar cases. You have requested an opinion as to the legality and propriety of the action of the trustee bank, as outlined in its letter.

The legislation which established this Fund is permissive in nature, and may be found in Chapter 24, Section 867, et seq., of the Illinois Revised Statutes of 1949.

The Municipal Code sets up the grant of the award and also provides for termination under the following conditions:

1. Death of the beneficiary.
2. The beneficiary attains the age of 21 years under no mental or physical disability preventing self-support and is not attending an accredited school or college.
3. The marriage of the beneficiary.
4. The special provision for those in the Armed Forces.

None of the above provisions for termination applies in this particular case, and it therefore follows that the beneficiary should continue to be entitled to the benefits of the award provided for in the Act governing the Policemen's and Firemen's Death Benefit Fund and the Municipal Code of the City of Chicago.

It must be borne in mind that, although the stepfather may assume responsibility for the support, education and maintenance of John Peppard, illness, adversity or death might deprive the beneficiary of such support. It must also be borne in mind that this award is being paid to John Peppard because he has suffered a great loss by reason of his own father's death as the result of heroic service to the community. If the grant to such child were to cease, the purpose of the legislation, i.e., the care and maintenance of such minor, would be defeated.

It is our opinion that, in any instance such as is set out above, the Bank should continue to make payments to such beneficiary, in compliance with the Act governing the Fund, which provides for payment of the trust moneys "for the use and benefit of the . . . minor child . . . of the deceased."

RE-ENTRY INTO FIRE SERVICE

(No. 11445—Firemen's A. & B. Fund—G. F. M., Jr.—November 19, 1951.)

In response to your request for an opinion concerning a fireman who left and then re-entered the service, the following is submitted:

Your letter states that this fireman was born June 29, 1890; that he entered the fire service March 8, 1914; that he resigned from the fire service May 4, 1947, and was granted an age and service annuity of one-half pay, to begin May 4, 1947; that this fireman received such annuity until July 1, 1948, at which time he re-entered the fire service; that his age and service payments were discontinued as of June 30, 1948, and that since July 1, 1948, he has continued to make regular contributions to this fund by salary deduction payments. Your question is as to the basis to be used for computing the amount of his annuity in the event of his separation from the service, in view of the fact that the annual salary for his rank in the fire service has been increased since July 1, 1948.

This fireman in question resigned from the fire service May 4, 1947, at which time he was 56 years, 10 months and 5 days of age. He re-entered the fire service on July 1, 1948, at which time his age was 58 years and 2 days.

Paragraph (b) of Section 34 of the Act governing your fund (Ill. Rev. Stats. 1951, Ch. 24, Sec. 944.34), provides in part thereof as follows:

> Sec. 34 (b) "When any such fireman shall re-enter the service after he shall have attained the age of fifty-seven (57) or more years, payments on account of any annuity previously granted to such fireman shall be suspended during the time thereafter that he shall be in the service, and when he shall again resign or be discharged therefrom, payments upon the annuity previously granted shall be resumed. * * *."

Despite the apparent inclusion of this particular fireman under the above mentioned provisions of your Act, it must be remembered that this fireman became a member of the Fire Department in 1914, and that he is, under the provisions of Section 12 of the Act governing your fund, a present employee, and, therefore, his rights and benefits would be governed entirely by the provisions of Section 52 of the Act governing your fund, which provides in part thereof, as follows: (Ill. Rev. Stats. 1951, Ch. 24, Sec. 944.52)

> Sec. 52 "* * * It is the intention of this Section that any and all rights and benefits granted under the certain act entitled 'An Act to provide for a firemen's pension fund and to create a board of trustees to administer said fund in cities having a population exceeding two hundred thousand (200,000) inhabitants,' filed June 14, 1917, in force July 1, 1917, as subsequently amended, shall be continued, preserved and secured by and under this Act to all persons to whom such rights or benefits shall have accrued or would or could have accrued under said latter Act, subject, however, to the limitation herein provided as to the payment of back pension."

Section 8 of the Act of 1917 (Ill. Rev. Stats. 1951, Ch. 24, Sec. 938), provides in part thereof, as follows:

> Sec. 8 "Any fireman of any such city, after having served twenty (20) years as a fireman, may retire from active service, and when such retired fireman shall have reached the age of fifty (50) years the board shall order and direct that such fireman shall be paid a monthly pension equal to one-half of the amount of monthly salary

attached to the rank which he may have held in the fire service at the date of his retirement: Provided, that the retired fireman has remained in good standing by paying to the treasurer of the board all his monthly contributions from the time of his retirement until he shall have reached the age of fifty (50) years, as required by this Act. Provided, further, that the pension so paid shall not exceed the sum of three thousand ($3,000.00) dollars per annum, nor be in any case less than six hundred ($600.00) dollars per annum."

It would, therefore, appear that the person in question may retire from the Fire Department of the City of Chicago, and upon the date of such retirement, be entitled to, "A monthly pension equal to one-half the amount of monthly salary attached to the rank which he may have held in the fire service at the date of his retirement."

ANNUITY FOR CHIEF FIRE MARSHAL

(No. 11515—Firemen's A. & B. Fund—G. F. M., Jr.—April 10, 1952.)

In response to your request for an opinion concerning Jeremiah J. McAuliffe, the following is submitted.

Your letter states and your records show that Jeremiah J. McAuliffe was born November 21, 1888; that he became a member of the Fire Department June 14, 1911; that he became a lieutenant November 16, 1916; that he became a captain April 25, 1925; that he became a battalion chief May 26, 1933; that he became a division marshal February 18, 1937; that he became second deputy fire marshal and department inspector May 11, 1949; and that he became Chief Fire Marshal February 7, 1951. On November 21, 1951, Jeremiah J. McAuliffe attained the age of sixty three (63) and as a result of the compulsory retirement Act was separated from his civil service position as Chief Fire Marshal at the close of business November 21, 1951. On November 22, 1951, he was appointed Chief Fire Marshal on a temporary basis and served as Chief Fire Marshal on a temporary basis until March 16, 1952. Your request is for an opinion as to what his annuity should be.

Section 12 of the Act governing your Fund, (Ill. Rev. Stats, 1951, Chap. 24, Sec. 944.12) provides in part thereof as follows:

> "The following words and terms as used in this Act shall mean as follows, respectively:
>
> 'Present employee': Any fireman (as hereinbefore described) who shall be in the employment of such city as a fireman thereof on the day before the date upon which this Act shall come in force and effect in such city; * * *"

Chief McAuliffe having been a member of the Fire Department since June 14, 1911 to March 16, 1952 must necessarily be a present employee inasmuch as the effective date of the Act governing your Fund was July 1, 1931.

Section 56 of the Act of the Fireman's Annuity and Benefit Fund, (Ill. Rev. Stats., 1951, Chap. 24, Sec. 944.56) provides in part thereof:

> "Any such present employee who shall be fifty (50) or more years of age at the time of his resignation or discharge from the service shall have a right to receive annuity, from and after the date of such resignation or discharge, of an amount equal to fifty (50)

per cent of the salary of such present employee as such salary shall be on the day one year prior to the date of his resignation or discharge from the service."

Section 61 of the Act governing your Fund, (Ill. Rev. Stats, 1951, Chap. 24, Sec. 944.61) provides in Part as follows:

"No annuity, pension or other benefit shall be paid to any fireman, or to the widow of any fireman, under or pursuant to any of the preceding provisions of this Act, general or special, excepting Section 52, based upon any salary paid to such fireman by virtue of a temporary appointment. All contributions, annuities, and benefits shall be related to the salary which shall attach to the permanent position of each fireman concerned. Any fireman temporarily serving in a position or rank other than that to which he has received permanent appointment shall be treated for all purposes of this Act while so serving as though he were serving in his permanent position or rank * * *."

Chief McAuliffe was serving as Chief Fire Marshal by virtue of temporary appointment from November 22, 1951 to March 16, 1952 and was serving and receiving a salary which was attached to that position in the service. He, therefore, during that period of time was still serving in his permanent position which was Chief Fire Marshal even though it was then on a temporary basis. The Fireman's Annuity and Benefit Fund does not provide for retirement at any particular age or for any particular reason. As far as retirement is concerned the Fireman's Annuity and Benefit Fund has to do only with the payment of retirement annuities to firemen after they have retired by reason of separation from the uniformed service. The Firemen's Annuity and Benefit Fund has been informed that Chief Fire Marshal McAuliffe retired from the uniformed service as Chief Fire Marshal on March 16, 1952.

Under the above quoted provisions of the Act, he is entitled to receive an annuity of an amount equal to one half of the salary attached to his position in the service as such salary was on the date one year prior to the date of his resignation or discharge from the service, i.e., one half of his salary as it was on March 16, 1951.

We are therefore of the opinion that Jeremiah J. McAuliffe should be paid an annuity in accord with the provisions of Section 56; that the day of his retirement from the uniformed service of the Chicago Fire Department was at the close of business March 15, 1952, i.e., 8 A.M. March 16, 1952; and that his annuity should be one half of the amount of his salary as such salary was on the day one year prior to such date of March 16, 1952.

WIDOW'S PENSION

(No. 11554—Firemen's A. & B. Fund—G. F. M., Jr.—June 26, 1952.)

In response to your request for an opinion concerning the eligibility of Elizabeth F. Smith for a widow's pension, the following is submitted.

Your letter states that John P. Smith, a member of your Fund, was born in 1873; that he entered the fire service June 20, 1905; that he was placed on disability pension November 18, 1913; that he married Elizabeth F. Smith on September 3, 1914; that he died March 5, 1952; that on March 13, 1952 Mrs. Smith made application for the partial pension payment due

her late husband up to the date of his death; and that she inquired if she were entitled to a widow's annuity. Your question is as to whether or not she is entitled to any annuity under the provisions of the Act governing your Fund.

Mr. Smith having been placed on disability pension in November, 1913, was a beneficiary under an act prior to the Act of 1917. The 1917 Act in Section 14 thereof, (Ill. Rev. Stats. Chap. 24, Sec. 944) provides for the continuation of pensions granted under any earlier Act in force at the time the 1917 Act became effective. On July 1, 1931 the Act which governs your Annuity and Benefit Fund (Ill. Rev. Stats. 1951, Chap. 24, Sec. 944.1, et. seq.) became effective and superseded the Act of 1917. Section 57 of the Act which governs your Fund (Ill. Rev. Stats. 1951, Chap. 24, Sec. 944.57) provides in part thereof as follows: (Par. 2)

> "Not withstanding the provisions of any other section of this Act, the widow of any fireman pensioner who was receiving a pension under any of the provisions of an Act entitled 'An Act to provide for a fireman's pension fund and to create a board of trustees to administer such fund in cities exceeding two hundred thousand (200,000) inhabitants' in force July 1, 1917, shall be paid a pension in the amount of forty-five dollars ($45) per month, provided that no pension shall be allowed to the widow of any deceased fireman pensioner who married such fireman pensioner subsequent to the date of his retirement with a pension under the provisions of said Act and subsequent to June 30, 1915."

Inasmuch as Elizabeth F. Smith married John P. Smith prior to June 30, 1915, i.e. on September 3, 1914, under the above quoted provisions of the Act governing your Fund she is entitled to receive a widow's pension in the amount of forty-five dollars ($45) per month.

RETURNING REFUND

(No. 11580—Firemen's A. & B. Fund—G. F. M., Jr.—September 11, 1952.)

In response to your request for an opinion concerning Martin E. Green, the following is submitted.

Your letter states and your records show that Martin E. Green entered the fire service on April 2, 1930 and was discharged on December 1, 1932; that he made application for refund of salary deductions, which refund was granted on June 27, 1933, in the amount of $127.92; that on January 16, 1951, Martin E. Green was again appointed as a probationary fireman from the current Firemen's Civil Service eligibility list; that under date of November 30, 1951, Mr. Green requested that he be permitted to repay to your Fund the refund granted him in 1933; and further, that he be given credit for the period of time from April 2, 1930 to December 1, 1932. Your question is whether or not it is permissible for your Board to accept a repayment of the refund made to Mr. Green, and give him credit for the time involved.

Section 39 (f) of the Act governing your Fund (Ill. Rev. Stats. 1951, Chap. 24, Sec. 944.39) provides in part thereof as follows:

> 39 (f) "Any such fireman who shall apply for and receive a refund provided for in this section, and shall subsequently re-enter the service, shall not thereafter become entitled to receive or to be

paid, nor shall the widow or parent or parents of such fireman be entitled to receive or to be paid any annuity, benefit or pension under or by virtue of anything contained in sections 45, 56 and 57 of this Act until and unless such fireman, or widow, or parent or parents shall pay into the annuity and benefit fund herein provided for an amount equal to any sum which such fireman shall have received as a refund under and by virtue of the provisions of this section, with interest thereon at the rate of four (4) per cent per annum from the date such sum shall have been received by such fireman to the date such amount shall be so repaid into this fund."

"Re-enter" as it is used in the above indicated paragraph is considered to mean a continuation of the same service from which the fireman withdrew. Mr. Green has not re-entered the fire service as a continuation of the service he left. He has entered the fire service under a new examination and cannot be considered to have re-entered it. His entrance into the fire service in 1951 is new, separate and entirely distinct from his original entrance in the service in the year 1930.

The word "re-enter" may apply only to a fireman who leaves the service and re-enters without taking any examination other than that which he originally took when he first became a member of the department.

We are, therefore, of the opinion that Mr. Green cannot pay to your Fund the refund that he received in 1933 nor can he be given credit for the period of time from April 2, 1930 to December 1, 1932.

REFUNDING WIDOW'S ANNUITY CONTRIBUTIONS

(No. 11712—Firemen's Annuity and Benefit Fund—G. F. M. Jr.—July 13, 1953.)

In response to your request for an opinion concerning Mr. William A. McCormick, the following is submitted.

Your letter states that Mr. McCormick was born October 26, 1891; that he entered the Fire service of the City of Chicago on January 9, 1916; that he was granted a disability pension October 12, 1949; and that he died March 4, 1953. Your letter also states that Mr. McCormick's wife, Irene B. McCormick, whom he married June 30, 1923, died on May 17, 1937; and that an inquiry has been made as to whether or not there is any refund which might be payable to the estate of William A. McCormick by reason of deductions made from his salary for widow's annuity purposes.

Section 944.39 of the Act governing your fund (Ill. Rev. Stats, 1951, Chap. 24, Sec. 944.39), provides in part thereof as follows:

> "(b) When any fireman shall become fifty-seven (57) years of age while in the service and shall not then be married, any sum accumulated from deductions from his salary for widow's annuity purposes shall then be refunded to him."

At the time of the death of his wife, Mr. McCormick was forty-seven (47) years of age and he never remarried. It has been the practice of the Retirement Board to retain in the Fund all deductions made for widow's annuity purposes until such time as a man leaves the service because of the provisions of Section 57 of the Act governing your Fund. For this reason no deductions for widow's annuity purposes were ever paid to Mr. McCormick during his lifetime.

We are, therefore, of the opinion that the deductions made from the salary of William A. McCormick for widow's annuity purposes should be paid to the estate of William A. McCormick for proper distribution to his heirs.

DISABILITY BENEFITS

(No. 11713—Firemen's Annuity and Benefit Fund—G. F. M., Jr.—July 13, 1953.)

Your letter states that the fireman entered the fire service of City of Chicago Fire Department April 23, 1929; that he was suspended on September 29, 1952 until April 21, 1953; that he received one day's pay for April 22, 1953; that April 23, 1953 he applied to your Fund for ordinary disability benefits; and that the Board's physician examined him and found him unfit for the performance of fire duty.

Your records show that his record had been clear until after the death of his wife on July 1, 1950; that after that date he apparently began to suffer from emotional disturbances as he reported sick December 8, 1951; returned to work December 15, 1951; was suspended December 16, 1951; returned to work January 14, 1952; again reported sick February 18, 1952; returned to work February 25, 1952; was sick March 10, 1952; returned to work May 27, 1952; and was suspended September 29, 1952.

During the period of time that he was away from work because of illness he was carried on the medical roll of the Fire Department and received full pay for said period of time. Both from your records and the doctor's report there is an indication that his present disability is a recurrence of the illness from which he has suffered in the past and for which he has been carried on the medical roll.

Section 944.47 of the Act governing your Fund (Ill. Rev. Stats, 1951 Chap. 24, Sec. 944.47) provides in part thereof as follows:

> "Any fireman, included under the provisions of this section, and less than fifty-seven years (57) of age, who shall become disabled subsequent to the date upon which this Act shall come in force and effect in such city, as the result of any cause other than the performance of an act or acts of duty, and other than as the result of alcoholism or venereal infection, shall have a right to receive ordinary disability benefit during any period or periods of any such disability, after the first thirty (30) days of any such period * * *"

As his illness first began in 1951 and has recurred several times since that time we are of the opinion that the first thirty (30) days of such illness have passed and that he should be paid disability to begin as of April 23, 1953, based upon the salary attached to the position held by him at the time he completed the first thirty (30) days of his illness, i.e. the period between March 10, 1952 and May 27, 1952.

NEW ENTRANTS CLASSIFICATION

(No. 11739—Firemen's A. & B. Fund—G. F. M. Jr.—September 8, 1953.)

In response to your request for an interpretation of the amendments contained in Senate Bill 219, passed by the General Assembly and approved by the Governor of the State of Illinois July 16, 1953, the following is submitted.

Section 12 of the Act governing your Fund (the definition section) is amended to provide for a new class of members in the annuity and benefit fund to be known as "new entrants", a new entrant being a fireman who enters the fire service for the first time after July 16, 1953.

Section 15 is amended to include the "new entrants" in the providing of annuities.

Section 16 is amended to change the amount of deductions from salaries from 3½% to 6% after June 30, 1953, and provides for continuation of such deductions while "new entrants" and future entrants shall be in the service. It also provides for the rate of interest upon accumulations for "new entrants" to be 3%.

Section 17 changes the deductions of salaries of present employees from 3½% to 6% and continues such deductions for all the time such present employees are in the service. This increase of deductions applies to all members of the Department including disability beneficiaries. The contributions by the City for those firemen that are receiving duty disability benefits must be increased to 6% and an adjustment must be made in the accounts of such firemen so as to indicate that contributions for the period intervening between June 30, 1953, and the date of receipt of this opinion shall be included in the event the deductions for that period were not at the rate of 6%. If a 2½% increase in contributions has not been made by ordinary disability beneficiaries since June 30, 1953, it is respectfully suggested that the additional money due your Fund for increased contributions for that period be secured from such disability beneficiaries in such manner as to the Board shall seem best.

Section 20 now provides for widows' annuities for widows of "new entrants".

Section 21 now provides for contributions by "new entrants" for their widows and for interest at the rate of 3% upon accumulations for "new entrants".

Section 26 is changed to give "new entrants" the same rights of fixation of annuities as is given future entrants.

Section 28 has been changed to include "new entrants" and fixes the basis of computation for annuities for "new entrants" and their widows. Annuities are to be computed according to the Combined Annuity Mortality Table without adjustment for male lives and being rated back four years for female lives. It also fixes the amount of widows annuity. It also determines that the amount of widows annuity or widows prior service annuity, which shall be fixed for the wife of any fireman while he is alive to be a revisionary annuity, computed according to the Applicable Table of Mortality.

Section 29 has been changed to include the "new entrant".

Section 30 has been changed to include the "new entrant" and sets the age of the widow of a "new entrant", if she be older than he is, at the same age as her deceased husband.

Section 33 has been changed to include the widows of "new entrants".

Section 34 fixes the age of any widow of a present employee or future entrant at five years less than the age of her husband or at her real age, if five or more years younger than her husband, and in the case of the widow of a "new entrant", her own age or the same age as her husband, whichever is younger.

Section 39 has been changed to include the "new entrant" and to permit a "new entrant" who has served less than ten years to leave his money in the Fund and have it improved by interest at 3% in the event he shall subsequently re-enter the service.

Section 50 has been amended to include the "new entrant" and to fix the basis of computation of his annuity as the Combined Annuity Mortality Table at the rate of 3%.

Section 53 has been amended to include a Fund from which the funds for the annuity described in Section 56½ may be paid.

Section 56 has been amended so as to grant to any present employee who remains in service after qualifying for annuity as provided in Section 56 or by virtue of Section 52 of your Act, an additional amount of annuity equal to 1% of salary for each complete year or fraction thereof served from and after the effective date of the amendatory Act, provided that the salary referred to in this paragraph shall be determined by striking an average of the five consecutive highest years of salary within the last ten years of service immediately preceding his resignation or discharge from the service.

The additional annuity which shall be granted to the present employee is provided by the new paragraph added to Section 56, which paragraph in part thereof is as follows:

> "Any present employee who remains in the service after qualifying for annuity * * * shall have added to said annuity an amount equal to an additional 1% of salary for each complete year or fraction thereof served from and after the effective date of this amendatory Act."

Section 56½ is a new section added to the Act and provides that a "new entrant" or future entrant, who shall resign or be discharged after he shall have completed twenty-five or more years of service and has attained an age of fifty-five or more years in the service, shall have a right to receive an annuity of an amount equal to 50% of his average salary of the five consecutive highest years of salary within the last ten years of service. This section also contains the same provision that Section 56 has had added to it, i. e., the right to have an additional amount of annuity equal to 1% of salary for each completed year or fraction thereof after qualifying for annuity as is provided in the first paragraph of Section 56½.

The wording of these sections in regard to additional annuity can only mean that a man can receive but 1% for any one year he may serve after qualifying for annuity, regardless of how many fractions of a year are contained therein, and that he is entitled to receive an additional 1% for any fraction of a year that he may serve after July 16, 1953, the effective date of this Act, even though such fraction might be but one day, or 1/365th of one year.

C. POLICEMEN'S ANNUITY AND BENEFIT FUND

REFUNDING CONTRIBUTIONS

(No. 11767—Policemen's Annuity and Benefit Fund—G. F. M., Jr.—December 1, 1953.)

In response to your request for an opinion concerning the refund of voluntary contributions, the following is submitted.

Your letter states that you wish to determine whether or not you have any right to refund voluntary contributions paid into your Fund by members of the police department.

At the last session of the general assembly, your Act was amended by the addition of Section 16½ (Ill. Rev. Stats. 1953, Chap. 24, Sec. 960½, which Section provides in part thereof as follows:

> "Any money which may have been voluntarily contributed under the former provisions of Sec. 16 of this Act shall be refunded to the members of the police service of such city who made such voluntary contributions; provided, however, that such return of voluntary contributions may be made only to such policemen as are still in the service on the effective date of this amendatory Act."

An opinion written June 29, 1953, fixed the effective date of this amendatory Act as January 1, 1954. After that date, this section of the Act governing your Fund will be in full force and effect.

It is therefore our opinion that after January 1, 1954, that voluntary contributions heretofore paid into your Fund by policemen, should be refunded to the policemen making such contributions provided such policemen are in the service on January 1, 1954.

CHILD'S ANNUITY

(No. 11134—Policemen's A. & B. Fund—G. F. M., Jr.—March 24, 1949.)

In response to your request for an opinion concerning the rights of a minor child of a former member of your Fund, the following is submitted:

Your letter states and your records disclose that the employee was born November 2, 1895; that he retired on an annuity of $135.50 a month as of November 3, 1945; that in his application for annuity he stated he was single; that your records all indicate that he was single; that he died February 23, 1949; that your office has been advised he left him surviving a minor daughter, Charline, who was born January 14, 1942; that one Richard Suffern has been appointed guardian of Charline under the terms of a Will executed by the employee; that Mr. Suffern has brought into the office records showing that the child's mother and the employee were married in Arkansas on November 30, 1945; that in April of 1946 a decree was entered in the Garland Chancery Court, Arkansas, finding the child to be legitimate, and that a decree of divorce dissolving the marriage of the employee and the child's mother was entered in July, 1946. You request an opinion as to whether Charline is entitled to a child's annuity, as the issue of the employee.

Section 44 of the Act governing your Fund (Ill. Rev. Stats. 1947, Ch. 24, Sec. 988) provides in part as follows:

> "Child's annuity, as hereinafter provided, shall be granted and paid for the benefit of any unmarried child less than eighteen (18) years of age the issue of any following described policeman who shall die on or after the first day in the month of January of the first year after the year in which this Act shall come in force and effect in such city; provided, such child shall have been born before such policeman shall have resigned or been discharged from the service;...
>
> ". . .; any policeman who shall resign or be discharged from the service subsequent to his attainment of an age of fifty (50) years and who shall have entered upon annuity . . ."

Your records and the application for annuity indicate that he was single, which he was at the time of filing such application, as he did not marry the mother of Charline until twenty-seven days later. Nevertheless, the child was born on January 14, 1942, at which time he was a member of the police department, and the requirement set out in Section 44 of your Act, that the child "shall have been born before such policeman shall have resigned or been discharged from the service," was thus complied with.

The statutes of the State of Illinois (Ill. Rev. Stats. 1947, Ch. 17, Sec. 15) provide in part as follows:

> "If the mother of any bastard child, and the reputed father shall, at any time after its birth, intermarry, the said child shall, in all respects, be deemed and held legitimate . . ."

The marriage to the mother of the child after its birth legitimatized said child, eliminated possible application of the decision of the court in the case of *Wittbrod* v. *Woodland, et al.,* 295 Ill. App. 431, and removed the bar to payment of child's annuity.

There is every indication that Charline is the legitimate daughter of the employee, and consequently is entitled to receive child's annuity, through her guardian, in accordance with the provisions of Section 44 of the Act governing your Fund.

REFUND OF EXTRA DEDUCTIONS

(No. 11135—Policemen's A. & B. Fund—G. F. M., Jr.—March 31, 1949.)

In response to your request for an opinion concerning Joseph E. O'Malley, the following is submitted:

Your letter states and your records disclose that Joseph E. O'Malley was appointed to a position in the Fire Department March 5, 1922; that he resigned from the Fire Department May 27, 1926, to accept an appointment in the Chicago Police Department on the same date; that he was promoted to Sergeant of Police July 1, 1938; that he was promoted to Lieutenant of Police April 10, 1946; that he had been classified as a future entrant participant of your Fund, and in 1940 paid in full the difference between the amounts he would have contributed as a member of the Policemen's Annuity and Benefit Fund and the amounts he did contribute to the Firemen's Pension Fund for the period of his service in the Fire Department from March 5, 1922, to May 27, 1946; that on March 9, 1949, your office received a letter from the Civil Service Com-

mission indicating that an order was entered in the minutes of the Commission changing the date of certification of Joseph E. O'Malley in the position of fireman from March 7, 1922, to January 11, 1921; and that by reason of the change in the date of his appointment in the fire department by the Civil Service Commission he will now be classified as a present employee. You have requested an opinion as to whether or not the payment he made as a future entrant, covering the difference between the amount of salary deductions made for his service in the Fire Department and the amount that he would have paid had he been a policeman at the time of rendering such service, should be refunded to him, and whether he should be required to pay into this Fund the amount of deductions which would have been made from his salary covering the period stated in the Civil Service Commission Order.

Section 41 of the Act governing your Fund (Ill. Rev. Stats. 1947, Ch. 24, Sec. 985) provides in part as follows:

> "Any service rendered by any policeman while not in the police department of such city, as a regular member of the paid fire department of such city shall be counted, for annuity and benefit purposes under the provisions of this Act, as if such service were rendered as a policeman of such city. And any salary received by any policeman for any such service in such fire department shall be treated, for the purposes of this Act, in the same manner as though such salary were received for the performance of duty as a policeman. Any fireman, hereinabove in this section referred to who has become or shall hereafter become a policeman, as defined in this Act, shall be credited in his account for annuity purposes in this Fund with an amount equal to the sums deducted from his salary, or contributed by him, and paid into the Firemen's Pension Fund existing in such city by operation of law prior to July 1, 1931, and such credit shall be treated in the same manner as prior service credits under the Act. Such policeman shall also have the right to pay into the annuity and benefit fund herein provided for an amount equal to the difference between the amount so credited and the sum which would have accumulated to the credit of such policeman in this fund from deductions from his salary for annuity purposes on the date when such payment shall have been made into this fund if such policeman had been paying into the annuity and benefit fund herein provided for such sums as he would have paid had his entire service in said fire department subsequent to January 1, 1922, been rendered as a member of the police department of such city, and such city shall concurrently contribute such amounts as are provided according to the terms of Sections 16 and 21 of this Act."

It is to be noted that this section of the Act provides: "Such policeman shall also have the right to pay into the annuity and benefit fund," etc. In other words, such payment is not compulsory, but such policeman shall have the right to make the payment if he so desires. It is discretionary on his part whether or not such payment shall be made.

Lieutenant O'Malley, being now classified as a present employee, does not receive any benefit from the moneys so paid by him as a contribution, being the difference between deductions from his salary in the fire department and the amount that would have been deducted had he been a policeman during the period of time he served in the fire department.

Your records disclose that other firemen who have transferred from the fire department to the police department, and who were members of the fire department prior to December 31, 1921, have not been required to make, nor have they made, any payments of the difference between the amounts deducted from their salaries during their period of service in the fire department and the amount that would have been deducted had they been members of the police department during that period of time.

The moneys which have been contributed by Lieutenant O'Malley, as hereinabove set out, should be refunded to him upon his request. in regard to the period of time from January 11, 1921, to March 7, 1922, during which time Lieutenant O'Malley did not contribute to the Firemen's Pension Fund, an amount equal to the deductions from his salary at the rate which was at that time payable by firemen into the Firemen's Pension Fund should be charged against Lieutenant O'Malley's account and deducted from any moneys payable to Lieutenant O'Malley.

DUTY DISABILITY BENEFITS

(No. 11145—Policemen's A. & B. Fund—G. F. M., Jr.—May 16, 1949.)

In response to your request for an opinion concerning Edward J. Burris, the following is submitted:

Your letter states, and your records disclose, that Edward J. Burris was appointed a temporary policeman April 16, 1946, and was assigned to duty at the Desplaines Street Station; that on July 10, 1946, while patrolling his beat, he was shot by two colored suspects whom he had stopped for questioning; that he was carried on the medical roll of the police department, and that on October 10, 1947, he was certified as a probationary policeman and subsequently paid into your Fund a sum covering salary deductions and interest for the period of his temporary service. Your question is as to whether or not Mr. Burris is to be considered a participant in your Fund at the time he was injured, and therefore entitled to receive duty disability benefits because of his injury.

Section 12 of the Act governing your Fund (Ill. Rev. Stats. 1947, Ch. 24, Sec. 956) defines "policeman" as follows:

> " 'Policeman': Any person appointed and sworn or designated by law as a policeman of such city, and who has served, or is serving, or shall serve in the regularly constituted police department of such city as a policeman, . . . and member of the police force of such police department."

At the time Mr. Burris was appointed as a police officer, even though it was a temporary appointment, he was sworn in as a police officer, and sworn to perform the duties of the position of a police officer. The definition of "policeman," as set out in your Act, would therefore apply to Edward J. Burris.

It is to be noted that, under the provisions of the section pertaining to duty disability benefits (Ill. Rev. Stats. 1947, Ch. 24, Sec. 989), such benefits are payable solely from moneys contributed by the City to your pension fund, and the policeman himself does not make any contribution from his salary for such benefits. It therefore follows that, despite the fact that no deductions had been made from the salary of Edward J. Burris because of his position as a temporary policeman, Edward J. Burris is entitled to be considered a member of your Fund for the purpose of duty disability benefits, from the date he was sworn in as a police officer on April 16, 1946.

CHILD'S ANNUITY

(No. 11151—Policemen's A. & B. Fund—G. F. M., Jr.—June 3, 1949.)

In response to your request for an opinion concerning the rights of Julia Armstrong, minor daughter of a deceased beneficiary of your Fund, the following is submitted:

Your letter states and your records disclose that John F. Armstrong was born January 4, 1882; that he became a member of the police department on February 22, 1915; that he became fifty-seven years of age on January 4, 1939; that he married Fairfax A. Armstrong April 18, 1940, after he had attained the age of fifty-seven years; that a daughter was born to John F. Armstrong and Fairfax A. Armstrong on June 21, 1941, and that John F. Armstrong died May 29, 1949, leaving him surviving his minor daughter, Julia Armstrong, and his widow, Fairfax A. Armstrong. Your question is as to whether the minor child of John F. Armstrong should be paid child's annuity in the sum of $10.00 or $25.00 a month, since there is no widow's annuity payable to Fairfax A. Armstrong.

Section 38 (a) of the Act governing your Fund (Ill. Rev. Stats. 1947, Ch. 24, Sec. 982 (a)) provides that no annuity shall be paid to the wife or widow of a policeman "if such widow shall not have been married to such policeman before he shall have attained an age of fifty-seven (57) years."

Section 43 of the Act governing your Fund (Ill. Rev. Stats. 1947, Ch. 24, Sec. 987) provides for the payment of child's annuity "from and after the date of the death of the policeman parent of any such child, until the annuitant shall attain an age of eighteen (18) years."

Section 44 of the Act governing your Fund (Ill. Rev. Stats. 1947, Ch. 24, Sec. 988) fixes the amount of annuity payable to such children of deceased policemen, and provides in part as follows:

> "Any such annuity shall consist of amounts of ten dollars ($10.00) per month for each child while a widow or widower of the deceased policeman parent of such child shall survive, and of twenty-five dollars ($25.00) per month for each such child while no such widow or widower shall exist; . . . "

While it is true that a widow exists in this case, such widow, because of the date of her marriage to her policeman husband, is not entitled to receive a pension.

In determining the amount of child's annuity payable, the intent of the legislature must be considered. In the case of *Scott* v. *Freeport Motor Casualty Company*, 379 Ill. 155, the Supreme Court of Illinois has laid down the following principles of law:

> "The primary object in construing a statute, is to ascertain the legislative intent expressed therein. (Citing cases). In seeking the legislative intent, courts should consider the language used, the object to be attained, or the evil to be remedied, and this may involve more than the literal meaning of the words used. (Citing case). When the words used, followed literally, lead to an absurd consequence or to a construction clearly not contemplated, this constitutes a sufficient reason to depart from the language used for the purpose of ascertaining the intent. (Citing case). A thing which is within the intention of a statute is within the statute, although not within its letter, and a thing within the letter is not within the statute unless it is within the intention. (Citing case). Statutes must be so construed as to be given a reasonable construction, if possible. (Citing cases). A statute, if possible, must be construed so as to give effect to all its provisions. (Citing case). In whatever language a statute may be expressed, it must be given a practical and common sense construction. (Citing case). The intention of the lawmakers, in passing a statute, is to be found and given effect if not in violation of the constitution. (Citing case). It is a well known rule of statutory construction, that a statute must be interpreted according to the legislative intention, and not always according to the literal meaning of the language used. (Citing case)."

It was the obvious intent of the legislature in its use of the word "widow," in Section 44, that the term should apply to a widow receiving a pension from the Policemen's Annuity and Benefit Fund of Chicago.

The provision for payment of $25.00 to the child of a deceased policeman while no widow exists, is the grant of an increased amount for the support of such child for the sole reason that no moneys are being paid to the child's mother, and it is therefore necessary that a larger sum be paid for the benefit of the child. The grant of $25.00 a month to a child while no widow exists is an increase of $15.00 per month allowed by the legislature for the care, maintenance and support of the child because there is no other support for the child.

In the instant case there is a widow, but she is not receiving a pension. It cannot be conceived that the legislature intended to place on the same level children whose mothers are receiving pensions and children whose mothers are not receiving pensions by reason of a technicality of law.

To go a step further, if Mrs. Armstrong had been divorced from her husband prior to his death, the child would be entitled to receive a larger grant of pension, not because her mother was dead, but because she was divorced, and legally there was no widow existing. Here, while there is a widow existing, such widow is not entitled to a pension.

As a further indication of the legislative intent, let us assume the case of a policeman whose wife had died leaving a minor child, and that the said policeman married again after he had reached the age of fifty-seven. Upon his death the child would be living with a stepmother, and the stepmother, having no legal obligation to support a child who was not her own, could turn the child over to some relative of the deceased husband, or some relative of the child's mother. The child would be thrown upon its own resources or be dependent upon the charity of the relatives of her father or her mother. It would be an absurd conclusion to say that because there was a widow the child could be paid only $10.00 a month, even though there was no widow entitled to receive a pension.

It will be noted in the *Scott* case, above cited, it was held that: "When the words used, followed literally, lead to an absurd consequence or to a construction clearly not contemplated, this constitutes a sufficient reason to depart from the language used for the purpose of ascertaining the intent."

It must be assumed that the legislature did not intend to discriminate against any child situated such as the minor child in this case, solely by reason of the words used in Section 44 of the Act concerning child's annuity.

In view of the holding in the *Scott* case, hereinabove cited, we are of the opinion that child's annuity in the amount of $25.00 a month should be granted and paid for the benefit of Julia Armstrong, minor child of John F. Armstrong, deceased.

TRANSFER TO NEW PENSION FUND

(No. 11196—Policemen's A. & B. Fund—G. F. M., Jr.—October 27, 1949.)

In response to your request for an opinion concerning Arthur P. Ryan, a former member of the police department of the City of Chicago, the following is submitted:

Your letter states and your records disclose that Arthur P. Ryan was appointed to the police department May 27, 1926; that he was discharged on March 29, 1928; that he was reappointed January 23, 1929; that on January 10, 1932, he became disabled, and received duty disability benefit from your Fund from that date until June 6, 1948, at which time he became separated from the police rolls to accept a position as a civil service painter for the City of Chicago; that Mr. Ryan is forty-eight years of age; and that he has requested that the accumulation standing to his credit in your Fund be transferred to the Municipal Employees' Annuity and Benefit Fund. Your question is as to whether or not such transfer may be made, and whether the amount so transferred should include contributions made by the City in lieu of salary deductions during the period of time Mr. Ryan was receiving duty disability benefit.

Section 45 of the Act governing your Fund (Ill. Rev. Stats. 1949, Ch. 24, Sec. 989) provides in part thereof as follows:

> "(h) In lieu of all amounts ordinarily deducted for annuity purposes, from the salary of any policeman, disabled as aforesaid, the city shall contribute sums equal to such amounts for any period of disability of such policeman during which he shall receive duty disability benefit. Such sums so contributed shall be credited to such disabled policeman as though they were deducted from his salary and shall be regarded for annuity purposes only as sums deducted from such salary."

The above quoted section of the Act specifically provides that the money contributed by the City in lieu of salary deductions for the period during which a policeman is disabled may be used for annuity purposes only, and therefore cannot be refunded to him.

Section 42 of the Act governing the Municipal Employees' Annuity and Benefit Fund (Ill. Rev. Stats. 1949, Ch. 24, Sec. 1085) provides for the granting of credit to any member of that Fund for any period of time he may have served as a policeman, fireman, or teacher "in the event such municipal employee elects to, and does pay into the Fund created by this Act prior to his separation from service, an amount equal to the amount which would then have accumulated in his account from deductions from his salary, including 4% interest, if deductions from his salary had been made for the purposes of this Fund for age and service and widow's annuity during all of the period of such service." By paying in the sum so provided, Mr. Ryan can preserve the annuity rights which he acquired while in the service of the police department.

It was the intention of the legislature to protect the pension rights of members of pension funds, and while it would not be possible to refund to Mr. Ryan the moneys standing to his credit in the Policemen's Annuity and Benefit Fund as a result of contributions made by the City in lieu of salary deductions during the period of time that Mr. Ryan was receiving duty disability benefit, such sums may be included in the amount transferred to the Municipal Employees' Annuity and Benefit Fund. Mr. Ryan may then receive credit for the full period of time he was in the police department, and such contributions may be used for annuity purposes, as specified in the Act governing your Fund.

The transfer of these funds should be accompanied by a copy of this opinion, together with a statement showing what portion of the sum transferred is made up of contributions in lieu of salary deductions, in order that the Municipal Employees' Annuity and Benefit Fund may be apprised of the fact that a portion of the amount transferred is made up of contributions by the City, so that, in the event at a later date Mr. Ryan requests a refund from the Municipal Employees' Annuity and Benefit Fund, the amount contributed by the City in lieu of salary deductions will not be included in such refund.

RETURN OF REFUND

(No. 11197—Policemen's A. & B. Fund—G. F. M., Jr.—October 27, 1949.)

In response to your request for an opinion in regard to Bernard Sweeney, a former member of the police department, the following is submitted:

Your letter states and your records disclose that Mr. Bernard Sweeney, a former member of the police department of the City of Chicago, was born August 23, 1892; that he was appointed to the police department on June 9, 1922; that prior to such appointment he was a member of the Chicago fire department, from December 24, 1919, to July 6, 1922; that he was suspended from the police service on January 16, 1932, and was discharged from the police department on January 30, 1932; that on September 23, 1933, he received a refund of his salary deductions; that on June 15, 1936, he was restored to his former position in the service by an order of the Superior Court of Cook County; that on May 24, 1948, he paid into your Fund an amount to cover his salary deductions for the period from January 16, 1932, to June 15, 1936, the time during which he was adjudged to have been illegally discharged from the service; that on June 28, 1949, he was again discharged from the service, and at that time had service credit sixteen years, nine months, and twenty-two days, dating from January 16, 1932.

You have requested an opinion regarding the right of Mr. Sweeney to repay into the Fund the refund he received on September 23, 1933, and also as to whether he would be entitled to receive service credit for the period of time he served in the Chicago Fire Department, in the event such refund is permitted, and is paid by him.

The refund which Mr. Sweeney received on September 23, 1933, was paid to him by reason of the fact that he had been discharged from the police department. The Superior Court of Cook County later held that his discharge was illegal. An illegal discharge is no discharge, and that being the case, Mr. Sweeney was not entitled to receive a refund, and should have repaid such refund when he was reinstated in the police department by order of court. Having failed to repay the refund at that time, he not only has the right to make such repayment, but should be required to repay into the Fund the moneys which he received as a refund at the time he was illegally discharged from the police service, together with 4% interest on such moneys from the date he received the refund until the date of repayment into your Fund. At such time as Mr. Sweeney makes such repayment, he will be entitled to receive service credit for that period of time, as well as for the period he served in the Chicago fire department, i. e. from December 24, 1919 to June 6, 1922. Credit for this latter period of service is allowable under the provisions of Section 41 of the Act governing your Fund (Ill. Rev. Stats. 1949, Ch. 24, Sec. 985) which grants credit to policemen for service rendered in the fire department of the City of Chicago, and classifies any policeman who was a member of the fire department on the 31st day of December in the year 1921 as a present employee.

DETERMINATION OF STATUS OF PRESENT EMPLOYEE

(No. 11201—Policemen's A. & B. Fund—G. F. M., Jr.—October 31, 1949.)

In response to your request for an opinion concerning George D. Slack, formerly a patrolman in the Chicago police department, the following is submitted:

Your letter states and your records disclose that George D. Slack was born October 14, 1886; that he was appointed to the police department on June 5, 1913; that on February 18, 1920, he was placed on disability pension because of injuries he had sustained while riding a motorcycle; that he was restored to active duty on November 30, 1931, the physician for the Retirement Board having found him to be recovered from his injuries; that he has worked from that time until he was retired because of attainment of age sixty-three, which was on October 14, 1949; and that at the time of his retirement his total police service was twenty-four years, eight months, and four days. Your question is as to whether or not this man should have been classified as a present employee or future entrant at the time of his reinstatement, and under what section of the Act annuity should now be granted to him.

The disability pension which Mr. Slack was receiving was granted to him under the provisions of the disability section of the Police Pension Fund Act of 1915, as amended in 1917, (Ill. Rev. Stats. 1949, Ch. 24, Sec. 908). Section 50 of the Act governing your Fund (Ill. Rev. Stats. 1949, Ch. 24, Sec. 995) provides that the Policemen's Annuity and Benefit Fund Act of 1921 shall supersede the Police Pension Fund Act of 1915, as amended in 1917. It further provides:

> "All annuities, pensions and other benefits allowed prior to the first day in the month of January of the first year after the year in which this Act shall come in force and effect in such city, . . . shall thereafter be paid by the said retirement board from the annuity and benefit fund herein provided for, according to the law or laws under which such annuities, pensions, or other benefits were allowed."

Section 4 of the Police Pension Fund Act of 1915, as amended in 1917, (Ill. Rev. Stats. 1949, Ch. 24, Sec. 908) contains the following provision:

> "Provided, however, that whenever such disability shall cease, such pension shall cease, and such person shall thereupon be reinstated in the department in the rank held by him at the time of his retirement."

On November 30, 1931, Mr. Slack was reinstated to active service in the police department, as he had recovered from the injuries he received in 1920.

In Corporation Counsel opinion No. 728, rendered December 6, 1924, and in opinion No. 1666, rendered September 29, 1926, it was held that a policeman placed upon disability pension under the law in existence prior to enactment of the Policemen's Annuity and Benefit Fund Act continued to be a member of the police department, and that his retirement upon disability pension was merely a retirement from active service. When Mr. Slack returned to active duty on November 30, 1931, he did not reenter the service, because he was never separated from the service; he merely changed his status in the service from that of a policeman temporarily retired because of disability to that of a policeman in active service after recovery from disability.

Section 12 of the Act governing your Fund (Ill. Rev. Stats. 1949, Ch. 24, Sec. 956) provides in part thereof as follows:

" 'Future Entrant': Any policeman who shall be employed as a policeman of such city for the first time on or after the first day in the month of January of the first year after the year in which this Act shall come in force and effect in such city; and any policeman who shall not be in the police service of such city on the thirty-first day in the month of December of the year in which this Act shall come in force and effect in such city, but who shall have been in the police service of such city prior to the said thirty-first day in the month of December of the year in which this Act shall come in force and effect in such city, and who shall reenter the police service as a policeman on or after the first day in the month of January of the first year after the year in which this Act shall come in force and effect in such city. This definition shall be retroactive to July 1, 1921."

Since Mr. Slack was not separated from the service by reason of his injuries, and did not "reenter" the service after he had recovered from his injuries (having been in the service during the entire period of his disability, although in an inactive status), he cannot be classified as a future entrant.

The definition of present employee in the same section of the Act provides as follows:

" 'Present Employee': Any policeman who shall be in the employment of such city as a policeman thereof on the thirty-first day in the month of December of the year in which this Act shall come in force and effect in such city."

Mr. Slack was a member of the police department in the month of December of the year in which this Act came in force and effect in such city. He had not been separated from the department, as is evidenced by his returning to work upon recovering from his injuries, and therefore is to be considered as a present employee.

As a present employee, Mr. Slack is entitled to receive anuuity in accordance with Section 55 of the Policemen's Annuity and Benefit Fund Act (Ill. Rev. Stats. 1949, Ch. 24, Sec. 1000), as if there had been no interruption in the period of his active service. Section 55 provides that any present employee who has served for a period of twenty years and has attained age fifty shall receive an annuity "of an amount equal to fifty (50) per cent of the amount of compensation attached to or appropriated for the rank in the police department which such present employee may have held by virtue of civil service appointment on the day one year prior to the date of his resignation."

AFFECT OF ADOPTION ON CHILD'S ANNUITY

(No. 11205—Policemen's A. & B. Fund—G. F. M., Jr.—November 8, 1949.)

In response to your request for an opinion concerning continuation of payment of child's annuity to Linda G. Parizek, child annuitant of your Fund, the following is submitted:

Your letter states and your records disclose that George A. Parizek, a member of the police department of the City of Chicago, died October 15, 1946; that his widow was granted term annuity of $10.00 a month, together with child's annuity for Barbara J. and for Marcia P. Parizek, minor children; that a posthumous child, Linda G. Parizek, was born on March 24, 1947; that child's annuity of $10.00 a month has been paid to

the mother of said child on her behalf; and that a letter has been received from one J. E. Talbot stating that he is contemplating the adoption of Linda G. Parizek. Your question is as to whether or not the annuity payments now being paid on behalf of Linda G. Parizek would be continued in the event she were adopted by Mr. Talbot.

Section 43 of the Act governing your Fund (Ill. Rev. Stats. 1949, Ch. 24, Sec. 987) provides in part thereof as follows:

> "Annuity to be known as 'Child's Annuity' shall be provided for unmarried children of policemen. Any such annuity shall be payable monthly, from and after the date of the death of the policeman parent of any such child, until the annuitant shall attain an age of eighteen (18) years. The first payment of such annuity shall not become due and payable until one (1) month from and after the date upon which such annuity shall accrue."

Section 44 of the Act governing your Fund (Ill. Rev. Stats. 1949, Ch. 24, Sec. 988) provides for the amount to be paid, and sets up certain requirements which must be met before any annuity is payable. This section further provides:

> "Any annuity which shall be granted for the benefit of any child shall be paid to the parent of such child who shall be providing for such child, unless another person shall have been or shall be appointed by a court of law as the guardian of such child."

Should Mr. Talbot adopt Linda G. Parizek, he will have been appointed by a court as the parent of such child, and as such parent he acts in the capacity of a guardian.

Since neither Section 43 nor Section 44 of the Act governing your Fund makes any provision for the termination of child's annuity for reasons other than death, attainment of age eighteen, or marriage prior to attainment of age eighteen, it therefore follows that payment of child's annuity on account of Linda G. Parizek should be continued even in the event of her adoption by Mr. Talbot.

VACATED DIVORCE DECREE—WIDOW'S ANNUITY

(No. 11236—Policemen's A. & B. Fund—G. F. M., Jr.—January 18, 1950.)

In response to your request for an opinion concerning the right of Mrs. Olive M. Borrelli to receive a pension as a widow of Dr. William F. Borrelli, a former police surgeon who died December 9, 1949, the following is submitted:

Your letter states that Dr. Borrelli was born July 2, 1880; that on July 5, 1905, he married Olive M. Ferrarri; that he was appointed a police surgeon on September 5, 1912; that a decree of divorce between William F. Borrelli and Olive M. Borrelli was entered on January 11, 1935; that Dr. Borrelli was married to Gertrude Pletzke, at Valparaiso, Indiana, on February 28, 1935; that Dr. Borrelli was divorced from Gertrude Pletzke on July 26, 1938; that on August 20, 1938, Dr. Borrelli and Olive M. Borrelli, his divorced wife, appeared before Judge Epstein, Judge of the Circuit Court of Cook County, and on that date the decree of divorce which had been previously entered on January 11, 1935, was vacated. Your question is as to whether or not Mrs. Olive M. Borrelli is entitled to receive widow's annuity as the widow of Dr. William F. Borrelli.

This question arises by reason of the fact that upon Dr. Borrelli's fifty-seventh birthday Mrs. Olive M. Borrelli was not the wife of Dr. Borrelli, but was divorced from him at that time. The fact that the divorce was set aside shortly thereafter, and she again became the wife of Dr. Borrelli, without the necessity of performance of a legal ceremony, and was his widow at the time of his death, constituted, for the purposes of this Act, continuity of marriage.

Section 38 of the Act governing your Fund (Ill. Rev. Stats. 1949, Ch. 24, Sec. 982) describes wives or widows of policemen who shall not have any right to annuity from the annuity and benefit fund provided for by said Act. The only portion of such section which might possibly be construed to apply in the case above set out is that known as paragraph (a), and which is as follows:

> "The wife or widow married subsequent to the date upon which this Act shall come in force and effect in such city, of any policeman who shall die while in the service if such widow shall not have been married to such policeman before he shall have attained an age of fifty-seven (57) years."

It is to be noted that the above quoted provision of the Act does not bar the widow of a policeman from receiving annuity because of the fact that she might not be his wife on the date he attained age fifty-seven, but bars her only "if such widow shall not have been married to such policeman before he shall have attained an age of fifty-seven (57) years." In this case, Olive M. Borrelli was the wife of William D. Borrelli before he attained age fifty-seven, and was still married to him at the time of his death, thus becoming his widow.

We are therefore of the opinion that Olive M. Borrelli, as the widow of Dr. William F. Borrelli, is entitled to receive widow's annuity from your fund.

DISABILITY ANNUITY—WIDOW'S ANNUITY

(No. 11258—Policemen's A. & B. Fund—G. F. M., Jr.—February 28, 1950.)

In response to your request for an opinion concerning Emil G. Johnson, the following is submitted:

Your letter states that Emil G. Johnson was appointed to the police department on February 15, 1915; that he was injured in the performance of an act of police duty on July 30, 1919, and received an old law disability benefit of $75.00 a month, dating from January 13, 1921; that Mr. Johnson was single at the date of his separation from the department, but on September 30, 1922, married one Viola E. Owen; and that Mr. Johnson died January 9, 1950. Your question is as to whether or not Mrs. Johnson is entitled to receive a pension as the widow of Emil G. Johnson.

Section 50 of the Act governing your Fund (Ill. Rev. Stats. 1949, Ch. 24, Sec. 995) provides in part thereof as follows:

> "Widows and children less than eighteen (18) years of age, of policemen who are or who shall become pensioners under and by virtue of said Act entitled, 'An Act to provide for the setting apart, formation and disbursements of a police pension fund in cities having a population exceeding two hundred thousand inhabitants,' approved June 29, 1915, in force July 1, 1915, as subsequently amended, and

who shall die shall have a right to receive pensions in accord with the provisions of said Act as subsequently amended, and the retirement board shall allow all such pensions in accordance with the provisions of said Act, as subsequently amended, and shall pay all such pensions from the annuity and benefit fund herein provided for in accordance with the provisions of this section."

Section 5 of the Act under which Mr. Johnson retired (Ill. Rev. Stats. 1949, Ch. 24, Sec. 909) provides in part thereof as follows:

"Whenever any person who has been appointed and sworn as a regular or probationary member of any such police force shall while in, and in consequence of, any performance of police duty, lose his life or receive injuries from which he shall thereafter die, leaving a widow or child or children under the age of eighteen (18) years, then, upon satisfactory proof being made to it, such board shall order and direct that the pension described in section 3 hereof to be paid to the widows and children shall be paid to such widow and such child or children, subject to the limitations contained in said section 3."

Section 3 of the Act of 1915, governing the Police Pension Fund (Ill. Rev. Stats. 1949, Ch. 24, Sec. 907) provides in part thereof as follows:

"(B) After the death of any such policeman, his widow, in case the marriage of such policeman shall have taken place more than one year prior to the time a pension is granted him hereunder, shall receive a pension of fifty ($50.00) dollars per month and an additional sum of ten ($10.00) dollars per month for each of his children under eighteen (18) years of age. Should any such child cease attending school between the age of fourteen (14) and eighteen (18) years, the aforesaid sum shall be reduced to five ($5.00) dollars per month."

It is to be noted that under the provisions of Section 5 of the Act of 1915, any pension payable to the widow of a deceased policeman is subject to the limitations contained in Section 3 of the Act; that Section 3 requires, among other things, that the widow of such policeman shall have been married to him "more than one year prior to the time a pension is granted him."

The marriage of Emil G. Johnson to Viola E. Owen took place on September 9, 1922, a year and eight months after Mr. Johnson had retired on a pension. We are therefore of the opinion that Viola E. Johnson is not entitled to receive a pension as the widow of Emil G. Johnson.

EXTRA ANNUITY CONTRIBUTIONS

(No. 11280—Policemen's A. & B. Fund—G. F. M., Jr.—April 4, 1950.)

In response to your request for an opinion concerning James F. Willett, the following is submitted:

Your letter states and your records disclose that Patrolman James F. Willett was appointed to the police department of the City of Chicago December 29, 1930; that he served until September 16, 1940, when he entered the military service; that while in the military service, Mr. Willett was wounded, and as a result now has limited mobility in his left shoulder; that Mr. Willett received his release from military service on January 29, 1946, and reported to the police department for restoration to service on March 16, 1946; that he was placed on the medical roll for thirty days and

then granted ordinary disability benefit; that his grant of ordinary disability benefit expired February 9, 1950, and he again applied for active duty in the department, but was found incapable of performing full police duty; that Mr. Willett resigned from the police department on February 9, 1950, and his net service is nineteen years, one month, and ten days; and that during the period of his service he made extra annuity contributions under the provisions of the Act in the amount of $321.89. Your question is as to whether or not these extra annuity contributions may be used in computing the amount of his annuity.

Extra annuity contributions may be made under the provisions of Section 16 of the Act governing your Fund (Ill. Rev. Stats. 1949, Ch. 24, Sec. 960) which provides in part as follows:

> "(d) In the event that the accumulation from salary deductions and city contributions hereinbefore in this section provided, shall not be of an amount sufficient to purchase for any future entrant heretofore or hereafter coming into the police service, after he has served twenty (20) years and when he shall have attained an age of fifty-seven (57) years, an annuity of not less than fifty percent of the maximum salary of a first class patrolman as such salary shall be at any time during the period of service of such future entrant, or an annuity of not less than fifty percent of the salary attached to any rank superior to that of patrolman held by such future entrant, by virtue of civil service appointment, if such future entrant shall attain such superior rank, such future entrant shall be permitted to pay into the fund (but not in the way of salary deductions) in addition to the amount hereinbefore in this section provided, such further amount as may be necessary which, when added to the salary deductions first hereinbefore provided for, and to the city's total contributions, will create a total accumulation sufficient to purchase for such future entrant when he shall have served twenty (20) years and shall have attained the age of fifty-seven (57) years, an annuity of not less than fifty percent of the maximum salary of a first class patrolman as such salary shall be at any time during the period of service of such future entrant, or an annuity of not less than fifty percent of the salary attached to any rank superior to that of patrolman held by such future entrant, by virtue of civil service appointment, if such future entrant shall attain such superior rank, and such city shall concurrently contribute two and three-sevenths (2-3/7) times the amount of such additional payments in like manner as is heretofore in this section provided for city contributions. Such additional payments and city contributions shall be improved with interest at the rate of four (4) per cent per annum and shall be carried in a separate account on the books of the fund; and when such future entrant shall attain the age of fifty-seven (57) years while still in the police service, or shall become separated from the service prior to the attainment of age fifty-seven (57) but after having completed at least twenty (20) years of service, the accumulation then to his credit shall be transferred into the annuity payment fund provided for in section 54 of this Act, and shall thereafter be of the same status as the salary deductions and city contributions first hereinbefore in this section provided for: . . . Should any such future entrant become separated from the service before the attainment of age fifty-seven (57) and with less than twenty (20) years of service to his credit, the additional payments herein provided for and voluntarily paid into the fund by him shall not be used in the computation of any annuity but shall be refunded according to the provisions of section 39 of this Act, together with the interest thereon."

While the language contained in the above provision of the Act is apparently very clear, the courts have held:

> "The primary object in construing a statute is to ascertain the legislative intent expressed therein." (*People* v. *Illinois Merchants Trust*, 328 Ill. 223.)

"In seeking the legislative intent, courts should consider the language used, the object to be attained, or the evil to be remedied, and this may involve more than the literal meaning of the words used." (*Peabody* v. *Russell*, 301 Ill. 439.)

"When the words used, followed literally, lead to an absurd consequence or to a construction clearly not contemplated, this constitutes a sufficient reason to depart from the language used for the purpose of ascertaining the intent." (*Mitchell* v. *Lowden*, 288 Ill. 327.)

"It is a well known rule of statutory construction, that a statute must be interpreted according to the legislative intention, and not always according to the literal meaning of the language used." (*People* v. *Lieber*, 357 Ill. 423.)

It was the evident intent of the legislature, in passing Section 16 (d) of the Act governing your Fund, to permit members of the police department to make voluntary contributions in order that they might ultimately obtain pensions amounting to half pay. It was also the intent of the legislature that this privilege should be so worded in the statute that it would act as an inducement to policemen to serve for a period of not less than twenty years. It was not the intention of the legislature to permit a policeman to join the police department, and then, by making large voluntary contributions, to accumulate such a sum that he would be entitled to receive a half pay pension within a short period of time, and by rendering only a short period of service.

The legislature apparently did not foresee a set of circumstances such as exists in the case of Mr. Willett, wherein a policeman has served nineteen years, one month and ten days, and then because of injuries received in defense of his country, he cannot be granted permission to return to the service and complete the final ten months and twenty days of his twenty years of service, the time specified in Section 16 (d) of your Act as the minimum period required to be served before his voluntary contributions may be taken into account in the computation of his annuity.

It is logical to assume that legislative sanction of the provisions contained in Section 16 (d) of the Act governing your Fund did not contemplate discrimination against policemen who honestly endeavor to be restored to the service and, through no fault of their own, are prevented from receiving the benefits intended for participants in your Fund who have rendered long and faithful service as members of the police department.

In the case of *Colton* v. *Board of Trustees*, 287 Ill. 56, 61, the Court held:

"The purpose of the pension laws is beneficial, and statutes of that character should be liberally construed in favor of those intended to be benefited."

We are therefore of the opinion that in the matter of the retirement of Officer James F. Willett, the voluntary contributions made by him and paid into the Policemen's Annuity and Benefit Fund may be used in the computation of his annuity.

DUTY OUTSIDE CITY LIMITS

(No. 11300—Policemen's A. & B. Fund—G. F. M., Jr.—May 8, 1950.)

In repsonse to your request for an opinion concerning the standing in your Fund of members of the Educational Unit of the Traffic Division of the Police Department of the City of Chicago, the following is submitted:

Your letter states, and the records of the Department disclose that there is in the Traffic Division a Unit which is known as the Educational Unit of the Traffic Division of the Police Department of the City of Chicago; that members of this Educational Unit are often required to go to suburban towns for the purpose of lecturing to the various communities regarding traffic regulations. Your question is as to what protection these members of the Educational Unit have if they are called upon to perform any specific act of duty outside the city limits of Chicago.

We assume your question may be interpreted to mean: To what extent may such members of the police department participate in the benefits of the pension fund if they are injured or killed while performing required services outside of the corporate limits of the City of Chicago?

Section 12 of the Act governing your Fund (Ill. Rev. Stats. 1949, Ch. 24, Sec. 956) provides in part thereof as follows:

> "'Act of Duty': Any act of police duty inherently involving special risk, not ordinarily assumed by a citizen in the ordinary walks of life, imposed on a policeman by the Statutes of the State of Illinois, or by the Ordinances or Police Regulations of the city in which this Act shall be in force and effect or by special assignment; or any act of heroism performed in such city by a policeman thereof having for its direct purpose the saving of the life or property of another person."

The right of a policeman to receive duty disability, or of his widow to receive compensation annuity, would be determined by the manner in which such policeman was injured or killed.

It is to be noted that in defining "Act of Duty," the statute specifically provides that where such "Act of Duty" takes the form of an "act of heroism," such "act of heroism" must be performed "in such city." Under this limitation, payment of duty disability, or of widow's compensation annuity, cannot be made unless the particular act of heroism has been performed "in such city."

We are therefore of the opinion that the pension rights to which members of the Educational Unit are entitled while they are engaged in police duties outside the City of Chicago, either under the Rules and Regulations of the police department, or under the Statutes of the State of Illinois, are the same as those to which they are entitled while they are performing police duty within the limits of the City of Chicago, with the exception of those pension rights to which they would be entitled for injury or death resulting from the performance of an act of heroism within the corporate limits of the City of Chicago.

COMMON LAW MARRIAGE

(No. 11338—Policemen's A. & B. Fund—G. F. M., Jr.—October 9, 1950.)

In response to your request for an opinion concerning the right of Delia Olson to widow's pension, the following is submitted:

Your letter states that Delia Olson is the alleged widow of Charles Olson, who died on the 21st day of November, 1947; that she was married to Charles Olson (either by marriage ceremony or common law marriage) on February 10, 1904; that in the month of May, 1928, Charles Olson, who at that time was receiving annuity, entered into an agreement with Mrs. Olson regarding his obligation for support and maintenance due her in the future: that Charles Olson at some later date married one Annie Dawson, from whom he was divorced on the 25th day of January, 1930; that on some later date he married one Annie E. Riley, who died in April, 1938; that Charles Olson died November 21, 1947.

Your letter further states that a search has been made of the records of the courts here in Cook County, and that no evidence of any divorce between Charles A. Olson and Delia Olson has been found; that Mrs. Olson has appeared before the Board and testified that she was never divorced from Charles A. Olson, and was never served with any documents of any kind in connection with any such law suits. Your question is as to what the holdings of the Supreme Court of Illinois have been in regard to a a situation similar to that set out in the above facts.

In the case of *Young* v. *Young*, 213 Ill. App. 402, at page 409, under circumstances similar to those set out above, the Court held: "It would be presumed that such man had obtained a divorce and was legally qualified to remarry, unless there was evidence to the contrary."

The fact that for twenty-five years Mrs. Olson continued to live at the same address, as was disclosed in her testimony before the Board; the further fact that no record of any divorce proceeding in Cook County has been found; and that she has testified she was never served with any documents in connection therewith overcome the presumption of the legality of Charles Olson's marriage subsequent to his leaving Delia Olson.

In the case of *Cole* v. *Cole*, 153 Ill. 585, it was held that where it is proved that a man and woman were legally married; that she has in no way violated her marriage obligation; that he deserted her without cause, and that the marriage was never dissolved in the jurisdiction in which they lived together and in which she continued to live; and that she has no personal knowledge of his obtaining a divorce, the presumption is that a second marriage contracted by him during her life is invalid.

In the case of *Panico's Estate*, 268 Ill. App. 585, the Court held that evidence that a search of the records in the jurisdiction where the wife lived and continued to live failed to disclose a divorce between the parties recorded therein is sufficient to overcome the presumption of validity of a second marriage.

It is to be inferred from the holdings in the cases cited above that the first marriage was never terminated. Following the decisions of the Court in these cases, it is our opinion that Delia Olson should be considered never to have been divorced from Charles Olson, and therefore to be the widow of Charles Olson, and as such widow entitled to receive a pension from your Fund.

DISABILITY ANNUITY—WIDOW'S ANNUITY

(No. 11516—Policemen's A. & B. Fund—G. F. M., Jr.—April 4, 1952.)

In response to your request for an opinion concerning the eligibility of Mrs. Ida A. Friend for pension as the widow of George E. Friend, deceased, the following is submitted.

Your letter states that George E. Friend was a member of the Police Department of the City of Chicago; that because he became disabled while serving in such police department he was granted a pension of $75.00 a month beginning January 13, 1921; that on October 13, 1921, he married one Ida A. Werner; that George E. Friend died on January 14, 1952; and that Ida A. Friend, his widow, has filed an application for widow's pension.

George E. Friend was granted his pension under the police pension fund Act of 1915, prior to the creation of the present annuity and benefit fund Act under which the fund operates at the present time. Section 4 of the police pension fund Act of 1915 (Ill. Rev. Stats. 1951, Chap. 24, Sec. 908) provides in part thereof as follows:

> "Whenever any person who has been appointed and sworn as a regular or probationary member of any such police force shall at any time become physically disabled while in, and in consequence of, the performance of police duty, said board upon his written request, or without such request, upon the recommendation of the commanding officer of police or head of the police department may retire such policeman from actual service, and order and direct that he shall be paid from such fund a yearly pension not exceeding one-half of the amount of the salary attached to the rank which he may have held in said police force at the time of his retirement.
>
> * * * On the death of any person so retired, his widow, provided the marriage of such policeman shall have taken place prior to the date he became so disabled, or child or children under the age of eighteen (18) years of such deceased pensioner, shall be paid the pensions specified aforesaid in Section 3 hereof under the paragraph designated 'B,' subject to the limitations therein contained."

Section 50 of the Act governing your Fund (Ill. Rev. Stats. 1951, Chap. 24, Sec. 995) provides in part thereof as follows:

> "Widows and children less than eighteen (18) years of age, of policemen who are or shall become pensioners under and by virtue of said Act entitled, 'An Act to provide for the setting apart, formation and disbursement of a police pension fund in cities having a population exceeding two hundred thousand inhabitants,' approved June 29, 1915, in force July 1, 1915, as subsequently amended, and who shall die shall have a right to receive pensions in accord with the provisions of said Act as subsequently amended, and the retirement board shall allow all such pensions in accordance with the provisions of said Act, as subsequently amended, and shall pay all such pensions from the annuity and benefit fund herein provided for in accordance with the provisions of this section."

Under the provisions of the Act governing your Fund, the Act of 1915 controls the granting of any pension to Mrs. Friend. Because Mrs. Friend did not marry her husband until October 23, 1921, approximately 9½ months after George E. Friend became disabled, and because the Act which controls the grant of a widow's pension to Mrs. Friend required that the widow of a disabled policeman be married to him before he became disabled, Mrs. Friend is not eligible to receive a widow's pension.

We are therefor of the opinion that Mrs. Ida A. Friend can not be paid a pension by your Fund.

REFUND OF WIDOW'S ANNUITY DEDUCTIONS

(No. 11560—Policemen's A. & B. Fund—G. F. M., Jr.—July 9, 1952.)

In response to your letter requesting an opinion in connection with a letter you had received from the law firm of Sherwin & Sherwin, the following is submitted.

Your letter to me forwarded a copy of a letter from Sherwin & Sherwin, which letter is as follows:

"The Retirement Board of the
Policemen's Annuity and Benefit Fund
City of Chicago
1002 City Hall
Chicago, Illinois

Gentlemen:

Directing your attention to your letter of May 20 regarding Fred Grohn, may I respectfully suggest a reconsideration of his application through this office for a refund of the sum that has accumulated from the deductions for widow's annuity together with the accumulated interest thereon.

I have read the cited sections of the Illinois Statutes and have spent considerable time researching the applicable cases on related subject matter. The obvious intention of the Legislature was that such amount as was deducted from a policeman's salary for widow's pension would be refunded to him if he resigned or was discharged from the service and the widow's pension had not become payable to such widow.

The cited sections of the Illinois Statute by implication include the situation that exists as to Fred Grohn. His wife having died, the widow's pension will never take effect and he should therefore have refunded to him the total amount deducted from his policemen's salary plus accumulated interest. It certainly was not the intention of the Legislature to deprive a policeman of the amount deducted for a widow's pension which was never paid out as a widow's pension, not otherwise refunded to him. It is the obvious intention of the Legislature to see to it that the widow's pension is paid when it accrues as such, or if not paid under those circumstances to refund the accumulation plus interest.

In view of the foregoing we respectfully suggest that you reconsider the matter relating to Fred Grohn and upon doing so conclude that he should be awarded the refund together with accumulated interest. To the Retirement Board and the Fund itself the amount refunded would be a mere pittance. To Fred Grohn it represents the sole remaining nest egg that he can turn to. We shall sincerely appreciate all the courtesies and efforts extended in this behalf.

Very truly yours,

Sherwin & Sherwin
By Julius L. Sherwin
(Signed)"

The Retirement Board of the Policemen's Annuity and Benefit Fund is a board of trustees created by a statutory enactment and as such has only such powers as are contained in the Act creating it. (*O'Connor* v. *Board*, 155 A. Ill. 460, 479).

The Act creating the Policemen's Annuity and Benefit Fund of Chicago, (Ill. Rev. Stats. 1951, Chap. 24, Sec. 945, *et. seq.*) contains provisions for the refunding of deductions made from police salaries and paid into the Policemen's Annuity and Benefit Fund for widow's anuuity purposes in the event: (Ill. Rev. Stats. 1951, Chap. 24, Sec. 983, Par. 5, (B) and (C)

> (B) "When any male policemen shall become fifty seven (57) years of age while in the service and shall not then be married, any sum accumulated from deductions from the salaries for widow's annuity purposes shall then be refunded to him. Thereafter, in his case, no sums shall be deducted from his salaries or contributed by the City for widow's annuity purposes."
>
> (C) "When any male policemen shall resign or be discharged from the service before he shall become fifty seven (57) years of age and shall enter upon annuity and shall not then be married, any sum accumulated from deductions from his salaries for widow's annuity purposes shall then be refunded to him."

Mr. Grohn was born June 7, 1898; entered the Police Department on October 26, 1922; retired from the Department September 1, 1949; and on July 31, 1951 his wife died. Under the provisions of Section 29 of the Act governing your Fund, (Ill. Rev. Stats. Chap. 24, Sec. 983, Par. 5 (C) Mr. Grohn was not and is not now entitled to receive a refund of deductions made from his salary for widow's annuity purposes, because at the time he retired from the Police Department, he was married.

Mr. Sherwin, in his letter addressed to you in connection with Mr. Grohn claim, makes a strong plea for the refund to Mr. Grohn of deductions made for widow's annuity purposes under his interpretation of the intention of the legislature at the time of the passage of the Act creating your Fund.

The law controlling the intention of the legislature of Illinois has been clearly stated on many occasions, and the foundation rule in considering statutes is to ascertain and give effect to the intention of the law making body, but the intention must be that which is expressed in the statute, and the language of the Act can not be disregarded unless the court can say the meaning is doubtful and that adherence to the letter of the statute will lead to injustice or absurdity. (*Colton* v. *Board*, 287 Ill. 56).

In attempting to arrive at the intention of the legislature at the time of the passage of the Act governing your Fund, it must be remembered that your Fund is based upon actuarial science, with certain saving features in order that your Fund may average the lives of its beneficiaries. Such saving as may be made by reason of the death of a pensioner's widow in that period of time during which no refund is payable, constitutes a saving that enables that Fund to continue payments to widows who outlive the normal or expected span of life, of the pension which was granted to them based upon the average life of widows, as determined by mortality tables.

Without such saving features which are in the Act governing your Fund, the pensions granted by your Fund would be necessarily smaller than they are at the present time. Further, the statute is clear and without ambiguity in regard to the payment of refunds of deductions made for widow's annuity purposes. Had the legislature intended that such refunds be paid under circumstances such as there are in Mr. Grohn's case, it would have so provided.

We are therefore of the opinion that in the circumstances involving Mr. Grohn, no refund may be made of deductions taken from his salary for widow's annuity purposes.

INVESTMENT IN PARK DISTRICT BONDS

(No. 11574—Policemen's A. & B. Fund—G. F. M., Jr.—August 6, 1952.)

In response to your question as to whether or not bonds issued by the Chicago Park District and known as Grant Park North Underground Parking Garage Revenue Bonds are a legal investment for your Fund, the following is submitted.

The ordinance passed and adopted by the Board of Commissioners of the Chicago Park District providing for the issuance of the above named bonds has been examined and found to contain all those provisions necessary for the protection of your Fund. The Chicago Park District has been held by the Courts of Illinois to be a municipal corporation of the State of Illinois and the bonds are interest bearing bonds. These bonds may also be registered in the name of the owners. These bonds also meet all the requirements of the Act governing your Fund and are, therefore, a legal investment for your Fund.

ANNUITY FOR ADOPTED CHILD

(No. 11597—Policemen's A. & B. Fund—G. F. M., Jr.—October 17, 1952.)

In response to your request for an opinion concerning any annuity rights of Robert H. Hanck, the adopted son of Herman and Lydia S. Hanck, the following is submitted.

Your letter states and your records show that Herman C. Hanck was born March 18, 1896; that he became a member of the Police Department of the City of Chicago from which department he retired on August 1, 1946; that he died September 30, 1946; that since his death his widow, Lydia S. Hanck, has been paid a widow's annuity; that she died on August 28, 1952; and that Robert F. Hanck, who was born July 22, 1937 and adopted by the Hancks shortly thereafter, has inquired as to whether or not he is entitled to receive an annuity.

The Act governing the Policemen's Annuity and Benefit Fund of Chicago at the present time in Section 44 thereof, (Ill. Rev. Stats. 1951, Chap. 24, Sec. 988) provides in part thereof for the paying of annuity to adopted children provided such adopted children meet the requirements set up in said Section. This section was amended in 1949 to provide as is above set out.

Prior to the year 1949 there was no way in which an adopted child could receive an annuity from the Policemen's Annuity and Benefit Fund of Chicago. Laws passed by the legislature are prespective in effect and cannot be retroactive unless it is specifically provided that they are to be retroactive to a certain date.

As the Act governing your Fund did not provide for the payment of an annuity to any adopted child or children on September 30, 1946, the date of death of Herman C. Hanck, we are of the opinion that Robert F. Hanck, the adopted son of Herman C. Hanck, deceased, is not entitled to receive an annuity.

EFFECTIVE DATE OF PENSION LAW

(No. 11705—Policemen's A. & B. Fund—G. F. M. Jr.—June 29, 1953.)

In response to your request for an opinion as to the date on which the provisions of House Bill No. 482, amending the Act governing your Fund, become effective, the following is submitted.

House Bill No. 482 amends Sections 12, 16, 17, 21, 28, 39, 41, 48½ and 54. It also adds a new section, to be known as Section 16½ to the Act governing your Fund. Sections 12, 16, 17, 21, 28, 39, 41, 48½ and 54 by their terms provide that they come into force and effect on January 1, 1954.

Section 16½, the new section added to the Act, provides therein that that section shall come into force and effect "on the effective date of this amendatory Act", which is an expression of the legislature that this new section (Section 16½) shall become effective on the same date as the other sections set out in House Bill No. 482. Had it been the intention of the legislature that Section 16½ should be in force and effect on July 1, 1953, the legislature would have made no mention of "the effective date of this amendatory Act" for the reason that this new section would then have automatically become in full force and effect on July 1, 1953. For that reason it can only be considered that it was the intention of the legislature that the effective date (i. e. the date on which the provisions or changes contained in the amendatory Act shall become effective) of this entire amendatory Act was to be January 1, 1954.

It is, therefore, our opinion that the effective date of all the provisions contained in House Bill No. 482 is January 1, 1954.

EFFECTIVE DATE OF LEGISLATIVE PENSION CHANGES

(No. 11704—Policemen's A. & B. Fund—G. F. M., Jr.—July 22, 1953.)

In response to your request for an opinion concerning the effective date of the amendments contained in House Bill No. 554, the following is submitted.

House Bill No. 554 was introduced in the General Assembly April 15, 1953, by Mr. Vito Marzullo. The Bill so introduced amends Sections 13, 43, 44 and 46 of the Act governing your Fund. This Bill passed the legislature June 18, 1953, and was signed by the Governor of the State of Illinois July 16, 1953.

Article IV, Section 13 of the constitution of the State of Illinois (1870) provides in part thereof as follows:

> "* * * that no act of the general assembly shall take effect until the first day of July next after its passage, unless, in case of emergency * * *"

and Article V, Section 16 of the constitution provides in part thereof as follows:

> "Every bill passed by the General Assembly shall, before it becomes a law, be presented to the Governor.

If he approves, he shall sign it, and thereupon it shall become a law * * *"

The provision hereinabove quoted as contained in Article IV, Section 13, fixes a date upon which the legislation passed prior to July 1 becomes effective. The provision cited contained in Article V, Section 16, is compulsory in that an Act signed by the Governor becomes a law and is effective from and after the date it is signed.

The Supreme Court of the State of Illinois in *People* v. *Kramer*, 328 Ill. 512, 160 Northeast 60, held that any Act signed by the Governor after July 1 in the year of passage takes effect immediately, i.e. from and after the date of signing.

As House Bill No. 554 has not provided a date from which the changes as contained in said House Bill shall become effective, we are of the opinion that the changes made in the Policemen's Annuity and Benefit Fund Act by the amendments contained in House Bill No. 554 shall take effect from and after the date such amendments become law as a result of the Governor of Illinois having placed his signature upon said House Bill.

ADDITIONAL CONTRIBUTIONS

(No. 11770—Policemen's A. & B. Fund—G. F. M., Jr.—November 17, 1953.)

In response to your request concerning the rights of Thomas Gibbons to pay additional voluntary contributions into your Fund the following is submitted:

Your letter states that Thomas Gibbons, a member of the Police Department of the City of Chicago, has been in receipt of duty disability benefits from your Fund since April 1, 1939; that on September 22, 1953, at which time he was 56 years of age, Thomas Gibbons resigned from the department and applied for annuity; that his accumulation will provide him with an annuity of $116.42 a month; that on October 6, 1953, Thomas Gibbons requested permission to pay into the Fund such amounts to bring his accummulation up to the point where it would entitle him to an annuity of $187.50; that according to the records of the Civil Service Commission, Thomas Gibbons attained the age of 57 years on October 21, 1953; and that your question is whether or not you have any right to grant the request of Mr. Gibbons.

Section 16 of the Act governing your Fund (Ill. Rev. Stats. 1951, Chap. 24, Section 960) provides that in the event the accumulation standing to the credit of a policeman at the time of his retirement is going to be insufficient to provide him with an annuity equal to half his salary at the time of retirement, he may make voluntary contributions so that such accumulation will be of such size that it will permit him to receive an annuity equal to one-half his salary at the time of retirement.

Section 26 of the Act governing your Fund (Ill. Rev. Stats. 1951, Chap. 24, Sec. 970) provides in part thereof as follows:

"(c) When any future entrant who shall have attained an age of fifty (50) or more but less than fifty-seven (57) years while in the service and who shall have served ten (10) or more years shall resign or be discharged from the service, the amount of age and

service annuity to which he shall have a right from and after the date of such resignation or discharge * * * shall be fixed, as of the respective ages, at that time: * * *".

Mr. Gibbons resigned from the department after attaining the age of 50 years but before attaining the age of 57 years. He had at that time been in service more than 10 years. His amount of age and service annuity was fixed on the date of his resignation from the Police Department.

To permit Mr. Gibbons to pay at this time such additional amount of money as would increase his age and service annuity to $187.50 a month would be to change the date of fixing his annuity from the date of his resignation to such time as the money would be paid into your Fund by him. If your Fund changes the date for fixing the annuity of Mr. Gibbons, there would be no reason why you should not change the date of fixing the annuity for any other policeman who might request such a change be made of the date of his retirement from the service, regardless when such request is made.

We are, therefore, of the opinion that your Board cannot grant permission to Mr. Gibbons to pay into your Fund any additional money to increase the amount of his annuity.

D. LABORER'S AND RETIREMENT BOARD EMPLOYEES' ANNUITY AND BENEFIT FUND

DEDUCTION FOR TEMPORARY APPOINTEE

(No. 11118—Laborers' and Retirement Board Employees' Annuity and Benefit Fund—M. H. F.—January 20, 1949.)

In response to your request for an opinion as to the status of Mary Ahlstrand, the following is submitted:

Your letter of information states that Mary Ahlstrand was born April 13, 1882; that on October 18, 1939, she was certified and appointed as a Lunchroom Attendant; that on June 27, 1942, she resigned from the service to accept annuity; that on May 3, 1943, she re-entered the service as a Lunchroom Attendant on a temporary basis; that on March 8, 1948, she was certified as a Head Attendant, at which time she was over sixty-five years of age; that on October 29, 1948, she resigned from the service; and that on November 23, 1948, she was again certified as a Lunchroom Attendant. Your question is as to whether or not salary deductions should have been made during the period from May 3, 1943, to March 8, 1948, during which time Mary Ahlstrand worked as a Lunchroom Attendant by virtue of temporary appointment.

Section 12 of the Act governing your Fund (Ill. Rev. Stats. 1947, Ch. 24, Sec. 1119) provides in part thereof as follows:

"The following words and terms as used in this Act shall mean as follows, respectively:

'Contributor'; 'Contributor to this fund', or 'Employee': Any person who was, is or shall be employed by such city or the board of education of such city in a position classified by the civil service commission of such city as in the labor servce thereof and who has been or shall be appointed to such position under and by virtue of an Act

entitled 'An Act to regulate the civil service of cities,' approved and in force March 20, 1895, as subsequently amended; * * *."

Section 52 of the Act governing your Fund (Ill. Rev. Stats. 1947, Ch. 24, Sec. 1159) provides in part as follows:

> "Notwithstanding the provisions of section 12, or any other section of this Act, whenever any contributor shall be or shall have been assigned to work for such city or board of education in any position other than the position which such contributor holds by virtue of certification and appointment as a result of competitive civil service examination, * * * such contributor shall have deducted from his salary the amount which would have been deducted had he continued to work in the position which he held by virtue of such certification and appointment, * * * or in the event such salary deductions shall not be made, through inadvertence or otherwise, such contributor shall have the right to pay such amount into such fund and shall be credited in his account with the corresponding city contributions in like manner, to the end that during such employement the said contributor may retain all of the rights which he otherwise would have under this Act were his employment continuous in the position which such contributor held by virtue of such certification and appointment, * * *; provided, that any such amount which shall not be deducted from the salary of such contributor nor paid by him, as herein provided, shall be deducted from the earliest possible and practicable payment of salary due and payable to such contributor or from any annuity, benefit or refund payable to or on account of such contributor. Such contributor shall be credited with the period of such employment as a period of service as a contributor for the purposes of this Act. * * *."

Under the provisions of the above cited sections of the Act, Mary Ahlstrand was entitled to be a contributor to your Fund during the period of her service as a Lunchroom Attendant by virtue of temporary appointment, having previously been a member of and contributor to your Fund by virtue of certification and appointment as a civil service employee. Deductions should have been made from her salary during the period from May 3, 1943, to March 8, 1948.

PROOF OF MARRIAGE

(No. 11124—Laborers' and Retirement Board Employees' Annuity and Benefit Fund—G. F. M., Jr.—February 16, 1949.)

In response to your request for an opinion concerning the marital status of Sarah Dooley, the following is submitted:

Your records disclose that Joseph J. Dooley became a civil service employee of the City of Chicago on June 9, 1924; that on July 17, 1935, he filed with your Fund the information sheet that is required from your members; that in said information sheet, which was sworn to, he stated that he was married to one Sarah McElroy on March 13, 1926; that he gave the name of his father and mother, and their birthplaces; that Joseph J. Dooley died September 7, 1948, at Chicago, Illinois; that Sarah McElroy Dooley filed an application for widow's annuity stating that she was the widow of Joseph J. Dooley, which application was also under oath; that Sarah Dooley appeared before your Board at a regular meeting thereof and testified that she was the widow of Joseph J. Dooley, to whom she had been married on March 13, 1926, at Van Wert, Ohio, that she

had lost the original marriage certificate; that she had endeavored to secure a copy of such certificate but had been unable to obtain one; that she further testified concerning the names and birthplaces of the father and mother of Joseph J. Dooley, which testimony corresponded with the information furnished by Joseph J. Dooley on his information sheet.

Your records also show that on January 26, 1949, an estate was opened for Joseph J. Dooley, deceased, in the Probate Court of Cook County, being File No. 49P 809, Doc. 482, Page 350, and that the ascertainment of heirship (which ascertainment was established by the testimony of one Anna D. Flaws, a sister of the deceased) disclosed that Sarah Dooley was the widow of Joseph J. Dooley.

Your request is as to whether the above evidence is to be considered proof that Sarah Dooley is the widow of Joseph J. Dooley.

The Courts in Illinois have always been inclined to uphold the validity of marriages, and have held in many cases that where there is a presumption of marriage, the burden of proof that no marriage exists falls upon those making such claim.

The Appellate Court in the case *"In re Estate of Clark"* (264 Ill. A. 544) held (page 547):

> "Record evidence of marriage is not required, and the admissions of the party may be sufficient to prove the marriage." (Citing *Lowery* v. *People*, 172 Ill. 466).

The Superior Court, in the case of *Western Coal & Mining Co.* v. *Industrial Commission* (296 Ill. 408) held (page 411):

> "In civil actions, except the action for criminal conversation, record for direct evidence of marriage is not required, but marriage may be shown by reputation, the testimony of witnesses, or by circumstances." (citing *Lowery* v. *Coster*, 91 Ill. 182; *Conant* v. *Griffin*, 48 Ill. 410.)

In view of the above, it appears that there is sufficient evidence to prove that Sarah Dooley was the wife, and is now the widow, of Joseph J. Dooley, deceased.

COMPUTING ANNUAL SALARIES

(No. 1114O—Laborers' and Retirement Board Employees' Annuity and Benefit Fund—G. F. M., Jr.—May 6, 1949.)

In response to your request for an opinion concering the method of computation of annual salaries for certain employees and for determining the date upon which ordinary disability service credit shall start, the following is submitted:

Your actuary has submitted the cases of seven applicants for ordinary disability benefits and in his letter states as follows: That all of the applicants are lunchroom attendants and are paid on an hourly basis; that the department letter concerning each employee does not give the amount of annual salary appropriated for the employees' positions, for the reason that the total amount appropriated in the year 1949 is insufficient to establish definite salary schedules for each employee; that as a result, the working periods are spread out among the employees in an irregular manner; and that as the rate of ordinary disability benefits depends upon the amount of annual salary of an employee, an opinion establishing a rule by which the salary can be determined has been requested.

Section 40(b-b) of the Act governing your Fund (Ill. Rev. Stats. 1947, Ch. 24, Sec. 1147 (b-b)) provides for a method of determining the annual salary when the employee is on an hourly basis, unless the appropriation for the salary to be paid is for a definite shorter period of time. As the lunchroom attendants work but ten months in the year, the appropriation is for a definitely shorter period of time, and another method of computation must be adopted.

Your actuary has suggested a method of averaging the salary for the part of the year (1949) that the employee worked, and then converting this average salary to an annual salary on a ten months' basis. It would appear that the method suggested by your actuary is a fair and reasonable, if not the only method, which may be used in arriving at the annual salary of this group of employees.

Your actuary further asks for advice as to how the date for service credit for disability purposes should be determined.

Section 47 of the Act governing your Fund (Ill. Rev. Stats. 1947, Ch. 24, Sec. 1154) provides in part thereof as follows:

> "No future entrant or present employee shall have any right to contribute for ordinary disability benefit purposes or to receive any ordinary disability benefit unless he shall be examined by at least one licensed and practicing physician appointed by the retirement board and shall be found to be in good physical condition."

While under the provisions of the above section a member of the Fund is not eligible to participate in ordinary disability benefits until he or she shall have been examined by a physician appointed by the Board and shall have passed such examination, it might work a hardship on employees whose examinations for eligibility for ordinary disability benefits, through no fault of their own, might be delayed, if credit for service were not to start until such examinations have been made.

As the period of time for which disability benefits may be received is dependent upon the amount of service which has been rendered by any employee, the date of his entrance into the service should be considered to be the date of the beginning of his service credits for ordinary disability benefit purpose, and not the date upon which he may have passed the physical examination which is required before he becomes eligible to receive disability benefits, when and if disability benefits are ever granted to him.

ACTUAL SALARY—DEDUCTIONS

(No. 11218—Laborers' and Retirement Board Employees' Annuity and Benefit Fund—G. F. M., Jr.—December 8, 1949.)

In response to your request for an opinion as to whether or not salary deductions for pension purposes should be made on an employee's actual salary earnings, or on the salary attached to his civil service position, the following is submitted:

Section 42 of the Act governing your Fund (Ill. Rev. Stats. 1949, Ch. 24, Sec. 1149) provides as follows:

> "In deducting any sum from the salary of any contributor for annuity purposes, the total amount of salary or wages earned during any semi-monthly salary payment period up to but not in excess of two hundred dollars ($200.00) shall be considered."

Section 52 of the Act governing your Fund (Ill. Rev. Stats. 1949, Ch. 24, Sec. 1159) provides in part thereof as follows:

"Notwithstanding the provisions of section 12, or any other section of this Act whenever any contributor shall be or shall have been assigned to work for such city or board of education in any position other than the position which such contributor holds by virtue of certification and appointment as a result of competitive civil service examination, or which such contributor holds by virtue of employment by any such retirement board, and if, in accord with other provisions of this Act no deductions from his salary would be made for the purposes of this fund while on a leave of absence from the position held by virtue of such certification and appointment such contributor shall have deducted from his salary the amount which would have been deducted had he continued to work in the position which he held by virtue of such certification and appointment, or by virtue of appointment by any such retirement board, or in the event such salary deductions shall not be made, through inadvertence or otherwise, such contributor shall have the right to pay such amount into such fund and shall be credited in his account with the corresponding city contributions in like manner, to the end that during such employment the said contributor may retain all of the rights which he otherwise would have under this Act were his employment continuous in the position which such contributor held by virtue of such certification and appointment, . . . Such contributor shall be credited with the period of such employment as a period of service as a contributor for the purposes of this Act. . . .

"From and after August 1, 1949 any contributor (as defined in section 12 of this Act) shall have the right to contribute to the fund for all periods of service, excepting those periods for which he has received and retains credit in some other annuity and benefit fund or pension fund in operation in such city for the benefit of employees of such city or board of education of such city, rendered by him to such city or board of education or retirement board, as defined in section 12 of this Act, after July 1, 1935 by virtue of appointment to a position which did not include him and allow him to contribute under the provisions of this Act, such amounts as he would have contributed for annuity purposes had deductions from his salary been made for the purposes of the annuity and benefit fund herein provided for, at the rates in effect and in accord with the provisions of this Act relating to future entrants and present employees during the period of time such service was rendered. Upon making such payments he shall be credited with concurrent city contributions at the rates in effect for contributors during the period of time such service was rendered . . ."

Section 12 of the Act governing your Fund (Ill. Rev. Stats. 1949, Ch. 24, Sec. 1119) provides in part thereof as follows:

"The following words and terms as used in this Act shall mean as follows, respectively:

" 'Contributory'; 'Contributor to this fund', or 'Employee': Any person who was, is or shall be employed by such city or the board of education of such city . . .; provided, however, this definition shall not include and this Act shall not apply to any person employed by such city or the board of education of such city, by virtue of temporary appointment as defined in section 10 of said 'Act to regulate the civil service of cities' excepting from and after August 1, 1949 when this definition shall include and this Act shall apply to said person employed by virtue of temporary appointment in a position classified by the civil service commission of such city as in the labor service thereof, provided said person shall before being included as a contributor, meet the following qualifications: (1) have rendered

service during not less than 120 calendar months to such city or board of education of such city, as a laborer, four of which said calendar months of service must have been consecutive full normal working months of service rendered immediately prior to filing application to be included; and (2) file written application while in the service, with the retirement board created by this Act, to be included under the provisions of this Act, and provided further that this definition shall not include and this Act shall not apply to any employee of such city or board of education of such city or retirement board of any such annuity and benefit fund now or hereafter in operation in such city who shall be a participant (by virtue of his being or having been an employee member) in any annuity and benefit fund, . . . nor to any person who enters the service upon or after his attainment of an age of sixty-five (65) years."

Section 52 of the Act governing your Fund limits the amount of salary to be considered in making deductions, for the purposes of your fund, to the salary attached to the civil service position of an employee who may be working in a temporary position at a higher salary.

Section 12 of the Act, in defining contributor or employee, makes possible the inclusion of certain temporary employees within the provisions of the definition, and permits them to become members of the Fund, and to have deductions made from their salaries, based on their actual earnings and paid into the Fund after August 1, 1949.

Section 49 of the Act limits the amount of salary of any member of the Fund which is to be considered in making deductions for the purposes of your Fund, whether a temporary employee or civil service employee, to $200.00 for each semi-monthly pay period, or $400.00 a month.

All of the above-mentioned sections of the Act must be considered in arriving at the amount of salary to be used in computing the deductions to be made from the salaries of employees.

In view of the fact that temporary employee members of the Fund may pay upon their actual salary earned (not to exceed, however, $200.00 semi-monthly), it would be inequitable to hold that deductions made from the salaries of civil service employees who might be occupying similar positions should be based solely on the salaries attached to the civil service positions held in such employees, when they are actually earning a higher salary by reason of appointment to a temporary position.

It must therefore be held that the amendments to the Act which became effective July 1, 1949, permitting temporary appointees to become members of your Fund under certain conditions, and requiring that deductions be made upon the actual salary earned by such temporary employees (not to exceed a salary of $200.00 semi-monthly), modified Section 52 of the Act as to all employee contributors to your Fund who are holding temporary positions.

We are therefor of the opinion that from and after August 1, 1949, all members of your Fund should have deductions made from their salaries for pension purposes, based upon the amounts actually earned by them, but not to exceed $200.00 semi-monthly.

ELIGIBILITY

(No. 11238—Laborers' and Retirement Board Employees' Annuity and Benefit Fund—G. F. M., Jr.—January 19, 1950.)

In response to your request for an opinion regarding the right of one Christian Buckberg to become a participant in your Fund, the following is submitted:

Your letter states that Christian Buckberg, of 8636 South Laflin Street rendered service under temporary authority as follows:

June 18, 1935, to December 31, 1945, as chauffeur and acting hoisting engineer;

January 1, 1946, to March 28, 1949, as operator of combination truck and air compressor;

March 28, 1949, to date, as laborer in Water Pipe Extension Division.

Your question is as to whether or not Christian Buckberg is eligible for membership in your Fund by reason of such service.

Section 12 of the Act governing your Fund (Ill. Rev. Stats. 1949, Ch. 24, Sec. 1119) provides in part thereof as follows:

> "The following words and terms as used in this Act shall mean as follows, respectively:
>
> 'Contributory'; 'Contributor to this fund', or 'Employee': Any person who was, is or shall be employed by such city or the board of education of such city in a position classified by the civil service commission of such city as in the labor service thereof and who has been or shall be appointed to such position under and by virtue of an Act entitled 'An Act to regulate the civil service of cities,' approved and in force March 20, 1895, as subsequently amended; . . . provided, however, this definition shall not include and this Act shall not apply to any person employed by such city or the board of education of such city, by virtue of temporary appointment as defined in Section 10 of said 'Act to regulate the civil service of cities,' excepting from and after August 1, 1949 when this definition shall include and this Act shall apply to said person employed by virtue of temporary appointment in a position classified by the civil service commission of such city as in the labor service thereof, provided said person shall before being included as a contributor, meet the following qualifications: (1) have rendered service during not less than 120 calendar months to such city or board of education of such city, as a laborer, four of which said calendar months of service must have been consecutive full normal working months of service rendered immediately prior to filing application to be included; . . ."

Information received from the Civil Service Commission discloses that the positions held by Christian Buckberg under temporary authority from June 18, 1935, to March 28, 1949, were not classified by the Civil Service Commission as being in the labor division, and consequently Christian Buckberg was not employed as a laborer for the 120 calendar months required under the provisions of the Act governing your Fund before a temporary employee may become eligible for membership in your Fund. Not having been so employed, Mr. Buckberg is not eligible to become a member of your Fund.

It is unfortunate that Mr. Buckberg is not eligible to participate in your Fund, by reason of the fact that his service for 120 calendar months was not in the labor division. Such service ordinarily would render him eligible for participation in the Municipal Employees' Annuity and Benefit

Fund, except for the fact that he is now employed by the City in a position classified as in the labor service.

If Mr. Buckberg were to take a position in the service of the City, other than one classified as in the labor service, and remain in such position for a period of four months, he would then become eligible to file an application to be included in the Municipal Employees' Annuity and Benefit Fund, thereby preserving his service credit for the periods of time during which he was employed under temporary authority.

CHANGE OF NAME

(No. 11259—Laborers' and Retirement Board Employees' Annuity and Benefit Fund—G. F. M., Jr.—February 28, 1950.)

In response to your request for an opinion concerning August Gennero (Annerino) the following is submitted:

Your letter states that August Gennero Annerino was born August 5, 1900; that on September 16, 1900, he was baptized August Gennero Annerino, at Santa Maria Incoronata Church, 218 Alexander Street, Chicago, Illinois; that on August 2, 1923, he was married to Anna Rocco, under the name of August Annerino; that in the year 1935 he worked under temporary appointment in the labor department of the City of Chicago under the name of August Gennero; that he continued to work in the labor department under that name, and at the present time is known to his foreman and fellow employees as August Gennero; that he is registered as a voter in the City of Chicago in the 48th Precinct of the 11th Ward under the name of August Gennero; that he has filed at the office of your Fund a statement that he changed his name from Annerino to Gennero for the reason that two of his brothers, who were professional fighters, fought under the name of Gennero, and he wished to be identified as their brother; and that throughout his working career he has been known as August Gennero. Your question is as to whether or not Mr. Gennero (Annerino) is entitled to participation in your Fund.

The question of the name under which the applicant chose to work is immaterial in determining whether or not he is entitled to participate in the benefits of your Fund. In the case of *Reinken* v. *Reinken*, 351 Ill. 409, it was held that an "individual may change his name without legal proceedings, and the name he assumes constitutes his legal name for all purposes."

Mr. August Gennero (Annerino) has identified himself as the same person who has worked for the City of Chicago under the name of August Gennero since 1935. He has to his credit the amount of service required under the provisions of the Act governing your Fund, in order that he might become a participant in your Fund. He has been certified by the Civil Service Commission of the City of Chicago, under the name of August Gennero, as a civil service laborer by reason of the recent amendment to the Civil Service Act. Those being the sole considerations, we are of the opinion that Mr. Gennero is entitled to membership in your Fund.

OPTIONAL MEMBERSHIP

(No. 11269—Laborers' and Retirement Board Employees' Annuity and Benefit Fund—G. F. M., Jr.—March 20, 1950.)

In response to your request for an opinion as to an application for withdrawal from your Fund made by Arthur A. Hopkins, the following is submitted:

Your letter states that Mr. Hopkins was born May 13, 1877; that he entered the service of the City April 4, 1938, as a temporary appointee; and that he was certified as a civil service employee of the City of Chicago July 1, 1949. Your question is as to whether or not it is mandatory that pension deductions be made from the salary of Arthur A. Hopkins.

Section 12 of the Act governing your Fund (Ill. Rev. Stats. 1949, Ch. 24, Sec. 1119) provides in part thereof as follows:

> " 'Contributory'; 'Contributor to this fund,' or 'Employee': . . . and provided further that this definition shall not include and this Act shall not apply to . . . any person who enters the service upon or after his attainment of an age of sixty-five (65) years."

Section 52 of the Act governing your Fund (Ill. Rev. Stats. 1949, Ch. 24, Sec. 1159) provides in part thereof as follows:

> "From and after August 1, 1949 any contributor (as defined in section 12 of this Act) shall have the right to contribute to the fund for all periods of service . . . rendered by him to such city or board of education or retirement board, as defined in section 12 of this Act, after July 1, 1935 by virtue of appointment to a position which did not include him and allow him to contribute under the provisions of this Act such amounts as he would have contributed for annuity purposes had deductions from his salary been made for the purposes of the annuity and benefit fund herein provided for, at the rates in effect and in accord with the provisions of the Act relating to future entrants and present employees during the period of time such service was rendered. Upon making such payments he shall be credited with concurrent city contributions at the rates in effect for contributors during the period of time such service was rendered. . . . All such payments by a contributor shall be made within five (5) years after August 1, 1949 in the case of those who became contributors to this fund prior to such date, and within five (5) years after becoming contributors to this fund in the case of those who become such on or after August 1, 1949, and must be made in full while such contributor is still in the service . . ."

Mr. Hopkins became seventy years of age on May 13, 1947. Even though the required deductions were to be made from his salary, he would not be entitled to receive a pension from your annuity and benefit fund unless he were to make voluntary payments for the period of his service prior to July 1, 1949, in accordance with the provisions of Section 52 of the Act governing your Fund. Since payments for service prior to July 1, 1949, are purely voluntary and Mr. Hopkins has indicated his unwillingness to become a member of your Fund, it is doubtful Mr. Hopkins will take advantage of the provisions of the Act governing your Fund regarding payment for service prior to July 1, 1949. If Mr. Hopkins does not make payment for such service, he must be considered to have entered the service at the time he became a member of the Fund; in other words, while he actually entered the service on April 4, 1938, his entrance for credit purposes would then have to be considered as being July 1, 1949, at which time he was over the age of sixty-five.

In view of the circumstances in this case, we are of the opinion that membership in your Fund would be optional with Mr. Hopkins.

ELIGIBILITY

(No. 11268—Laborers' and Retirement Board Employees' Annuity and Benefit Fund—G. F. M., Jr.—March 20, 1950.)

In response to your request for an opinion as to an application for withdrawal from the Fund made by Michael Reagan, the following is submitted:

Your letter states that Mr. Reagan was born December 17, 1877; that he entered the service of the City December 17, 1942, as an employee in the Bureau of Parks, as a temporary appointee, and that he was certified to his position July 1, 1949. Your question is as to whether or not it is mandatory that pension deductions be made from the salary of Michael Reagan because of his age at the time of his entrance into the service.

Section 12 of the Act governing your Fund (Ill. Rev. Stats. 1949, Ch. 24, Sec. 1119) provides in part thereof as follows:

> " 'Contributory'; 'Contributor to this fund,' or 'Employee': . . . and provided that this definition shall not include and this Act shall not apply to . . . any person who enters the service upon or after his attainment of an age of sixty-five (65) years."

Mr. Regan having entered the service on his sixty-fifth birthday, is not eligible for participation in your Fund, and consequently pension deductions should not be made from his salary.

CHILD'S ANNUITY

(No. 11353—Laborers' and Retirement Board Employees' Annuity and Benefit Fund—G. F. M., Jr.—January 8, 1951.)

In response to your request for an opinion concerning Thomas Owens, child of Charles Owens, deceased member of your Fund, the following is submitted:

Your records disclose that Charles Owens entered the labor service of the City of Chicago as a temporary employee on June 1, 1930, and worked as follows: From June 1, 1930 to December 31, 1932; from June 1, 1933 to November 1, 1933; and from June 1, 1934, until the date of his death on September 27, 1950.

Charles Owens was blanketed into the civil service by virtue of an Act of the Illinois legislature, effective July 1, 1949. Your question is as to whether or not Thomas Owens, child of Charles Owens, deceased, is entitled to receive child's annuity.

Section 45 of the Act governing your Fund (Ill. Rev. Stats. 1949, Ch. 24, Sec. 1152) provides as follows:

> "Child's annuity, as hereinafter provided, shall be granted and paid for the benefit of any unmarried child less than eighteen (18) years of age, the issue of any following described contributor to this fund who shall die on or after the day on which this Act shall come in force and effect in such city; . . . any contributor who shall die while in the service from any cause other than injury incurred in the performance of any act or acts of duty; provided, such contributor

shall have been in the service at least four (4) years from and after the date of his original entrance thereto and at least two (2) years from and after the date of his latest reentrance thereto. . . ."

When Charles Owens became classified as a civil service employee of the labor department by reason of legislative enactment, he was immediately given credit for prior service for that period of time during which he served as a laborer prior to July 1, 1935, the date upon which the Act governing your Fund came into force and effect.

The Act governing your Fund does not require that the person concerned shall have been a member of your Fund for four years, or for two years from and after the date of his latest reentrance, but only requires that "such contributor shall have been in the service at least four (4) years from and after the date of his original entrance thereto and at least two (2) years from and after the date of his latest reentrance thereto."

Charles Owens' last entry into the service was on June 1, 1934, and although he has failed to pay into your Fund an amount equal to the accumulation which would now stand to his credit had he been a member of your Fund since July 1, 1935, (the date of the creation of your Fund) such failure to pay does not constitute an absence from the service of the City, nor does it nullify the credit Mr. Owens had for service rendered prior to July 1, 1935.

It is our opinion that Mr. Owens comes within the provisions of Section 45 of the Act governing your Fund, and that Charles Owens, child of Thomas Owens, is entitled to receive child's annuity.

CHANGE OF NAME

(No. 11417—Laborers' and Retirement Board Employees' Annuity and Benefit Fund—G. F. M., Jr.—August 29, 1951.)

In response to your request for an opinion correcting the opinion heretofore rendered on February 28, 1950, concerning August Gennero (Annerino) the following is submitted:

Your letter states that August Gennero Annerino was born August 5, 1900; that on September 16, 1900, he was baptized August Annerino, at Santa Maria Incornata Church, 218 Alexander Street, Chicago, Illinois; that on August 2, 1923, he was married to Anna Rocco, under the name of August Annerino; that in the year 1935 he worked under temporary appointment in the labor department of the City of Chicago under the name of August Gennero; that he continued to work in the labor department under the name, and at the present time is known to his foreman and fellow employees as August Gennero; that he is registered as a voter in the City of Chicago in the 48th Precinct of the 11th Ward under the name of August Gennero; that he has filed at the office of your Fund a statement that he changed his name from Annerino to Gennero for the reason that two of his brothers, who were professional fighters, fought under the name of Gennero, and he wished to be identified as their brother; and that throughout his working career he has been known as August Gennero. Your question is as to whether or not Mr. Gennero (Annerino) is entitled to participation in your Fund.

The question of the name under which the applicant chose to work is immaterial in determining whether or not he is entitled to participate in the benefits of your Fund. In the case of *Reinken* v. *Reinken*, 351 Ill.

409, it was held that an "individual may change his name without legal proceedings, and the name he assumes constitutes his legal name for all purposes."

Mr. August Gennero (Annerino) has identified himself as the same person who has worked for the City of Chicago under the name of August Gennero since 1935. He has to his credit the amount of service required under the provisions of the Act governing your Fund, in order that he might become a participant in your Fund. He has been certified by the Civil Service Commission of the City of Chicago, under the name of August Gennero, as a civil service laborer by reason of the recent amendment to the Civil Service Act. Those being the sole considerations, we are of the opinion that Mr. Gennero is entitled to membership in your Fund.

ORDINARY DISABILITY

(No. 11483—Laborers' and Retirement Board Employees' Annuity and Benefit Fund—G. F. M., Jr.—February 25, 1952.)

In response to your request for an opinion concerning Frank DeGustino the following is submitted.

Your letter states that Frank DeGustino was born October 13, 1907; that he became a civil service employee of the City of Chicago on September 31, 1949; that his record shows in the period ending September 31, 1951 he worked one day; that in the period ending October 15, 1951 he worked one day; and that in the period ending October 31, 1951 he worked one day.

Your letter further states that Frank DeGustino on November 7, 1951 broke his leg while he was at home; that on November 8, 1951 he applied to the civil service for a leave of absence; and that you would like an opinion as to whether or not Frank DeGustino is entitled to receive ordinary disability.

Section 47 of the Act governing your Fund, (Ill. Rev. Stat. 1951, Chap. 24, Sec. 1154) provides in part thereof as follows:

> "and provided further, that no contributor shall have the right to receive ordinary disability benefit on account of any disability which shall commence during any period of absence from duty whether such absence be caused by lay-off, leave of absence or suspension of employment for a definite or indefinite period of time, or any other reason, * * *."

While it is most unfortunate that Mr. DeGustino was absent from his work by reason of the fact there was not enought work to keep him busy more than one day during the previous pay period, such lack of work does not entitle him to receive ordinary disability should he become injured during that period, as is provided in Section 47 of your Act, as hereinabove set out.

We are therefore of the opinion Frank DeGustino is not entitled to receive ordinary disability benefits from your Fund.

PROOF OF MARRIAGE

(No. 11487—Laborers' and Retirement Board Employees' Annuity and Benefit Fund—G. F. M., Jr.—February 27, 1952.)

In response to your request for an opinion concerning one Perkins Baldwin, a member of your Fund, the following is submitted.

Your letter states that Perkins Baldwin was born on March 2, 1882; that he became a civil service employee of the City of Chicago on May 14, 1924; that he married one Annie Davis on December 7, 1912; and that he died on April 3, 1951.

Your letter further states that in completing your records you found that Annie Davis was married July 8, 1908 to one Joseph Davis; that Joseph Davis deserted her shortly thereafter; that she was informed by an acquaintance that her husband had died in 1910; and that believing her husband to be dead, Annie Davis married Perkins Baldwin.

Your question is whether or not the marriage of Perkins Baldwin to Annie Davis was good and valid for the purpose of your Fund.

The Supreme Court of the State of Illinois has always looked very carefully into any attempt to disturb the marriage state. The Supreme Court, since its creation to the present time, has held that when a marriage is shown to have been performed the law raises a strong presumption in favor of its legality; that the burden is with the person objecting to its legality to prove its illegality. (*Johnson* v. *Johnson,* 114 Ill. 611.)

The same ruling has been held in the case of *Barber* v. *People,* 203 Ill. 543; *Crysler* v. *Crysler,* 330 Ill. 74; and *Criss* v. *Industrial Commission,* 384 Ill. 75. From these rulings it may readily be seen that it has always been the intention of the court that marriage should be held sacred and that the burden of proof rests upon the party who challenges the validity of such marriage.

We are therefore of the opinion that for the purposes of the Act governing your Fund, Annie Davis Baldwin was the true, lawful wife of Perkins Baldwin at the time of his death.

VACATED DIVORCE DECREE— WIDOW'S ANNUITY

(No. 11502—Laborers' and Retirement Board Employees' Annuity and Benefit Fund—G. F. M., Jr.—March 25, 1952.)

In response to your request for an opinion concerning the annuity rights for Beatrice Howard, the widow of Anthony T. Howard, Jr. the following is submitted.

Your letter states and your records show that Anthony T. Howard, Jr. was an employee of the City of Chicago in the Laborer Department and a member of your Fund; that on December 16, 1946 Anthony T. Howard, Jr. was divorced by his wife, Beatrice Howard; that Anthony T. Howard, Jr. died on September 25, 1951; that after his death Beatrice Howard filed suit in the form of a petition to vacate and set aside a decree of divorce heretofore entered between Beatrice Howard and Anthony T. Howard, Jr.; that on or about the 23rd day of November, 1951, an order was entered,

on an ex-parte hearing, vacating the decree of divorce between Beatrice Howard and Anthony T. Howard, Jr.; and that since that date Beatrice Howard has filed a certified copy of such proceedings with your Board, together with an application for widow's annuity.

Your request is for an opinion as to whether or not Beatrice Howard is entitled to an annuity as the widow of Anthony T. Howard, Jr.

Section 38 of the Act governing your Fund (Ill. Rev. Stats, 1951, Chap. 24, Sec. 1145) provides in part thereof as follows:

> "The following described wives or widow of contributors to this Fund shall not have any right to annuity from the Annuity and Benefit Fund herein provided for:
>
> (e) The divorced wife or widow of any contributor who has a decree of divorce from her contributor husband annulled, vacated, or set aside by any proceedings in court subsequent to the death of the contributor, unless such court proceedings are filed within five (5) years after the date of the divorce and within one (1) year after the death of such contributor and unless the Retirement Board of this Fund is made a party to said proceedings."

The suit vacating the decree of divorce, entered on December 16, 1946, was filed within five (5) years after the date of divorce. It was also filed within one (1) year after the death of Anthony T. Howard, Jr. the contributor in this case. However, the Retirement Board of your Fund was not made a party to the proceedings to vacate the decree of divorce, as is required by the Act governing your Fund.

We are therefore of the opinon that the above quoted Section of the Act governing your Fund does not permit the payment of any annuity to Beatrice Howard, the widow of Anthony T. Howard, Jr.

WIDOW'S ANNUITY

(No. 11583—Laborers' and Retirement Board Employees' Annuity and Benefit Fund—G. F. M., Jr.—September 16, 1952.)

In response to your request for an opinion concerning the rights of the widow of Joseph V. Montessano, the following is submitted.

Because the facts in this opinion are rather involved they will be divided into two paragraphs.

Vincenzo Montessano filed an application for a civil service job on March 15, 1926. According to evidence in your file Vincenzo was working for the parks as a caretaker at the time he was told to report for work by the City of Chicago in the Labor Department; he continued to work at the parks (not accepting the job in the Labor Department of the City of Chicago) until the year 1940.

Shortly after leaving the employ of the parks in 1940 Vincenzo Montessano worked for the City of Chicago as a street sweeper until his death in 1943.

Joseph V. Montessano, a brother of Vincenzo Montessano, was informed in May, 1927 by his brother, Vincenzo, of the fact that he, Vincenzo, had been notified by the City of Chicago to report for work as a

Laborer. Joseph V. Montessano reported for work as Vincenzo Montessano and continued to work as a Laborer for the City of Chicago until some time in the year 1950. He died on December 15, 1950. Mrs. Joseph V. Montessano filed an application for a widow's annuity, which application is still pending before your Board. After a considerable time in investigation, the information hereinabove set out as facts was disclosed to the Board. Your question is as to the rights of the widow of Joseph V. Montessano.

From the facts above set out we are of the opinion that no annuity may be paid to Mrs. Joseph Montessano as her husband was not entitled to be an employee of the City of Chicago or a member of this Fund; that no annuity may be paid to Mrs. Vincenzo Montessano as her husband never worked as an employee of the Labor Department of the City of Chicago; that the moneys now in the possession of your Fund standing as an accumulation to the credit of Vincenzo Montessano should be paid to the widow and children of the individual (Joseph V. Montessano) who actually worked for the City of Chicago in the Labor Department as a refund, inasmuch as the Annuity and Benefit Fund has no interest whatsoever in the said funds except to pay them to the rightful parties; and that prior to the payment of the refund to Mrs. Joseph V. Montessano and her children, there should be secured an application signed by herself and her children, which application should direct to whom the refund should be paid.

E. HOUSE OF CORRECTION EMPLOYEES' ANNUITY AND BENEFIT FUND

SURVIVING HUSBAND OF EMPLOYEE

(No. 11129—House of Correction A. & B. Fund—G. F. M., Jr.—March 3, 1949.)

In response to your request for an opinion as to the right of a surviving husband of a deceased woman contributor to your Fund to receive a pension, the following is submitted:

The facts, as disclosed in your letter, are as follows: That a woman contributor to the Fund has served for twenty years and attained age fifty-five; that while she is eligible to retire on the full amount of pension payable under the provisions of the Act governing your Fund, she elects to remain in the service; and that while still in the service she dies, leaving her surviving a husband and no other heirs. Your question is as to whether or not the surviving husband is entitled to receive a pension from your Fund.

There is no section of the Act governing your Fund (Ill. Rev. Stats. 1947, Ch. 67, Sec. 18, et seq.) which provides for the payment of any moneys in the form of pension to the surviving husband of a deceased woman contributor to your Fund.

Pensions are in the nature of bounties of government paid to the employee and his widow for long and faithful service. It has always been assumed that the man in the family is the wage earner and for that reason, upon his death, a pension is payable to his widow, since she

is then deprived of support. Upon the death of a woman, leaving her husband surviving, it is assumed that he, being the wage earner of the family, will continue to work and thus support himself.

In no event can a pension be paid to the husband of a deceased woman contributor to your Fund.

PENSION FOR FRACTION OF MONTH

(No. 11128—House of Correction A. & B. Fund—G. F. M., Jr.—March 3, 1949.)

In response to your request for an opinion as to whether or not pension payments may be made for fractional parts of a month, the following is submitted:

Your letter states that a widow annuitant of your Fund received her pension on the first day of each month; that such widow died on the 15th day of the month; that she had received her pension on the first of that month for the previous month; and that her estate has applied for that portion of the pension which they claim is payable for the fifteen days which she survived after the payment of the pension for the previous month. Your letter also requests information as to whether or not the estate of a male pensioner would be entitled to receive his pension for the same portion of a month.

Section 8 of the Act governing your Fund (Ill. Rev. Stats. 1947, Ch. 67, Sec. 24) provides in part as follows:

> "Upon the death of any contributor or any beneficiary who before becoming a beneficiary contributed to said fund for at least two (2) years the said board of trustees shall pay, as hereinafter provided, an annuity not to exceed seven hundred twenty dollars ($720.00) per annum, to be paid in equal monthly installments to the widow as long as she remains the same of such deceased contributor or beneficiary: * * *"

Upon a widow's death, no annuity would be payable to her estate for a fractional part of a month, for the reason that the Act provides for the payment of the annuity in equal monthly installments. Further, the purpose of an annuity or pension is to provide moneys for the subsistence of the beneficiary himself, and not for the accumulation of an estate to be paid to his heirs. This also applies to the estate of a male pensioner, where he leaves no widow or minor children.

I am therefore of the opinion that no annuity or pension may be paid to the estate of a deceased beneficiary for any portion of time less than a month.

POWERS OF EX-OFFICIO MEMBERS OF BOARD OF TRUSTEES OF HOUSE OF CORRECTION

(No. 11186—House of Correction A. & B. Fund—G. F. M., Jr.—October 7, 1949.)

In response to your request for an opinion in regard to the rights and powers of ex-officio members of the Board of Trustees of the House of Correction Employees Pension Fund, the following is submitted:

The Act creating the pension fund of the House of Correction employees provides for the establishment of the Board of Trustees as follows (Ill. Rev. Stats. 1947, Ch. 67, Sec. 22):

> "Sec. 5. The said board of trustees shall consist of the chairman of the board of inspectors and the superintendent of the house of correction, four employees contributing to the fund and one member from the beneficiaries. The chairman of said board of inspectors and the superintendent of the house of correction shall be ex-officio members of such board of trustees, and the five (5) other members of such board of trustees shall be elected by ballot, . . ."

While it is true that the ex-officio members of the Board of Trustees are not members of the House of Correction Employees Pension Fund, and do not contribute to such Fund, the legislature made no distinction between the ex-officio members and the elected members in delegating to such ex-officio members the right to membership as trustees of the Board governing the pension fund. Such trustees, although ex-officio members of the Board, are trustees in every sense of the word, with the same powers and obligations as the elected trustees of the Fund.

Such Trustees have the same voice in matters controlling the pension fund as do the other Trustees, and are in all respects to be considered as members of the Board. They should be notified of meetings, and should give to the Board of Trustees the benefit of their experience in connection with business matters. They should not be denied the privilege of being heard, nor the right to vote.

RESIGNATION WHILE ON LEAVE

(No. 11284—House of Correction A. & B. Fund—G. F. M., Jr.—April 6, 1950.)

In response to your request for an opinion concerning the amount of pension payable to employees of the House of Correction under certain circumstances, the following is submitted:

Your letter states that certain of your employees who have twenty years or more of service and have attained an age of fifty-seven or more years have expressed their intention of taking a leave of absence for a period of one year starting sometime after July 1, 1950, and then, without returning to the service, resigning and applying for a pension. You have requested an opinion as to the amount of pension which would be payable under such circumstances.

Section 6 of the Act governing your Fund (Ill. Rev. Stats. 1949, Ch. 67, Sec. 23 (9)) provides in part thereof as follows:

> "Any contributor to said fund who is at least fifty-five (55) years of age and who shall have been in the service of said house of correction for a period of at least twenty (20) years, and shall have contributed to said fund for the same period, shall have the right to retire and become a beneficiary under this Act as follows: Any such contributor who retires and becomes a beneficiary after July 1, 1939, shall receive a benefit or annuity of one thousand dollars ($1,000) per annum. Any contributor to said fund who is at least fifty-seven (57) years of age and who shall have been in the service of said house of correction for a period of at least

twenty (20) years, and shall have the right to retire and become a beneficiary under this Act as follows: Any such contributor who retires and becomes a beneficiary of this fund after July 1, 1951, shall receive a benefit or annuity of fourteen hundred and forty dollars ($1440.00) per annum, the said annuities to be paid in equal monthly installments, . . ."

The employees mentioned in your letter have met all the requirements necessary under the provisions of the above section of the Act to receive a pension of $1,000.00 a year, or in the event of retirement after July 1, 1951, a pension of $1,440.00 a year.

The pension fund of the House of Correction employees is built up from several sources, one of which is contributions by employees. An employee on leave of absence does not contribute to the pension fund. Repeated use of the word "contributor" in Section 6, above set forth, leaves little doubt that it was the intention of the legislature that the increased benefits provided for in that section should be payable only to employees performing service for the House of Correction, and contributing to the pension fund on July 1, 1951, or after such date. Any attempt to secure such benefits through scheme or subterfuge, by taking a leave of absence until after July 1, 1951, and thereafter securing a pension, must be looked upon as obtaining an advantage prejudicial to to the rights of the other members of the Fund, and defeating the real purpose of the Act.

We are therefore of the opinion that any employee who takes a leave of absence in order that his resignation might not become effective until after July 1, 1951, or at such later date as he may desire, should be considered as having resigned on the date such leave of absence becomes effective.

PAYMENT FOR TEMPORARY SERVICE

(No. 11319—House of Correction A. & B. Fund—G. F. M., Jr.—July 20, 1950.)

In response to your request for an opinion concerning payment for temporary service, the following is submitted.

Your letter states that certain employees of your fund requested the privilege of paying for a portion of their temporary service in order that they might have the necessary amount of service to retire, but such employees do not wish to pay for all of their temporary service.

Sections 9 and 9½ of the Act governing your fund (Ill. Rev. Stats. 1949, Ch. 67, Sect. 25 and 25½) provide in part thereof as follows:

"Sec. 9. Any person who is at least fifty-five years of age and who has been an employee of said House of Correction for a period of twenty (20) years or more and has contributed to said fund for a period of not less than twenty (20) years, or shall pay into the fund the amount of money such person would have paid had the contributions been made by him at the prevailing rate from the first day of his employment, * * *.

"Sec. 9½. Any person who is certified and appointed to a position as an employee of the House of Correction as employee is defined in this Act, who has served as an employee of the House

of Correction by virtue of temporary appointment prior to such certification and appointment, shall have the right to have credited to such employee for pension and widow's pension purposes the period of time such employee served in such position by virtue of temporary appointment upon such employee paying into the House of Correction employee's pension fund, such amount of money as he would have paid into such pension fund had he been a member of such pension fund during such period of temporary employment, together with interest at the rate of four percent (4%) per annum upon each such payment from the time such payment would have been made had he been a participant in the fund, until such payment is made * * *"

These sections of the statute can only be interpreted to mean that the entire period of temporary service must be paid for in order that credit may be received for it. Nowhere in these sections does there appear any reference to allowance of credit for part of such temporary service. It therefore follows, that any employee who wishes to obtain credit for temporary service must pay for the entire period of service, together with interest at four percent (4%) per annum. The use of the word "per annum" in connection with the rate of interest indicates that it was the intention of the legislature that any interest payable should be computed as simple interest and not compound interest.

DISABILITY AFTER AGE OF FIFTY-FIVE

(No. 11348—House of Correction A. & B. Fund—G. F. M., Jr.—December 18, 1950.)

In response to your request for an opinion concerning Joseph Milosewski, the following is submitted:

Your letter states that Joseph Milosewski was born April 26, 1894; that he became an employee of the House of Correction on August 23, 1932, and that on or about July 20, 1934, he was certified to his present position as guard; that on May 22, 1949, Mr. Milosewski applied for disability under the provisions of the Act governing your Fund; that he was disabled from May 22, 1949, to October 15, 1949, during which time he received a disability pension of $50.00 a month, under the provisions of the Act which governed the Fund at that time; and that Mr. Milosewski has now suffered a reoccurrence of the illness for which he received disability in the year 1949, and has again applied for a disability pension. Your question is as to whether or not he should be paid a disability pension at this time, in view of the fact that the Act governing your Fund at the present time does not provide for the payment of a disability pension to members of the Fund who become disabled after attainment of age fifty-five.

In 1937 the Act governing your Fund was amended so as to bar from membership in your Fund future employees of the House of Correction who were over the age of thirty-five at the time of their entrance into such employ. Prior to 1937, an employee might have become a member of your Fund at any age, and at the present time be over age fifty-five, with less than the required period of service to qualify for an annuity or pension.

In the year 1949, the legislature amended the disability provisions of your Act (Ill. Rev. Stats. 1949, Ch. 67, Sec. 26) so as to increase the amount payable to a disabled member of your Fund, and fixed the limit of age fifty-five for the payment of such disability benefit, over-

looking the fact that there were a number of members of your Fund who were over the age of thirty-five at the time of entrance into your Fund. These members, who might become disabled after attainment of age fifty-five, might not have twenty years of service with the House of Correction, and therefore would not be able to receive either a service pension or a disability benefit. Before amendment the section provided for the payment of a disability pension of $50.00, with no limitation as to age.

It must therefore be assumed that the legislature did not intend to prevent employees falling in this category from receiving disability pensions, but that it was the intent of the legislature that the provisions of the Act as they existed before amendment should govern in such cases.

Your attention is invited to a Corporation Counsel opinion written in June, 1949, concerning Joseph Milosewski. The conclusion reached therein as to the amount of disability pension to be paid Mr. Milosewski is in apparent conflict with the holding in this opinion, for the following reason:

The letter requesting the opinion did not mention Mr. Milosewski's age, and it was assumed, from the tenor of the questions, that Mr. Milosewski was considerably under the age of fifty-five, since it was indicated that he had well under twenty years of service. At the time his disability occurred, the law provided, and had so provided for a number of years prior thereto, that an employee over the age of thirty-five could not become a member of the House of Correction Employees Pension Fund. As Mr. Milosewski apparently had less than twenty years of service, it was naturally assumed that he was less than fifty-five years of age at the time the opinion was requested. Such was not the fact.

The Courts have held that the purpose of pension laws is beneficial, and such statutes should be liberally construed in favor of those intended to be benefited. (*Colton* v. *Board of Trustees*, 287 Ill. 56.)

Scott v. *Freeport Motor Casualty Company*, 379 Ill. 155, lays down the following rules (p. 161):

> "The primary object in construing a statute is to ascertain the legislative intent expressed therein. (*People* v. *Illinois Merchants Trust Co.*, 328 Ill. 223; *American Aberdeen-Angus Breeders' Ass'n* v. *Fullerton*, 325 id. 323; *Barnes* v. *City of Chicago*, 323 id. 203; *State* v. *Brush*, 318 id. 307.) In seeking the legislative intent, courts should consider the language used, the object to be attained, or the evil to be remedied, and this may involve more than the literal meaning of the words used. (*Peabody* v. *Russell*, 301 Ill. 439.) When the words used, followed literally, lead to an absurd consequence or to a construction clearly not contemplated, this constitutes a sufficient reason to depart from the language used for the purpose of ascertaining the intent. (*Mitchell* v. *Lowden*, 288 Ill. 327.) A thing which is within the intention of a statute is within the statute, although not within its letter, and a thing within the letter is not within the statute unless it is within the intention. (*Peabody* v. *Russell, supra.*) Statutes must be so construed as to be given a reasonable construction, if possible. (*Friend* v. *Borrenpohl*, 329 Ill. 528; *Galpin* v. *City of Chicago*, 249 id. 554.) A statute, if possible, must be construed so as to give effect to all its provisions. (*People* v. *Price*, 257 Ill. 587.) In whatever language a statute may be expressed, it must be given a practical and commonsense construction. (*People* v. *New York, Chicago and St. Louis Railroad Co.* 353 Ill. 518.) The intention of the lawmakers, in passing a statute, is to be found and given effect if not in violation of the constitution. (*Illinois Bell Telephone Co.* v. *Ames*, 364 Ill. 362.) It is a well known rule of statutory construction that a

statute must be interpreted according to the legislative intention, and not always according to the literal meaning of the language used. (*People* v. *Lieber*, 357 Ill. 423.)"

We are therefore of the opinion that Joseph Milosewski is entitled to be paid a disability pension at this time in the amount of $50.00 a month, as was provided by the Act before amendment in 1949.

RESIGNATION WHILE ON LEAVE

(No. 11402—House of Correction A. & B. Fund—G. F. M., Jr.—July 19, 1951.)

In response to your request for an opinion concerning James Devens, the following is submitted:

Your letter of information states that James Devens became an employee of the House of Correction January 1, 1908; that he had been an employee from that time until April 4, 1951, at which time he asked for a leave of absence because of illness; that he has filed with your Board an application for an annuity; and that he has signed a resignation effective July 2, 1951. Your records disclose he is over 57 years of age. Your question is as to the amount payable to Mr. James Devens under the provisions of the Act governing your fund.

Section 6 of the Act governing your fund (Ill. Rev. Stats. 1949, Ch. 67, Sec. 23) states in part thereof as follows:

> Sec. 6 (9) "* * * Any contributor to said fund who is at least fifty-seven (57) years of age and who shall have been in the service of said house of correction for a period of at least twenty (20) years, and shall have contributed to said fund for the same period, shall have the right to retire and become a beneficiary under this Act as follows: Any such contributor who retires and becomes a beneficiary of this fund after July 1, 1951, shall receive a benefit or annuity of fourteen hundred and forty dollars ($1440.00) per annum, the said annuities to be paid in equal monthly installments ' * *."

Mr. Devens has fulfilled all the requirements to receive a pension in the amount of fourteen hundred and forty dollars ($1440.00) per annum.

The mere fact that Mr. Devens secured a leave of absence on April 4, 1951, has no effect upon his application for an annuity. He secured his leave of absence, according to your letter, because of illness. He was not separated as an employee of the House of Correction, and would have a right to return to service upon expiration of his leave of absence, should he so desire. The fact that he has resigned, effective July 2, 1951, instead of having returned to work, is his privilege. Such leave of absence has no effect upon his date of retirement from the service of the House of Correction.

We are therefore of the opinion that under the Act governing your fund, Mr. Devens should be entitled to receive an annuity in the amount of fourteen hundred and forty dollars ($1440.00) per annum, payable in monthly installments.

REQUIREMENTS FOR MEMBERSHIP

(No. 11420—House of Correction A. & B. Fund—G. F. M., Jr.—September 7, 1951.)

In response to your request for an opinion concerning Erwin C. Huebner, the following is submitted:

Your letter states that Mr. Huebner became a Civil Service employee of the House of Correction October 22, 1921; that some time in the year 1948 Erwin Huebner was assigned to the Purchases, Contracts and Supplies Department of the City of Chicago; that he still performs the same duties at the House of Correction; that he has been a member of and a contributor to your Fund since 1923. From the general tone of your letter the question is assumed to be whether or not he is still entitled to be a contributor to your Fund.

A check of Mr. Huebner's position indicates that as Head of the Junk Yard, he is under the supervision of John F. Ward, purchasing agent for the City of Chicago; that the budget for the City of Chicago discloses that he is paid by the Department of Purchases, and that he is carried in such budget as "Head of Junk Yard, House of Correction." In the budget for the City of Chicago prior to the year 1948 he occupied the same position under the heading, "House of Correction", and below in sub heading, "Head of Junk Yard."

The determining factor as to a man's position is the work that is performed by the individual. If a man is performing the same work and has the same duties that he had prior to a change in title, he is still holding the same position that he occupied before such change.

All employees of the City of Chicago are paid out of appropriations made and allocated by the City Counsel of the City of Chicago, and while the direct payment may be made from different departments, the supreme test of a man's position is the duties attached to it. If a man's duties now are the same as they were years ago before the title was changed, a change in title does not remove him from his original position. For many years the courts in Illinois have so held. In the matter of *Kipley* v. *Luthart,* (178 Ill. 525) and the *City of Chicago* v. *Luthart,* (191 Ill. 516) the courts established this theory and have continued to sustain that decision ever since. In the opinions of the Corporation Counsel (Volume 18, page 220, No. 7484) the same opinion was expressed.

To hold any other way would not only be contrary to law, but might serve to deny to the employee certain pension rights attached to his position as an employee of the House of Correction.

We are therefore of the opinion that Mr. Huebner is to be considered an employee of the House of Correction and, therefore, entitled to be a member of your Fund.

VOTING FOR TRUSTEES WHILE ON LEAVE

(No. 11421—House of Correction A. & B. Fund—G. F. M., Jr.—September 18, 1951.)

In response to your request for an opinion concerning the right of members of your Fund on leave of absence to vote in the coming election for Trustee, the following is submitted:

Your letter states that one Michael H. Ward, a guard, now on leave of absence, has requested information as to whether or not he is entitled to vote in the election to be held for Trustee of the House of Correction Employees' Pension Fund.

The Act governing your Fund provides in Section 5 thereof (Ill. Rev. Stats. 1949, Ch. 67, Sec. 22) as follows:

> "The five other members (other than ex-officio members) of such Trustees shall be elected by ballot, the members of the contributors to be elected by the employees contributing to said fund at the time and for the terms respectively as follows: * * *."

Section 2 (Ill. Rev. Stats. 1949, Ch. 67, Sec. 19) provides in part thereof as follows:

> "* ** any employee on sick leave or leave of absence from said house of correction who has contributed to said pension fund, will be considered a member of said pension fund, and will be entitled to all benefits and annuities under this Act while he or she remains on said sick leave or leave of absence from said house of correction: Provided the said employee does not take employment other than at such house of correction while on sick leave or leave of absence from such house of correction * * *."

If Mr. Ward is not employed outside the house of correction, in fairness to him, he should be permitted to vote. To deny him the right to cast a ballot for the Trustee would be to deny him one of the "benefits" of the fund, and such denial of benefits is contrary to Section 2 of the Act governing your fund.

We are therefore of the opinion that employees of the house of correction on leave of absence should have the right to vote for Trustee to be elected by members of such fund.

DISABILITY AFTER AGE OF FIFTY-FIVE

(No. 11442—House of Correction A. & B. Fund—G. F. M., Jr.—November 8, 1951.)

In response to your request for an opinion concerning Edward J. Suk, the following is submitted:

Your letter states that Edward J. Suk was born June 6, 1893; that he became a Civil Service employee of the House of Correction January 16, 1923; that he entered the House of Correction Employees' Pension Fund February 1, 1923; that you are in receipt of a letter form Mr. Suk which sets out that he was disabled from April 1 to May 15, by reason of the fact that he had been operated on and was required to remain at home until he recovered; that he has made a request for disability benefit under the provisions of the Act governing your Fund; and that your question is whether or not he is entitled to receive such disability benefit. Edward Suk, at the time he became disabled, was 57 years, 9 months and 21 days of age. He had 28 years and 2 months of membership in your fund.

Section 10 of the Act governing your Fund (Ill. Rev. Stats. 1951, Ch. 67, Sec. 26) provides in part thereof as follows:

> Sec. 26 "Any person who has contributed to said Fund for a period of three (3) years or more, may retire from the service of said

house of correction on account of serious disability rendering him or her unable to properly discharge his or her duties.* * * If such disability shall not be a result of the performance of an act or acts of duty and is not due to alcoholism or pregnancy, such person shall be entitled to receive ordinary disability pension in the amount of Seventy-five dollars ($75.00) per month for a period of time equal to exceed five (5) years.

Neither duty disability pension nor ordinary disability pension shall be paid to any contributor to this fund after such contributor has attained the age of fifty-five (55) years."

Mr. Suk, being over the age of fifty-five years on April first, and having more than twenty years of service, is not entitled to receive disability pension.

There is a difference between this case and the case of Joseph Milosewski, who was granted a disability pension on or about December, 1951, for recurrence of an illness that he had prior to July 1, 1949. In that opinion it was held that the old provisions in your Act should be considered to continue in force, for the reason that Mr. Milosewski had not had twenty years of service, and therefore, would not, if he were unable to return to work, be entitled to receive anything under the present provisions of the Act governing your fund. That was not and could not have been the intention of the legislature, so a ruling was made that Mr. Milosewski should be paid a disability pension of $50.00 per month under the old provisions of the Act.

The facts in the present case are considerably different. Mr. Suk has twenty-eight years of service, and if he failed to recover from his illness, he would still be entitled to receive a pension from your fund.

We are, therefore, of the opinion that Mr. Suk is not entitled to receive disability pension for the period of his disability from April 1 to May 15, 1951.

MEMBERSHIP QUALIFICATIONS

(No. 11485—House of Correction A. & B. Fund—G. F. M., Jr.—February 26, 1952.)

In response to your questions concerning certain employees at the House of Correction who are expressing a preference for the Municipal Employees' Officers and Officials Annuity and Benefit Fund the following is submitted.

For clarification, your questions will first be set out in full and will then be answered.

Q. Is it compulsory for a civil service employee of the City of Chicago to belong to one of the pension funds?

A. Yes, either the House of Correction Pension Fund or the Municipal Employees' Annuity and Benefit Fund of Chicago.

Q. If number one is yes, then must eligible employees come into our Fund?

A. Not necessarily. Employees eligible may be a member of your Fund or the Municipal Employees' Fund (Sec. 2).

Q. Can Mr. Downes resign from our Fund, and go into the Municipal Employees' Fund?

A. Yes, he may do so (Sec. 2).

Q. With reference to a group of employees who started young; contributed to the fund for more than twenty years, but are several years short of the age of 57:

A. Could this group or any one of them resign from the fund (now) and continue to be employed at the House of Correction under civil service?

B. Would he receive the full pension of $120.00 per month when he became 57 years of age if he should then resign?

A. Such person or persons may resign from membership in the House of Correction Employees' Pension Fund. If they continue to work at the House of Correction under civil service, they would have to become a member of the Municipal Employees' Annuity and Benefit Fund as all civil service employees of the City of Chicago are required to be a member of a pension fund.

B. What any one, now under the age of 57, would receive in pension upon his attaining the age of 57, can not be answered until the person in question reaches that age. To attempt to say at this time what any one individual or any group of indvduals would receive in the form of pension at some period in the future would only be sheer guess work, as any change in a number of factors might make a change in the answer.

CONTRIBUTIONS WHILE ON DISABILITY PENSION

(No. 11491—House of Correction A. & B. Fund—G. F. M., Jr.—February 29, 1952.)

In response to your question concerning Mr. Joseph Milosewski, the following is submitted.

Your letter states that Mr. Milosewski was born April 26, 1894; that he entered the service of the House of Correction August 22, 1932; that he became civil service July 20, 1934; and that he is now receiving a disability pension of Fifty ($50) Dollars per month, which was rendered him in accord with an opinion of this office dated December 18, 1950.

Your letter states that you have been asked the question, "Why doesn't Mr. Milosewski contribute Twelve ($12) Dollars to the Fund as a monthly contribution?" You also ask when a contributor receiving a disability pension contributes to your Fund.

Mr. Milosewski was granted his disability pension in accordance with the Act governing your Fund as such Act was prior to July 1, 1949. The former Act (under which Mr. Milosewski receives his payment) does not require that any payment be made to your Fund, nor does it provide for Mr. Milosewski to receive credit for the time he is receiving such disability pension.

In response to your second question, when a person is placed on disability benefit under Section 10 of the Act governing your Fund, (Ill. Rev. Stats. 1951, Chap. 67, Sec. 26) then a deduction of an amount equal to the

same amount of the payroll deduction of the person concerned is deducted from his disability benefit check and placed to his credit in Your Fund. He is also given credit for the period of time he is on disability.

DISABILITY BENEFIT

(No. 11735—House of Correction Employees' Pension Fund—G. F. M., Jr.—August 27, 1953.)

In response to your request for an opinion concerning Joseph Milosewski, the following is submitted.

Your letter states that Mr. Milosewski has been a contributor to your Fund for fifteen years, nine months and fifteen days; that he is now fifty-nine year of age; that he has been on disability pension receiving $50.00 per month since November 16, 1951; that he returned to work on July 30, 1953, and worked for that one day; that six (6%) per cent of his day's salary was deducted for annuity purposes; that he has again applied for ordinary disability benefits; and that you would appreciate being informed as to the amount of ordinary disability benefits Mr. Milosewski is entitled to receive, if any.

Mr. Milosewski has been the subject of two previous opinions of this office. The first opinion was dated June 27, 1949, and held that the payment of disability pension started with the day of separation from the payroll, and that Mr. Milosewski was not entitled to credit for any time for which he received disability pension as he was receiving disability pension as the Act was at the time his disability began and prior to the amendments of the year 1949.

The second opinion concerning Mr. Milosewski was written after he had returned to the service of the House of Correction and had worked for a period of some months. In November of 1950 (and not 1951 as stated in your letter) Mr. Milosewski again became sick, disabled and unable to perform his duties. At that time the law had been amended (in 1949) to provide for ordinary disability benefits to be paid to members of your Fund under fifty-five years of age. As Mr. Milosewski was over fifty-five years of age at that time, the opinion held that he was not entitled to receive ordinary disability benefits. The opinion went further, however, and held that it was not the intention of the legislature to deny sick and disabled people over the age of fifty-five an opportunity to receive some form of disability pay, and, therefore, that his illness in November of 1950 was a re-occurence of his original illness in 1949, and that Mr. Milosewski was entitled to continue on the disability pension provided in the Act prior to the amendments of 1949.

In the year 1953 the legislature of the State of Illinois saw fit to change the Act governing the House of Correction Employees' Pension Fund and at that time raised the age limit for disability to sixty-five years. They also fixed the amount of money payable for ordinary disability at forty-four (44%) per cent of the salary of such disabled person. This increase in the age limit by the legislature must be held to be a clarification of the Act and was made for the purpose of correcting the oversight made in the year 1949. As the amount to be paid is a percentage of salary the salary to be used for the purpose of ordinary disability is to be the salary attached to the position occupied by any individual at the time he applies for ordinary disability benefits.

In the case of Joseph Milosewski, he returned to work on July 30, 1953. While he worked but one day, he worked at the rate of pay that was received by those occupying similar positions. It is, therefore, our opinion that Mr. Milosewski is entitled to receive ordinary disability benefits in the amount of forty-four (44%) per cent of the salary attached to the position he occupied on July 30, 1953, less any deductions provided for in the Act governing your Fund.

RIGHTS OF EX-OFFICIO BOARD OF TRUSTEE MEMBERS

(No. 11744—House of Correction A. & B. Fund—G. F. M., Jr.—September 22, 1953.)

In response to your request for an opinion as to the rights and duties of *ex-officio* members of your board, the following is submitted.

Section 4 of the Act governing your fund (Ill. Rev. Stats., 1951, Chapter 67, Sec. 22) provides in part thereof as follows:

> "The said board of trustees shall consist of the chairman of the board of inspectors and the superintendent of the house of correction, four members contributing to the fund and one member from the beneficiaries. The chairman of said board of inspectors and superintendent of the house of correction shall be ex-officio members of such board of trustees, and the five (5) other members of such board of trustees shall be elected by ballot * * *"

To appoint members of a board of trustees, who had no power except to sit and listen to the matters which come before such board, would be a useless appointment and would be of no benefit to either the board of trustees or the pension fund controlled by it. The reason for appointing as members of boards of trustees, men who occupy positions of power or control is for the purpose of giving the board of trustees the advantage of having as members, men of experience in other occupations than those occupied by the elected members of such board. Such men also act as a balance on such boards, in that they tend to bring the views of outsiders into meetings, and as they are not benefited in any way whatsoever, their reasoning is also fair and unbiased.

Among the duties of the board of trustees as provided by the Act controlling your fund (Ill. Rev. Stats., 1951, Chapter 67, Sec. 23) are the following:

> "1. To make all payments for said pension fund pursuant to the provisions of this Act * * *.
>
> * * * *
>
> 8. Said board shall hear and determine all applications for benefits given under this Act, on account of disability and shall have power to suspend any annuity given on account of disability whenever in their judgment the disability of the beneficiary has ceased, or for other good cause."

The duty of any trustee is the duty of every trustee, and every trustee has the same rights and duties as any other member of the board, to act in connection with any business that is properly before it.

We are, therefore, of the opinion that the rights and duties of the *ex-officio* members of the board are identical to the rights and duties of any other member of the board.

F. MUNICIPAL COURT AND LAW DEPARTMENT ANNUITY AND BENEFIT FUND

RE-ENTRY INTO SERVICE

(No. 11116—Municipal Court and Law Department A. & B. Fund—G. F. M. Jr.—January 14, 1949.)

In response to your request for an opinion concerning the interpretation of Section 34 (a) of the Act governing your Fund (Ill. Rev. Stats. 1947, Ch. 37, Sec. 538) the following is submitted:

Your letter requests clarification as to whether or not the present value of credits not used in previous annuity computations should be placed to the credit of annuitants for future annuity computations on the day they re-enter the service under the following conditions:

a. An annuitant who re-enters the service before age 60 and again leaves the service before attaining age 60 having received previous annuity based on 15 years of previous service.

b. An annuitant who re-enters the service either before attaining age 60 or after attaining age 60 and subsequently leaves the service after having attained age 60 having received previous annuity based on 15 years of previous service.

Section 34(a) of the Act governing your Fund (Ill. Rev. Stats. 1947, Ch. 37, Sec. 538) provides in part as follows:

> "When any employee who shall resign or be discharged from the service * * * shall re-enter the service before he shall have attained an age of sixty-five (65) years, any annuity previously granted to such employee, and any annuity fixed for the wife of such employee shall be cancelled. Such employee shall be credited in his account for annuity purposes with sums sufficient to provide annuities equal in amounts to those cancelled for such employee and the wife for whom such annuity shall have been fixed of such employee as of their respective ages on the date of such employee's re-entrance into the service; * * * when the proper time, as provided in the foregoing sections of this Act, shall have arrived, new annuities based on the amount then to the credit of such employee for annuity purposes and the entire term of such employee's service shall be fixed for such employee and such wife of such employee."

In the case of an employee who leaves the service after rendering fifteen years of such service, there has been set up, for the purpose of providing him annuity, one-half of the amount contributed by the City for annuity purposes, and he receives an annuity based upon the total of his accumulations and the aforementioned one-half of the City's contributions.

Upon such employee re-entering the service, his annuity is cancelled and an amount is set up to his credit sufficient to pay him as of that date an annuity equal to the one which was cancelled.

Upon setting up the accumulations to provide for annuities of an amount equal to the cancelled annuities, there must be included in such sums certain of those City contributions which had not been previously used, by reason of the employee's separation from the service. If such sums were not included, such employee might receive a smaller annuity than he was previously receiving at the time of his first separation from the service.

It is not the theory of pension fund legislation that additional service should result in reducing an employee's annuity, nor is there any provision in the Act that City contributions not used are forfeited forever. It would therefore appear that upon an employee re-entering the service, after having been separated therefrom, and receiving an annuity, there should be set up to the credit of such employee the entire amount of city contributions not used in the payment or computation of such annuity, and such contributions for the entire period of the employee's service should be used in determining the amount of annuity payable to him upon his separation from the service after re-entry.

This interpretation is further borne out by the last sentence of paragraph 1 of Section 34(a), hereinabove cited, and which provides in part:

> "New annuities based on the amount then to the credit of such employee for annuity purposes and the entire term of such employee's service shall be fixed for such employee and such wife of such employee."

It therefore follows that, in order to be consistent in the application of the provisions of the Act governing your Fund, it is necessary that those employees who re-enter the service under 60, and those who re-enter the service over 60, should both be credited in their accounts with the present value of their annuities, as of the date of re-entrance, and of the present value of the City contributions as of the date of re-entrance not used in the computation at the time of their resignations from the service. Each such employee would thereupon receive credits based upon his entire period of service.

If such interpretation were not placed upon this section of the Act it might be possible for an employee to work for ten years and one month and retire at age fifty-five and one month and receive an annuity based on one-twelfth of ten per cent of the City's contributions for ten years and one month; to re-enter the service one month later, work for nine years and nine months, again become separated from the service, and receive in toto only the original City contributions applied to his previous annuity. This, of course, is neither the spirit nor the intention of the Act governing your pension fund.

It is common knowledge that one of the purposes of pension funds is to induce long and loyal service by the employee members of such pension fund. In order to produce such long and loyal employment, the Act governing the pension fund must be fair and equitable and must offer to an experienced employee the same inducements for re-entering the service that it offers to a beginner in the service.

I am therefore of the opinion that both classes of employees mentioned in your letter, upon their re-entrance into the service, should be credited in their accounts with all the present values of the City's contributions not used in the previous computation; that the increase in their periods of service by reason of their re-entry should increase such accumulation; and that upon their retirement after re-entry the entire amount of such City contributions should be used in computing the amount of annuity to be paid to them upon their second retirement.

PHYSICAL EXAMINATIONS

(No. 11162—Municipal Court and Law Department A. & B. Fund—G. F. M., Jr.—July 28, 1949.)

In response to your request for an opinion relative to the physical examination required of members of your Fund for participation in the

Ordinary Disability Benefit provisions of the Act governing your Fund, the following is submitted:

Your request contains three separate sets of facts, and for the purpose of rendering a clear opinion each set of facts will be dealt with separately. You request an opinion as to whether or not an employee who has qualified for participation in Ordinary Disability Benefit provisions, has become separated from the service, and then re-enters the service must again be examined by a physician, if:

1. He did not make application for and did not receive refund of salary deductions.

A. A participant in your Fund who becomes separated from the service and does not make application for or receive a refund of salary deductions, upon his re-entry into the service is restored to all the rights which he possessed in the Fund upon the date of his separation from the service. These rights include participation in Ordinary Disability Benefit, and he, having once qualified for participation in such benefits, need not again apply for participation, nor need he be examined by the physician for the Fund.

2. The employee in question applied for and accepted a refund of salary deductions.

A. Such employee surrenders and forfeits all right to participation in the Ordinary Disability Benefit fund. Section 38 of the Act governing your Fund (Ill. Rev. Stats. 1947, Ch. 37, Sec. 542, par. 3) provides in part as follows:

> "3. Any such employee who shall avail himself of such right and withdraw such amount so credited to him shall ipso facto surrender and forfeit all rights to any annuity or other benefits from the annuity and benefit fund herein provided for, for himself and for any other person or persons who might benefit through him because of service rendered by him prior to the time he shall make application for refund of the amounts hereinbefore stated . . ."

Such employee is not entitled to participate in the Ordinary Disability Benefit provisions of your Act without passing an examination by the physician for the Fund after his re-entrance into the service.

3. He applied for and accepted a refund of salary deductions and upon re-entrance and completion of two years or more of service repaid the refund, as provided for in Section 38 1/2 of the Act governing this Fund.

A. The provisions of Section 38 1/2 of the Act governing your Fund (Ill. Rev. Stats. 1947, Ch. 37, Sec. 542.2) provides in part as follows:

> "Notwithstanding the provisions of any section or sections of this Act to the effect that any employee who shall withdraw in refund the amount credited to him for annuity purposes shall forfeit all rights for himself and for any other person or persons who might benefit through him because of service rendered by him prior to the time he made application for refund, any such person shall have all rights restored to him in the event that he shall re-enter the service and serve for a period or periods comprising at least two (2) years after the date when he made his application for refund, by compliance with either of the following provisions:

"(a) He shall make application to the retirement board in writing for the privilege of reinstating such rights and at the same time pay to the annuity and benefit fund herein provided for, a sum equal to the amount received in refund . . ."

(There follows a description of the various methods of payment.)

Under the provisions of the above quoted section, if an employee shall re-enter the service and serve for a period of two years and repay the amounts received in the form of refund, together with interest at 4%, such employee shall be restored to all the rights that he had in such Fund at the time of his separation from the service.

During the period of time that such employee is serving the two-year period required for restoration of such rights, he would not be entitled to participate in the disability benefit provisions of your Act, unless he had been examined by the physician for the Fund and had passed such examination.

MARRIAGE AFTER AGE OF SIXTY-FIVE

(No. 11169—Municipal Court and Law Department A. & B. Fund—G. F. M. Jr.—August 23, 1949.)

In response to your request for an opinion as to the distribution of moneys accrued in the Fund from the salary deductions of Thomas D. May, a former member of your Fund, the following is submitted:

Your letter states and your records disclose that Thomas D. May entered the service of the City of Chicago November 16, 1931; that he filed information sheets with your Fund on August 29, 1935, in which he stated his date of birth to be July 31, 1886; that on March 25, 1946, he advised the Fund of the death of his wife, Gertrude Neff May, and his remarriage on July 19, 1945, to Irene A. Coleman May; that Thomas D. May died on February 5, 1949; that pursuant to making application for widow's annuity, Mrs. May presented a certificate of birth of the Registrar General's Office of Toronto, Canada, indicating that the date of birth of Thomas D. May was July 20, 1876; that the Retirement Board has approved the birth certificate of the Registrar General's Office of Canada and ordered the records corrected to show Mr. May's date of birth to be July 30, 1876. Your records further disclose that Mr. May left him surviving, in addition to Irene A. Coleman May, his wife, Thomas F. May, his son. Your question is as to the proper distribution of moneys standing in the Fund to the credit of Mr. May at the time of his death, which sums are as follows:

Refund of Deductons for Widow's Annuity to 7-30-41	$ 183.49
Deductions for Widow's Annuity made in error from 7-30-41 to date of death	237.07
Employee's accumulated deductions for annuity purposes to date his annuity was fixed	845.79
Employee's accumulated deductions for annuity purposes from 7-30-41 to 6-30-47, with interest to date of death	438.35
Employee's accumulated deductions for annuity purposes from 7-1-47 to date of death	309.76
Total	$2,014.46

The Retirement Board, having accepted the birth certificate submitted by Mrs. May, and having ordered the records corrected accordingly, established Mr. May's date of birth as July 30, 1876. It follows that at the time of Mr. May's marriage to Irene A. Coleman May, on July 19, 1945, he was over the age of sixty-five, and Mrs. May is therefore not entitled to receive widow's annuity.

The accumulation standing to the credit of Mr. May at the time of his death was composed of various forms of deductions, some of which, under the terms of the Act governing your Fund, should have been refunded to Mr. May at various times during his service. Such amounts cannot therefore be classed as accumulations for annuity purposes under the provisions of your Act.

Section 38 of the Act governing your Fund (Ill. Rev. Stats. 1947, Ch. 37, Sec. 542(c)) provides in part thereof as follows:

> "2. If any male contributor shall be married when he shall become sixty-five (65) years of age while in the service, and shall subsequently become a widower while in the service, any sum accumulated from deductions from his salary for widow's annuity purposes shall be refunded to him when he becomes such widower."

The sum of $183.49 reported by your actuary as the amount of money which had been deducted for widow's annuity from the date of Mr. May's entrance into the Fund until the date he attained age sixty-five, i.e., July 30, 1941, was therefore refundable to Mr. May under the provisions above set out, since he became a widower after attainment of age sixty-five, while in the service. This sum is therefore refundable to his estate.

The sum of $237.07 reported by your actuary as sums deducted for widow's annuity from July 30, 1941 (the date on which Mr. May attained age sixty-five) until the date of his death, was deducted in error, and this also should be paid to his estate.

Section 38(e) of the Act governing your Fund (Ill. Rev. Stats. 1947, Ch. 37, Sec. 542(e)) provides in part as follows:

> "In any case in which an amount equal to the total amount accumulated to the account of a deceased employee from sums deducted, after the first day in the month of January of the first year after the year in which this Act shall come in force and effect in such city, from the salary of such employee for annuity purposes shall not have been paid to such employee, and in the case of a married male employee to such employee and the widow of such employee both together, in form of annuity before the last of such persons who shall die, an amount equal to the difference between the sum of such amounts, and the entire amount paid in form of annuity or annuities, without interest upon either such amount, shall be refunded and paid to the children of such employee, . . ."

The sum of $845.79, reported by your actuary as employee's accumulated deductions for annuity purposes, and the sum of $309.76 reported by your actuary as employee's accumulated deductions for annuity purposes, from July 1, 1947, (the date on which the Act governing your Fund was amended to provide that deductions from employees over sixty-five should be resumed) should be refunded under the provisions of Section 38(e) and be paid to Thomas F. May, the son of Thomas D. May.

The sum of $438.35, reported by your actuary as employee's accumulated deductions for annuity purposes from July 30, 1941, to June 30, 1947, although paid by Mr. May after attainment of age sixty-five,

was made up of deductions paid for prior service credit (as provided by the law governing your Fund) and is actually a deduction from the salary of the employee for annuity purposes. This sum is also payable to Thomas F. May, under the provisions of Section 38(e) above set out.

The report of your actuary discloses that there was standing to the credit of Mr. May at the time of his death the sum of $2014.46. Of this amount $1593.90 is payable direct to Thomas F. May, the son of Thomas D. May, under the provisions of Section 38(e) of the Act governing your Fund. The $420.56 remaining should be paid to the estate of Thomas D. May, as moneys which were refundable to him during his lifetime, and which were not accumulations "to the account of a deceased employee from sums deducted . . . from the salary of such employee for annuity purposes," and consequently cannot be paid to Thomas F. May in accordance with the provisions of Section 38(e).

PHYSICAL EXAMINATION

(No. 11206—Municipal Court and Law Department A. & B. Fund—G. F. M. Jr.—November 10, 1949.)

In response to your request for an opinion concerning Harry Markin, the following is submitted:

Your request states, and your records disclose that Harry Markin was born February 25, 1888; that he was appointed an Assistant Corporation Counsel on January 18, 1943, Payroll No. 1040; that the Chief Clerk of the Law Department was notified to advise Mr. Markin to appear April 15, 1943, for a physical examination to qualify for ordinary disability benefit participation; that Mr. Markin never appeared for examination; that no deductions were made from his salary for ordinary disability benefit purposes; and that Mr. Markin was granted a leave of absence beginning March 1, 1949.

There was attached to your request a copy of an application in the form of a letter, dated July 8, 1949, which was sent to your Board by Mr. Markin, requesting that he be granted disability benefit from March 1, 1949. In the application it is stated that Mr. Markin was surprised to learn he was not eligible to receive ordinary disability benefits because of his failure to take a physical examination; that Edward Sullivan, now deceased, who was then Chief Clerk of the Law Department, had informed Mr. Markin that because of Mr. Markin's former employment by the Health Department of the City of Chicago it was unnecessary for Mr. Markin to take such physical examination; that relying upon the statements and representations of Mr. Sullivan, Mr. Markin did not take such examination; that on or about February 17, 1948, Mr. Markin paid into your Fund the sum of $252.07 for additional benefits (as provided by an amendment to the Act governing your Fund, passed by the legislature in 1947); that at the time of such payment he was not informed that he was not eligible to receive disability benefits from the Fund in the event of illness, nor did he make any inquiry as to such eligibility.

Mr. Markin's letter further states that he was in excellent health from the time of joining the Corporation Counsel's office until September 10, 1948, at which time he consulted one Dr. Miller, who signed a statement dated June 24, 1949, to the effect that there was nothing in the past history of Mr. Markin "to suggest any serious disabling disease." The statement of Dr. Miller was attached to Mr. Markin's application.

Your question is as to whether Mr. Markin is qualified to receive ordinary disability benefits, in view of the facts disclosed by the Funds records and the allegations set forth in Mr. Markin's communication.

The provisions of the Act governing your Fund (Ill. Rev. Stats. 1947, Ch. 37, Sec. 548) in regard to ordinary disability benefits, provide as follows:

> "Benefit to be known as 'ordinary disability benefit' shall be provided for employees in the service who shall become disabled as the result of any cause other than injury incurred in the performance of an act or acts of duty, and other than as the result solely of chronic alcoholism, and other than as the result of pregnancy or child-birth.
>
> "No participant in the annuity and benefit fund herein provided for shall have any right to receive ordinary disability benefit if he shall not apply for participation in said benefit and shall be examined by at least one licensed and practicing physician appointed by the retirement board and shall be found to be in good physical condition. . . ."

It is clear from the above that a physical examination was provided for in the Act for the protection of the Fund, so that the question of ability or inability to perform the duties imposed upon him would not be left to the discretion of the employee. This section further provides that the participant must be under sixty-five years of age, sets up the period of time for which he is entitled to receive ordinary disability benefit, and contains other provisions not pertinent to this opinion.

Your Retirement Board is a board of trustees created by statutory enactment, and has only such powers as are granted to it by the Act which created the Fund. (*O'Connor, et al.*, v. *Bd. of Trustees Fire Pen. Fund*, 155 Ill. A. 460.) The legislature did not give your Board the power to waive any of the provisions of the Act governing the Fund. The Chief Clerk, who, according to Mr. Markin's letter, informed him of the examination and then waived such requirement, was at that time a trustee of the Fund. Since the Board as a whole, acting in its official capacity, has no authority to waive such requirement, it is logical to assume that no individual member of the Board, having knowledge of the fact he was unauthorized so to do, would assume personal responsibility for waiving a requirement provided for in the Act governing the Fund.

Mr. Markin was informed by the Chief Clerk of his department, Mr. Edward Sullivan, of the provision contained in the Act concerning physical examinations, and he, having been so informed, should have inquired into the right of his informant to waive a requirement provided by statute.

Section 58 of the Act governing your Fund (Ill. Rev. Stats. 1947, Ch. 37, Sec. 562) provides:

> "It shall be the duty of all officers, officials, and employees of such municipal court and city to perform any and all acts, required to carry out the intent and purposes of this Act, which it shall be necessary that any such officer, official or employee shall perform so that the provisions of this Act may be complied with and the intent and purposes thereof fulfilled."

The above quoted provision further emphasizes the fact that a physical examination is required before any employee may become eligible to participate in the ordinary disability benefits provided for in the Act governing the Fund. It places, not only upon the department head who is required to notify the employees, but on the employees themselves, the obligation "to perform any and all acts, required to carry out the

intent and purposes of this Act, which it shall be necessary that any such officer, official or employee shall perform so that the provisions of this Act may be complied with and the intent and purposes fulfilled."

It is unfortunate that Mr. Markin did not present himself for examination by a physician on April 15, 1943, since it would appear the condition of his health at that time was such that he would have had no difficulty in passing the examination. However, due to the fact that the legislature, in creating this Fund, required such a physical examination before a member could become eligible to participate in the ordinary disability benefits of the Fund, and placed the obligation upon members of the Fund (thus making it a duty not only of the officers and officials but of the employees themselves) Mr. Markin is not eligible to participate in the ordinary disability benefits provided for in the Act governing your Fund, since he failed to appear for such examination.

PAYMENT OF WIDOW'S ANNUITY FOR FRACTION OF MONTH

(No. 11385—Municipal Court and Law Department A. & B. Fund—G. F. M. Jr.—May 7, 1951.)

In response to your request for an opinion in the matter of the Estate of Irene Horesco, the following is submitted:

Your letter states and your records disclose that one Frank J. Horesco was a member of your Fund; that he was a deputy bailiff, and the husband of one Irene Horesco; that Frank J. Horesco died August 30, 1943; that at the meeting of the Retirement Board held September 23, 1943, Irene Horesco was granted widow's annuity as of August 31, 1943, the date following the death of her husband; that Mrs. Horesco died January 30, 1951; and that her widow's annuity payment check was due as of January 31, 1951, the check in payment thereof being so dated. Your question is as to whether or not the check dated January 31, 1951, is payable to her estate by reason of her death on January 30, 1951.

Section 20 of the Act governing your Fund (Ill. Rev. Stats. 1949, Ch. 37, Sec. 524) provides as follows:

> "Annuity to be known as 'widow's annuity' shall be provided for widows of future entrants and of present employees. Except as provided in Sections 47 and 53 of this Act, any such annuity shall be a life annuity, and equal payments thereof shall be made monthly throughout the life of the annuitant from and after the date when the event upon which payment of such annuity shall depend shall occur. The first such payment shall not become due and payable until one month from and after such date, and no payment shall be made for any part of the monthly period in which the annuitant shall die."

Mrs. Horesco was alive on a portion of the last day of the monthly period for which her monthly annuity was payable, and having been alive a portion of such day, in the eyes of the law she was alive the entire day.

Courts do not ordinarily take cognizance of fractions of a day. "Day" has been interpreted by the courts as being "an indivisible unit consisting of a 24-hour period from midnight until midnight" (*Rock Finance Co.* v. *Central National Bank of Sterling*, 339 Ill. App. 319.) It follows that, since Mrs. Horesco lived during some portion of January 30, she must be considered to have lived the entire day, which was the last day of the "monthly period" for which she was to receive annuity.

We are therefore of the opinion that, in compliance with the specific provision contained in the Act governing your Fund, the annuity payment due Mrs. Horesco as of January 31, 1951, should be paid to her estate, by reason of the fact that she was alive on January 30, the last day of the "monthly period."

REFUND OF WIDOW'S ANNUITY MONEY

(No. 11416—Municipal Court and Law Department A. & B. Fund—G. F. M. Jr.—August 24, 1951.)

In response to your request for an opinion concerning the affidavit filed with your Fund by Chester A. Phillips, a former employee annuitant, the following is submitted:

Your letter requests an opinion as to whether or not Mr. Phillips has a right to receive a refund of the moneys that he paid into your Fund for widow's annuity. The affidavit enclosed therewith sets up that Mr. Phillips stated to you in his application for employee's annuity that he was married once, and had not seen or communicated with his wife for over twenty-five years, that he did not know of her whereabouts, whether she was dead or alive, or had obtained a legal divorce. The affidavit further states that in or about the year 1906, he obtained a marriage license in Michigan City, Indiana, to marry one Josephine Davis, but that he and Josephine Davis were never married; that because there were two children born to Josephine Davis (Joseph A. Phillips and Shirley Ann Phillips) and that he was their father, he attempted to establish the legitimacy of the birth of these two children by stating on the application for annuity that he was married. An investigation was made by the undersigned of the records in the Policemen's Annuity and Benefit Fund (Mr. Phillips having at one time been a Police Officer of the City of Chicago) discloses that the records stated that he was married to one Josephine Davis in the year 1908 at Michigan City, Indiana. A checking of the records at LaPorte County, of which Michigan City is the County Seat, disclosed the fact that there was no record of any marriage of Chester A. Phillips.

Assuming the statement contained in the affidavit to be true, and the statement of Richard L. Anderson, the Clerk of the Circuit Court who checked the records is true, Mr. Phillips is entitled to receive a refund of the moneys he paid into your Fund for widow's annuity, as he has separated himself from the service of the Municipal Court.

The Act governing your Fund in Section 38 thereof (Ill. Rev. Stats. 1949, Ch. 37, Sec. 542, 5 (c)) provides in part thereof as follows:

> (c) "When any male employee shall resign or be discharged from the service before he shall have become sixty-five (65) years of age and shall enter upon annuity and shall not then be married, any sum accumulated from deductions from his salary for widow's annuity purposes shall then be refunded to him."

We are, therefore, of the opinion that Mr. Chester A. Phillips is entitled to receive a refund of the accumulations standing to his credit for widow's annuity.

CREDITS USED IN DETERMINING ANNUITIES

(No. 11424—Municipal Court and Law Department A. & B. Fund—G. F. M. Jr.—September 20, 1951.)

In response to your request for an opinion concerning the interpretation of Section 34 (a) of the Act governing your Fund, the following is submitted:

Your letter requests clarification of the value of all credits in the case of an employee who left the service prior to attaining the age of sixty-five (65), with more than ten years but less than twenty years of service, (who did not take refund and did not make application for annuity upon becoming eligible for such annuity) when such employee, having re-entered the service, is again separated after attaining the age of sixty (60).

On January 14, 1949, there was rendered by this office an opinion for determining the present value of credits which were not used in previous annuity computation for a person who had retired upon annuity and later re-entered the service. The classification of credits in that opinion would apply in the circumstances set up in the request to which this opinion is a response, for the reason that the sole distinction between the parties involved is, that in the matter discussed in the opinion of 1949, the individual benefited to the extent of receiving an annuity for a period of time, and in the present matter, the individual has not so benefited. To deny him the value of credits which he has earned by reason of his service, because he left the service and then re-entered it, is not and could not have been within the intention of the legislature, as is fully set out in said opinion of January 14, 1949.

We would respectfully suggest that the interpretation set out in such opinion hereinabove mentioned, be used in establishing the credit in all cases similar to the one set out in your request.

INVESTMENT IN MORTGAGE

(No. 11428—Municipal Court and Law Department A. & B. Fund—G. F. M. Jr.—September 27, 1951.)

In response to your request for an opinion concerning certain mortgages for investment purposes in catagories which were as follows:

1.) Mortgages insured under Title II of the National Housing Act enacted June 27, 1934 and commonly known as HOLC.

2.) Real Estate Mortgages guaranteed under provisions of the Servicemens Readjustment Act of 1944 as amended, Titles III and IV, commonly known as Veterans Guaranteed and Insured loans.

the following is submitted:

Enclosed with your letter is a letter by the Heitman Mortgage Company, who offer you the certain real estate mortgages described above. In addition to your letter, I have had the pleasure of talking to one of the executives of the Heitman Mortgage Company and their counsel.

It was suggested by them in the event your retirement board should feel that the mortgages did not sufficiently meet the requirements of the Act governing your Fund, that they would secure a bond guaranteeing the Fund against any loss, cost or damage, which might arise or occur by reason of some neglect of duty on the part of the Heitman Company which would or might invalidate the guarantee of the United States Government.

Section 6 of the Act governing your Fund, as amended by H. B. 934, approved June 30, 1951, provides in part thereof as follows:

> Sec. 6. "The Retirement Board shall have the power and it shall be the duty of said retirement board to:
>
> (e) Invest the moneys of said Annuity and Benefit Fund in interest bearing bonds, notes or bills of the United States, or obligations fully guaranteed as to the payment of both principal and interest by the United States, * * *."

It is to be noted that the requirement of the Act is "obligations fully guaranteed as to the payment of both principal and interest by the United States." Mortgages insured under Title II and real estate mortgages guaranteed under provisions of the Servicemens Readjustment Act of 1944 as amended, provide that the guarantee of the United States shall remain in force and effect unless a payment upon the mortgage shall not be made when due, and thirty days shall elapse without the Government being notified. If such event should occur, the guarantee of the United States Government ceases to exist. This failure of the guarantee in itself indicates that the bonds are not fully guaranteed as contemplated in the Act governing your Fund. The offer of the Heitman Mortgage Company to secure a bond is a further guarantee that your Fund would not suffer any loss by reason of the failure of the United States Government to guarantee one of the mortages sold by them to your Fund. The failure of human element which would be involved in the handling of such mortgage is a further indication that the mortgage is not a fully guaranteed obligation of the United States Government, and the mortgages hereinabove described on page one are not such "obligations fully guaranteed as to the payment of both principal and interest by the United States * * *.", as were contemplated by the legislature in amending the Act governing your Fund. This requirement of notice to the Federal Government, together with the offer of the Heitman Mortgage Company to secure a bond, indicates that the mortgages insured under Title II and the real estate mortgages guaranteed under the Servicemens Readjustmen Act of 1944 as amended are not fully guaranteed by the United States Government.

We are therefore of the opinion that such mortgages are not proper investments for your Fund.

CONTRIBUTIONS FOR PAST SERVICE

(No. 11482—Municipal Court and Law Department A. & B. Fund—G. F. M. Jr.—February 22, 1952.)

In response to your request for an opinion interpreting Section 35 of the Act that governs your Fund, the following is submitted.

Your request is for clarification as to whether or not a participant may make payment under Section 35 for any period or periods of service since January 1, 1936, rendered to any department covered by the Fund, for which service they would not or were not permitted to contribute to your

Fund by reason of their employment being of a temporary nature and ordinarily requires less than ten (10) months of actual duty in each calendar year.

Section 35 of the Act governing your Fund, (Ill. Rev. Stats. 1951, Chap. 37, Sec. 539) provides in part thereof as follows:

> "From and after January 1, 1952, any employee shall have the right to contribute to the Fund for all periods of service, excepting those periods for which he has received and retains credit in some other annuity and benefit fund or pension fund in operation of such city for the benefit of employees of such city or board of education of such city, rendered by him to such city or board of education by virtue of appointment to a position which did not include him and allow him to contribute under the provisions of this Act, such amounts as he would have contributed to annuity purposes during the period of time such service was rendered."

It does not seem possible that it was the intention of the legislature that the people who were employed in departments other than those included in the provisions of this Act should be permitted to pay for such service during the time they were in such positions and people who performed service in positions and work covered by this Act should not be permitted to pay for such service.

To adhere to such a strict interpretation of the law would only mean that the Act governing your Fund discriminates against its own members. Such discrimination could not have been the intention of the legislature.

We are therefore of the opinion that under the provisions of Section 35 of the Act governing your Fund, participants in your Fund may pay into your Fund for service they rendered departments covered by your Fund subsequent to January 1, 1936 for such period or periods of time that they have not heretofore made payment.

MILITARY SERVICE DEDUCTIONS

(No. 11486—Municipal Court and Law Department A. & B. Fund—G. F. M. Jr.—February 26, 1952.)

In response to your request for an opinion concerning Section 38½ of the Act governing your Fund, the following is submitted.

Your question is for clarification of whether or not an employee who forfeits military service deductions at the time he received a refund will have such credit restored to him if he re-enters the service and repays the refund.

Section 38½ of the Act governing your Fund, (Ill. Rev. Stats. 1951, Chap. 37, Sec. 542.2) provides in part as follows:

> "Not withstanding the provisions of any Section or Sections of this Act to the effect that any employee who shall withdraw in refund the amount credited to him for annuity purposes shall forfeit all rights for himself and for any other person and persons who might benefit through him because of service rendered by him prior to the time he made application for refund, any such person shall have all rights restored to him in the event he shall re-enter the service and serve for a period comprising no less than two (2) years after the

date when he made application for refund, by compliance with either of the following provisions."

After the quoted paragraph there follows two paragraphs, one providing for payment in full, the other permitting payment by installment. It is to be noted that the paragraph hereinabove quoted provides for the restoration of "all rights" to any one who shall make a repaymen of the refund in accordance with the position provisions with Section 38½. All rights include everything that stood to the credit of a participant, including the military service credits.

We are therefore of the opinion that in the event an employee shall re-enter the service and repay any refund heretofore received by him, he shall, after he has served two years, be entitled to have restored to him all rights which he forfeited at the time he left for service.

TRANSFERRING FUNDS

(No. 11490—Municipal Court and Law Department A. & B. Fund—G. F. M. Jr.—February 28, 1952.)

In response to your request for an opinion interpreting Section 48¼ of the Act governing your Fund, the following is submitted.

Section 48¼ became part of the Act governing your Fund as a result of House Bill number 990, which was passed by the General Assembly in the year 1951 and was approved July 23, 1951.

Your request is for clarification as to whether or not this section provides for the transfer of funds from the Municipal Employees' Annuity and Benefit Fund of Chicago and/or the Board of Election Commissioner's Employees' Annuity and Benefit Fund of Chicago to your Fund for credit for annuity purposes. Section 48¼ (Ill. Rev. Stats. 1951, Chap. 37, Sec. 552.1) as originally introduced in the General Assembly, provided merely for the transfer of service credits from certain Funds. This Bill was later amended to provide for the transfer of funds standing to the credit of an individual who may transfer from one employment to another and leave money standing to his credit in the Fund which covered such previous employment. It was apparently overlooked that the original Bill provided for the transfer of service credits from the county to the city or to any park district and sanitary district. The amendment to House Bill 990, included not only the pension funds mentioned in the original House Bill 990, but also the Board of Election Commissioner's Employees' Annuity and Benefit Fund and your Fund.

It becomes necessary, because of ambiguity which exists in this particular section of the Act governing your Fund, to interpret it so that the intention of the legislature in amending your law is determined. Because of the mention of the Board of Election Commissioner's Employees' Annuity and Benefit Fund and the Municipal Employees' Officers and Officials Annuity and Benefit Fund, it must be held that this Section provides for the transfer of funds from all of the annuity and benefit funds named in said Section to your Fund for credit for annuity purposes.

Your Board also requests an opinion as to whether or not members have the right to transfer funds from your Fund to either the Municipal Employees' Officers and Officials Annuity and Benefit Fund and the Board of Election Commissioner's Employees' Annuity and Benefit Fund of

Chicago for credit for annuity purposes over the Statutes governing those funds. The legislature by intending that your Fund should receive transfers and credit from the Funds mentioned in the section hereof can only have intended that those Funds would also receive transfers of credit from your Fund In the discussion concerning the passage of House Bill 990, one of the arguments used was that there would be a leveling off of the benefits, in that the number of employees who transferred from one Fund to another Fund would offset the number of employee transfers from another Fund to that one. It can only be interpreted that not only may your Fund receive credits from the other Funds mentioned in Section 48¼ but each of those Funds are obliged to receive transfers from your Fund also. Further indication that each Fund shall receive transfers from other Funds is given by the legislative provisions, (Ill. Rev. Stat. 1951, Chap. 37, Sec. 552.1) as follows:

> "This Section shall not be affective unless there is a similar provisions in each of the following Acts."

We are therefore of the opinion that transfers of funds from the Municipal Employees' Officers and Officials Annuity and Benefit Fund and the Board of Election Commissioner's Employees' Annuity and Benefit Fund of Chicago may be received by your Fund for credit for annuity purposes and that participants in your Fund have the right of transfer of moneys to Funds herein in this paragraph set out.

REFUND IN LIEU OF PENSION

(No. 11547—Municipal Court and Law Department A. & B. Fund—G. F. M. Jr.—June 2, 1952.)

In response to your request for an opinion as to whether or not a refund may be given instead of a pension, the following is submitted.

Your letter states that the Retirement Board of your Fund requests that an opinion be forwarded to it as to whether or not a widow of a deceased employee participant has the option of requesting and accepting a refund in lieu of widow's annuity.

Section 38 of the Act governing your Fund, (Ill. Rev. Stats., 1951, Chap. 37, Sec. 542) deals with the granting of refunds, but does not permit a refund to be paid in place of an annuity. Nor is any other provision made in any other section of the Act governing your Fund which would permit a widow to receive a refund of the accumulation standing to her deceased husband's credit in lieu of a widow's annuity.

We are therefore of the opinion that because your Retirement Board is controlled by the grant of powers given to it in the Act governing your Fund and because such grant of power does not permit the paying to a widow of a refund in lieu of widow's annuity, that any such request must be denied.

AGE REQUIREMENT FOR ANNUITY

(No. 11737—Municipal Court and Law Department A. & B. Fund—G. F. M. Jr.—September 1, 1953.)

In response to your request for an opinion concerning the annuity payable to John A. Bauer, the following is submitted.

Your letter states that on February 24, 1949, John A. Bauer was granted an annuity under the provisions of Section 48½; that on April 4, 1951, Mr. Bauer re-entered the service; that his annuity was terminated as of that date; that on July 26, 1953, he again resigned from the service and made application on July 28, 1953, for annuity; that during the period of his service from April 4, 1951, to July 26, 1953, deductions were made from his salary for annuity purposes; and that your question is as to whether or not the annuity payable to Mr. Bauer should be increased by reason of his additional period of service after the original grant of annuity.

Section 48½ of the Act governing your Fund, as amended by an Act approved by the Governor of the State of Illinois on July 16, 1953, provides as follows:

> "Notwithstanding the provisions of any foregoing section or sections of this Act concerning the amount of annuity which any employee shall have a right to receive, any employee who shall resign or be discharged from the service (as service is defined or computed in this Act) after he has attained an age of sixty-five (65) or more years, and who shall have completed twenty (20) or more years of service, and for whom the amount of annuity or annuities provided in accordance with the foregoing provisions of this Act shall be less
>
> than the amount stated in this section, shall from and after the date of such resignation or discharge, in lieu of all annuity or annuities otherwise provided, be entitled to receive an annuity for life, of one hundred and fifty dollars ($150.00), plus an amount equal to one and one (1½) per cent for each year of his service, to and including twenty (20) years, and one and two-thirds (1 2/3) per cent for each year of his service over twenty (20) years, of the average annual salary for the last five (5) years of his service, such annuity to be paid in equal monthly installments; provided that this immediately foregoing provision shall also apply in the case of any employee who shall resign or be discharged after such twenty (20) or more years of service, who shall have attained or when he does attain an age of fifty-five (55) or more years * * *.
>
> The aforesaid provisions shall not apply in the case of any former employee who has been, or is, receiving an annuity from the annuity and benefit fund herein provided for, and who reenters the service as an employee, unless such annuitant shall, after such reentrance into the service, render at least three (3) additional years of service from and after the date of such reentrance."

It is to be noted that the term "former employee" is used and not merely the word "employee". Inasmuch as Mr. Bauer upon his reentrance into the service on April 4, 1951, could not be considered to be a former employee as the term is used in Section 48½, as that term can only apply to those individuals who retire under some other provision of this Act and prior to July 1, 1947.

Mr. Bauer was granted an annuity under Section 48½ of this Act and has again retired, with additional service that he has rendered to the City of Chicago.

We are, therefore, of the opinion that Mr. Bauer is entitled to retire again under the provisions of Section 48½ and is entitled to an annuity under that section, including credit for service rendered since April 4, 1951, to the date of his second separation from the service on July 26, 1953.

AGE REQUIREMENT FOR ANNUITY

(No. 11738—Municipal Court and Law Department A. & B.—G. F. M., Jr.—September 1, 1953.)

In response to your request for an opinion concerning the interpretation of Section 48½ of the Act governing your Fund, as amended by an Act approved by the Governor of the State of Illinois on July 16, 1953, the following is submitted.

Your letter states that an employee participant, having 20 or more years of service (such service constituting qualifying service for application of Section 48½) has been separated from the service prior to July 17, 1953, and before attainment of age 55; that he attained age 55 subsequent to July 17, 1953, and made application for annuity on or after his fifty-fifth birthday.

Your question is as to whether or not such person is eligible to receive annuity under the provisions of Section 48½.

Section 48½ of the Act governing your Fund, as amended by an Act approved by the Governor of the State of Illinois on July 16, 1953, provides as follows:

> "Notwithstanding the provisions of any foregoing section or sections of this Act concerning the amount of annuity which any employee shall have a right to receive, any employee who shall resign or be discharged from the service (as service is defined or computed in this Act) after he has attained an age of sixty-five (65) or more years, and who shall have completed twenty (20) or more years of service, and for whom the amount of annuity or annuities provided in accordance with the foregoing provisions of this Act shall be less than the amount stated in this section, shall from and after the date of such resignation or discharge, in lieu of all annuity or annuities otherwise provided, be entitled to receive an annuity for life, of one hundred and fifty dollars ($150.00), plus an amount equal to one and one-half (1½) per cent for each year of his service, to and including twenty (20) years, and one and two-thirds (1 2/3) per cent for each year of his service over twenty (20) years, of the average annual salary for the last (5) five years of his service, such annuity to be paid in equal monthly installments; provided that this immediately foregoing provision shall also apply in the case of any employee who shall resign or be discharged after such twenty (20) or more years of service, who shall have attained or when he does attain an age of fifty-five (55) or more years * * *".

The above quoted paragraphs from Section 48½ provide that the minimum annuity formula shall also apply in the case of any employee who shall resign or be discharged after such 20 or more years of service who shall have attained or when he does attain an age of fifty-five or more years.

It would appear that all that is necessary under the provision of this section is, that an employee of 20 or more years, attain an age of fifty-five years after the effective date of this Act. The date of separation from service does not appear to be considered, but only the date of attainment of age fifty-five.

In the event of an individual, such as the one described in your letter, who is separated from the service prior to July 17, 1953, and attained the age of fifty-five after July 17, 1953, we are of the opinion that upon the attainment of age fifty-five this individual would be entitled to receive an annuity under the provisions of Section 48½.

G. PUBLIC LIBRARY ANNUITY AND BENEFIT FUND

SEMI-MONTHLY DEDUCTIONS

(No. 11548—Public Library A. & B. Fund—G. F. M. Jr.—June 3, 1952.)

In response to your request for an opinion concerning the manner of payment of deductions into your Fund, the following is submitted.

While it is true that the section of your Act which governs the payment of deductions provides for "equal monthly installments," it must be born in mind that the legislature in creating the Act governing your Fund created it at such a time when salaries were paid but once monthly and therefore deductions could be made only in equal monthly installments.

Now that the salaries of employees of your Fund are paid on a semi-monthly basis, it must be held that it was the intention of the legislature to have deductions made from each payment of salary.

We are therefore of the opinion it is no longer mandatory that deductions be made in equal monthly installments but may be made in semi-monthly installments, i. e., from each pay period.

CHAPTER IV — RELATIONS OF CITY WITH OTHER GOVERNMENTS

A. CHICAGO HOUSING AUTHORITY

POWER OF CITY COUNCIL OVER CHICAGO HOUSING AUTHORITY

(No. 11103—City Council—J. F. G.—November 19, 1947.)

By your letter of October 29, 1947 you requested us to submit for the consideration of your sub-committee appointed to investigate the operations of the Chicago Housing Authority an analysis of the legal relationship between the Chicago Housing Authority and the City Council and, particularly, to advise you what would be the legal effect of action by the City Council disapproving the annual budget of the Housing Authority.

The Chicago Housing Authority was created under and by virtue of the "Housing Authorities Act" (Chap. 67½, Ill. Rev. Stat. 1947). The stated purposes of that act is to provide for the creation of municipal corporations to be known as "Housing Authorities," and to confer upon and vest in them all powers necessary or appropriate to engage in low rent housing and slum clearance projects. In considering the nature of the Chicago Housing Authority and its relations with the City, reference must be made to the Housing Cooperation Law and the housing development and redevelopment legislation known as Senate Bills Nos. 548, 549 and 550 enacted by the 65th General Assembly of Illinois (Chap. 67½, par. 28 at seq. Ill. Rev. Stat. 1947).

In sustaining the constitutionality and validity of the Housing Authorities Act and the Housing Cooperation Act the Supreme Court for this State in *Krouse* v. *Peoria Housing Authority*, 370 Ill. 356, held that the Housing Authority was created for a public purpose. Section 8 of the Housing Authorities Act provides that the Authority shall be a municipal corporation and shall constitute a body both corporate and politic, exercising public and essential governmental functions, and having all the powers necessary or convenient to carry out and effectuate the purposes and provisions of this Act, including power to sue and be sued; to have a seal and to alter the same at pleasure; to have perpetual succession; to make and execute contracts and other instruments necessary or convenient to the exercise of the powers of the Authority; to make and from time to time amend and repeal by-laws, rules and regulations to carry into effect the powers and purposes of the Authority.

It is apparent from an examination of all legislative acts relating to housing authorities to which reference has been made here that Chicago Housing Authority is a public or municipal corporation, just as the Sanitary District of Chicago, the Board of Education of the City of Chicago or the Chicago Transit Authority, separate and distinct from any other public or municipal corporation created under the laws of the State *(Board of Education* v. *Upham*, 357 Ill. 264; *Wilson* v. *Board of Trustees*, 133 Ill. 443; *The People* v. *Chicago Transit Authority*, 392 Ill. 77). The Authority is vested with governmental powers although it has no power to levy taxes which is usually accorded, but not essential,

to public corporations, municipal and quasi-municipal *(People* v. *Chicago Transit Authority,* 392 Ill. 77, 89). Its property is exempt from general taxation under the Revenue Act but in lieu of taxes the Housing Authority is required to pay an agreed percentage of its shelter rentals for the services and facilities furnished by the several taxing bodies within whose jurisdiction the Authority operates (Sec. 29, Housing Authorities Act; sec. 5b, Housing Cooperation Law).

Although the property of housing authorities is subject to the laws, ordinances and regulations applicable to the locality in which such property is situated (sec. 10, Housing Authorities Act) and in respect to such matters as the expenditure of funds contributed by the City and the location of low rent housing and temporary housing under the various housing laws, the City Council has not been granted any supervisory power over the management of the affairs of Chicago Housing Authority. Such investigatory and supervisory power is lodged by section 13 of the Housing Authorities Act in the State Housing Board, *except with reference to any project financed in whole or in part by the Federal government or any agency or instrumentality thereof, so long as such project is supervised or controlled by the Federal government or any agency or instrumentality thereof.*

The exception noted is significant. It implements the powers granted to the Authority by section 8 of the Housing Authorities Act, to take over by purchase, lease, or otherwise any project undertaken by any government; to act as agent for the Federal government in connection with the acquisition, construction, operation or management of a project or part thereof; to function as an agency of the city and to act as an agent for any other government with respect to matters relating to housing and the elimination of unsafe and unsanitary dwellings; to borrow money upon its bonds, notes, debentures, or other evidences of indebtedness and to secure the same by pledge of its revenues, or in any other manner, and in connection with any loan by a government, to agree to limitations upon the excise of any powers conferred upon the Authority by this Act.

We have been informed that Chicago Housing Authority maintains and operates eleven low rent housing projects of which six are leased from the Federal government. Title to the remaining five is in the Chicago Housing Authority but each of these has been financed in whole or in part by the Federal government.

A cursory examination of the leases from the United States Housing Authority, the National Housing Agency and the Federal Public Housing Authority discloses that all these leases contain a more or less uniform clause which, in effect, obligates Chicago Housing Authority to operate, administer, manage and maintain the project as long as the lease remains in full force and effect, in accordance with budgets (referred to as operating budgets) prepared on an annual basis with quarterly breakdowns and in accordance with the terms of approval of each operating budget, including the amounts of expenditures designated therein for specific purposes, annually and quarterly. The Housing Authority also agrees to keep and maintain as long as the lease remains in effect complete records, books of account and minutes of meetings in such form and under such accounting system as may be prescribed or approved by the Federal agency relating to all operations under the lease. All such records, books of account and minutes and other information is open to inspection or audit by authorized representatives of the Federal agency during regular business hours.

We have also examined copies of agreements between Chicago Housing Authority and the Federal agencies covering the financing of housing projects owned by Chicago Housing Authority. The loans made by the Federal agency for the development of each project and the contributions made by such Federal agency for its maintenance as a low rent

housing project are subject to the requirements of the Federal agency that the Authority shall prepare detailed operating budgets for each development similar to the provisions in the leases to which we have referred.

The agreements with the Federal agencies were made pursuant to express power granted to Housing Authorities by section 12 of the Housing Authorities Act which provides that *an Authority may, in connection with the borrowing of funds, or otherwise, enter into an agreement with the Federal government or any agency or instrumentality thereof providing for supervision and control of the Authority or any project and containing such other covenants, terms and conditions as the Authority may deem advisable.*

See also section 27 of the Housing Authorities Act permitting an Authority to borrow money from the Federal government and to that end, comply with such conditions and enter into such agreements and do any and all other things necessary or desirable to secure financial aid.

It appears from the foregoing that, notwithstanding the provisions in the Act bearing upon the relations between a Housing Authority and the State Housing Board or the City Council, the investigatory and supervisory power over the management of Chicago Housing Authority in the operation of all of its present housing projects which are either leased from or financed by the Federal government is by the Act explicitly reserved for the Federal government.

It is a fundamental principle of the law relating to municipal corporations created by the State that their charter powers are subject to control by the State at all times. The State may withdraw any power granted to such corporation and transfer it to another public agency. It may abolish such corporation entirely and transfer its money and property to other public uses subject, however, to existing obligations of such corporation to private persons and other public agencies not within the control of the State. Chicago Housing Authority cannot abandon or surrender its functions and obligations without the consent of the Federal government. So, the provision in section 8 of the Housing Authorities Act which was added by amendment in 1945 that in municipalities containing over 500,000 inhabitants the annual budget of the Housing Authority shall be presented to, and approved by the City Council before becoming effective, cannot be given meaning without reference to other provisions in the Act. All of the provisions of the Housing Authorities Act must be read together and when so read it can only be construed to mean that such approval by the City Council is subject to the superior right of the Federal government to control the budget as to those projects which the Federal government has leased to the Chicago Housing Authority or has financed in whole or in part. The power to regulate such specific matter as the adoption of a budget cannot be lodged in two governmental agencies at the same time. It is inconceivable that the legislature intended by its amendment to give to the City Council the power of vetoing expenditures by the Housing Authority in the operation of its housing accommodations by disappproving a budget which has been approved by the Federal government under contracts expressly authorized by the Housing Authority Act.

Aside from the seeming inconsistencies in the Housing Authorities Act relating to the supervision and control of the managerial functions of the Housing Authority, we have serious misgivings as to the effectiveness of the amendment of 1945 requiring City Council approval of the Authority's annual budget. We find no provision in any law of our State which prohibits the Housing Authority from expending money in the management and control or maintenance and operation of a housing project unless there is provision for such expenditure in an annual budget. The Illinois Municipal Budget Law does not apply to a Housing Authority. It applies only to tax levying bodies of this State as

indicated by the title of the Act (Chap. 120, par. 365.1, Ill. Rev. Stat. 1947). The requirement for the adoption of a budget is found only in the agreements between Chicago Housing Authority and the Federal agencies. So long as these agreements continue in force, control of the Housing Authority's budget is in the Federal agencies, as we have pointed out, and when these agreements have been fully performed or have been abrogated by acts of the Federal government there will be no basis under the present State law for the adoption of a budget. It may be required by the State Housing Board in the exercise of its investigatory and supervisory power over the management of housing projects or by the City Council in an agreement with the Housing Authority as a condition for granting aid and cooperation in an undertaking by the Housing Authority under the Housing Cooperation Law.

In our opinion the disapproval by the City Council of the Housing Authority's budget at this time would prove to be innocuous.

C. H. A. RESIDENTS OUTSIDE CITY

(No. 11228—A. F. G.—December 28, 1949.)

We have your letter of December 16, 1949 in which you call attention to a recent opinion of this office in which we held that veterans residing in the Chicago Housing Authority Projects at Thatcher avenue and Forest Preserve Drive in Leyden Township and Thatcher avenue and Addison street in Norwood Township had not lost their Chicago residence for relief purposes and were entitled to receive relief from the Chicago Department of Welfare.

Your board now raises a question of the voting status of these veterans, also their right to police and fire protection which they do not receive at the present time.

In an opinion to the Chicago Housing Authority in response to an inquiry from that body requesting a statement of the services the city could furnish to the projects, we said:

> "It may furnish sewer and water connections, but water service charges must be paid by the occupants. Fire protection may be furnished, but police protection should be furnished by the County or forest preserve police who have jurisdiction in these territories. Because the city has no power outside its limits to enforce its ordinances concerning duties of property owners or tenants with respect to the handling of garbage, (furnishing of containers, etc.), it should not agree to collect garbage from these projects."

We do not believe that our holding that for the purpose of poor relief, these veterans had a technical domicile in Chicago and were entitled to receive relief from the Chicago agency for relief, affects their right to vote in either of the townships where they maintain a permanent place of abode, if they otherwise comply with the requirements of the Election Code.

Section 1 of article 7 of the Constitution and section 3-1 of the Election Code prescribe the qualifications for voting in this State. Both of these sections provide that a person to be entitled to vote must have resided in the State, one year, in the county, ninety days, and in the election district thirty days next preceding election therein, and must be a citizen of the United States above the age of twenty-one years. Section 3-2 of the Election Code provides that a permanent abode is necessary to constitute a resi-

dence within the meaning of section 3-1. Article 5 of the said code provides for the permanent registration of voters in counties of over 500,000 population. Section 5-7 of that Article requires a verified form to be filed by applicants for registration containing among other items, the following information under the caption "Residence": "The name and number of the street, avenue or other location of the dwelling, and such clear and definite description as may be necessary to determine the exact location of the dwelling of the applicant."

Our Supreme Court has held in more than one case that there is a distinction between place of residence and domicile and that, although it may be true that a person retains one domicile until he acquires another one, it does not necessarily follow that his residence or place of abode coincides with his domicile. In one case it decided that residence for voting purposes means an actual place of abode and points out that domicile and residence are not synonymous. In another case they held that the term "residence" as used in the election law is equivalent to "permanent abode." (*Pope* v. *Board of Election Commissioners*, 370 Ill. 196; *Park* v. *Hood*, 374 Ill. 36.)

These veterans having a residence and place of abode within the meaning of the Election Code in the said townships are entitled to vote from their places of residence regardless of the fact that for other purposes they have a domicile in Chicago.

GARBAGE REMOVAL BY CITY

(No. 11365—Commissioner, Streets and Electricity—C. P. H.—February 20, 1951.)

We have your letter of January 16, 1951 wherein you request our opinion as to the duty of the City of Chicago to remove refuse from the housing projects under the jurisdiction and control of the Chicago Housing Authority.

Pursuant to ordinances passed by the City Council, the City of Chicago has entered into five Cooperation Agreements with the Chicago Housing Authority covering sixteen housing projects, as follows:

Ordinance Adopted	Coun. Jour.	Project	Location
11-3-38	7211	Ida B. Wells Homes	37th, 39th, South Park Way, Cottage Grove
3-8-40	2152	Robt H. Brooks Homes	Roosevelt, 14th, Racine, Loomis
		Francis Cabrini Homes	Chicago, Oak, Larrabee, Hudson
1-5-42	6192	Bridgeport Homes	31st, 32nd, Lituanica
		Lawndale Gardens	25th, 26th, California, Washtenaw
3-28-46	5475	Altgeld Gardens	130th, 133rd, Greenwood, Langley
		Wentworth Gardens	37th, 39th, Wentworth, Princeton
		Dearborn Homes	27th, State, 30th, N. Y. Central Railroad

Ordinance Adopted	Coun. Jour.	Project	Location
12-22-50	7578	Racine Courts	108th, 110th, Racine, Penn. R. R.
		LeClaire Courts	44th, Cicero, City Limits
		Odgen Courts	13th Place, Ogden Blvd., Talman, Fairfield
		Harrison Courts	Harrison, Congress, Francisco, Sacramento
		Maplewood Courts	Jackson Blvd., Van Buren, Maplewood, Penn. Railroad
		Loomis Courts	14th Place, 15th Street, Loomis, Throop
		Archer Courts	23rd Street, Archer, Princeton, Penn. Railroad
		Prairie Avenue Courts	26th Street, Drake School, Prairie Ave., South Parkway

Each of the Cooperation Agreements referred to above provided that the City shall furnish the authority and the tenants of the projects the usual municipal services and facilities which are or may be furnished without cost or charge to other dwellings and inhabitants within the City, "including but not limited to * * * collection and disposal of residue from incinerators and other refuse * * *." The agreements further provide that the authority shall make annual payments which shall be known as service charges to the Treasurer of Cook County in lieu of taxes and in payment for services and facilities furnished to the projects by the various taxing bodies.

The City has not entered into a Cooperation Agreement with the Authority, with respect to the removal of refuse from the following three projects:

Projects	Location
Jane Addams Houses	Roosevelt, Cabrini, Loomis, Racine
Julia C. Lathrop Homes	Clybourn, Damen, N. Branch River
Trumbull Park Homes	Bensley, Yates, E. 10th

However, the Chicago Housing Authority submitted a proposed ordinance to the City Council at its meeting held January 24, 1951, (C. J., p. 7642) which would authorize execution of a Cooperation Agreement between the City and the Authority covering these three projects. The proposed agreement would be substantially the same as other cooperation agreements now in effect between the City and the Authority. The proposed ordinance was referred to the Committee on Housing.

Manifestly the ordinances authorizing execution of Cooperation Agreements between the City and the Authority does not expressly or impliedly amend, modify or extend the provisions of the Municipal Code governing the disposal of garbage, which provides as follows:

> "Section 99-18. Except in the case of a multiple dwelling containing less than five living units, a multiple dwelling producing less than thirty-two gallons of refuse per week, or a multiple dwelling each living unit of which is individually heated by the tenant, it shall be the duty of the owner of every multiple dwelling to cause to be removed at his own cost and expense at least once each week all refuse produced therein."

It is, therefore, our opinion that the Cooperation Agreements now in effect merely make it the duty of the City to furnish the same refuse disposal service to the sixteen housing projects of the Chicago Housing Authority covered by the agreements which is furnished without cost or charge to other dwellings within the City in accordance with the above quoted previsions of section 99-18 of the Code.

It is also our opinion that it is the duty of the City to furnish the same refuse disposal service to the housing projects of the Chicago Housing Authority that are not covered by a Cooperation Agreement which is furnished without cost or charge to other dwellings within the City, in accordance with the provisions of section 99-18 of the Code for the reason that the provisions of said section do not differentiate between public dwellings and private dwellings.

SEWER INSPECTION

(No. 11426—Superintendent of Sewers—C. P. H.—September 21, 1951.)

We have your letter of September 12, 1951 requesting our opinion as to whether or not it is the duty of the Bureau of Sewers of the Department of Public Works of the City of Chicago to issue free sewer permits and to render free sewer inspection service to the Chicago Authority in connection with the construction, within the corporate limits of the City, of low rent projects containing 21,000 units.

The Chicago Housing Authority was created under the provisions of the Housing Authority Act to engage in low rent housing and slum clearance projects to relieve the shortage of safe and sanitary dwellings, (Ill. Rev. Stat. 1949, ch. 67½, pars. 1-27 e). The City of Chicago has been given broad powers under the provisions of the Housing Cooperation Act to grant aid to and cooperate with the Chicago Housing Authority in planning, undertaking and constructing housing projects, (Ill. Rev. Stat. 1949, ch. 67½, pars. 28-35). By virtue of this statutory authority the city council enacted an ordinance on January 20, 1950, (C. J., pp. 5763-66) authorizing the City of Chicago to enter into a cooperation agreement with the Chicago Housing Authority for the development and administration of the said housing projects. This ordinance sets forth the terms of the proposed agreement. This agreement however does not contain the same provisions that are set forth in the previous agreement between the City of Chicago and the Chicago Housing Authority authorized by the City Council by ordinance passed on March 8, 1940 (C. J., pp. 2152-53) to which reference is made in your communication. Paragraph 4 of this latter agreement which refers to other Housing Projects, provides as follows:

> "The City further agrees to waive any building and inspection fees to which the Authority or its Projects might otherwise be or become subject."

Provisions similar to the above quoted paragraph are not contained in the agreement authorized by the City Council on January 20, 1950. We are advised that the Authority does not expect such permits and inspection service without payment of the proper fees.

Since the agreement of January 20, 1950 does not authorize the issuance of free sewer permits and free sewer inspection service, it

is our opinion that the Bureau of Sewers does not have authority to issue such permits and to render such inspection services free of charge to the Chicago Housing Authority for the Projects covered by the said agreement.

WATER SHUT-OFF CHARGES

(No. 11678—Commissioner, Department of Water and Sewers—J. C. M.—April 10, 1953.)

In your letter of March 30, 1953 you advised that during the past years a great many dwellings and buildings have been vacated or demolished occasioned by the action of the Medical Center Commission, Chicago Land Clearance Commission, Chicago Housing Authority, State Highway Department, Cook County Highway Department and the Department of Subways and Superhighways. In order to prevent wilful or unreasonable wastage of water and other damage because of underground and fixture leaks, your department has cut off water supply to the various premises involved and sealed the pipes and the Water Fund has been reimbursed for the costs incurred either through the wrecking contractors or by the various governmental agencies. You further advise that the Chicago Housing Authority now requests an opinion as to the legality of assessing such costs and expenses against it.

From the records in your department it appears that the Water Fund, which is a special fund pledged to certain purposes under the Statute, is being reimbursed for the costs incident to the shutting off of water service due to the wrecking of buildings by the Medical Center and the Chicago Land Clearance Commission and the construction of the Congress Street Highway by the State Highway Departmen, Cook County Highway Department and the Department of Subways and Superhighways of the City of Chicago, by those governmental agencies either by payment through the wrecking contractors or by payment by the governmental agencies upon being billed therefor at stated intervals.

In a letter dated September 20, 1951 the Chicago Housing Authority agreed that its demolition specifications "will continue to require the demolition contractor to comply with the regulations in connection with the disconnection of water service and to bear all costs occasioned thereby." Other than the equitable principles involved, there are sound legislative and contractual provisions that place these costs and expenses upon the Chicago Housing Authority as incidents of its projects.

The Chicago Housing Authority by its actions bring about situations that require the Commissioner of Water and Sewers to cut off water service and supply in order to prevent waste. The demolition of buildings in a large area that has been serviced with water and the uncertainty as to the location of future service pipes, present problems that require your action and entail expense that must be paid out of the Water Fund.

It appears to be the intent of the City Council, in enacting the Municipal Code of Chicago, that the expense involved in the shutting off of water service should be borne by the owner of the premises. Various sections provide: (a) That the cost of installing service and supply pipes and shut-off boxes (Section 185-3); (b) that the cost of keeping in repair all pipes leading from the shut-off rod box to the building on premises and prevent all waste of water from such pipes (Section 185-3); and (c) that the cost of shutting off such service and the restoration thereof shall be borne by the person having service from the Chicago waterworks system.

Section 185-6 of the Code prohibits water service into any premises "unless a permit from the Commissioner of Water and Sewers shall have been secured." If any person violates this provision, the supply of water shall be shut off and it shall not be turned on again until there shall have been paid to the City such sum of money as the Commissioner of Water and Sewers shall deem properly due for the amount of water furnished or used in violation of the provisions of this section, "and *until the expense* for cutting off the water service on account of such violation shall have been paid."

Under Section 185-10 of the Code the Commissioner of Water and Sewers is empowered to cut off the water supply if there is a waste of water in or about the building, structure or premises, and the expense of cutting off and again turning on such water supply shall be paid by the owner, occupant or person in charge or control.

Section 185-12 provides:

> "Where service or supply pipes are severed in accordance with the provisions of this Chapter, such severing or cutting off shall be done at the water mains or as near thereto as practicable, and no water shall again be supplied to such building, structure or premises, or be permitted to be turned on therein or thereto, until the cost and expense of such severing and also any other unpaid rates that may be still outstanding have been paid and a permit for the restoration of service has been obtained from the Commissioner of Water and Sewers."

In our conferences with the representatives of the Chicago Housing Authority, they expressed doubt as to the application of the above section of the Code to the situations created by that Authority.

Section 83-13 provides that no building shall be wrecked without giving notification in writing to the Commissioner of Water and Sewers "in order that the water service may be shut off, and leaking or wasting of water shall be eliminated or prevented."

If the Authority is wrecking buildings in accordance with Section 83-13, it should be subject to the Code provisions as are individuals or private corporations. Certainly the latter are subject to all the provisions of the Code. We cannot subscribe to the theory of the Authority's representatives that Section 185-12 is applicable only where the water supply has been shut off due to the non-payment of bills for such service. As noted above, other governmental agencies recognize these charges as just and equitable.

We have examined the "Cooperation Agreement" entered into between the Chicago Housing Authority and the City of Chicago as authorized by the City Council on January 20, 1950 (C. J. pp. 5764-5766) and find no provision therein that excuses the Authority from standing the costs incident to shutting off or turning on water service.

The agreement, in fact, negatives any such contention. Under Section 5(a) it is provided that the City shall furnish the Authority, without cost, "the public services and facilities which are at the date hereof being furnished without cost or charge to other dwellings and inhabitants in the City," including, "sewer and water systems" and "also such additional public services and facilities as may from time to time hereafter be furnished without cost or charge to other dwellings and inhabitants." Section 6 (c) provides that the City "will provide or cause to be provided, water mains an storm and sanitary sewer mains leading to such Project and serving the bounding streets thereof, (in consideration whereof the Local Authority shall pay to the City such amounts as would be assessed against the project site if it were privately owned)."

It will be noted that the Authority is to get, without cost, only those services which owners of private properties are entitled to receive without cost.

In an opinion rendered by the Law Department to the Superintendent of Sewers on September 20, 1951 as to whether the Authority was entitled to free sewer permits and free sewer inspection, it was said:

> "Since the agreement of January 20, 1950 does not authorize the issuance of free sewer permits and free sewer inspection service, it is our opinion that the Bureau of Sewers does not have authority to issue such permits and to render such inspection services free of charge to the Chicago Housing Authority for the Project covered by said agreement."

We refer to this opinion only to demonstrate that under the agreement the Authority is in no different position than private owners, except where the agreement spells out some exception.

We are of the opinion that the Chicago Housing Authority is required to reimburse the Water Fund for all the expenses incurred by the Department of Water and Sewers in shutting off and sealing the service pipes supplying the buildings which are being vacated and prepared for wrecking as part of its Project. You should insist upon compliance therewith in accordance with the letter of the Authority dated September 20, 1951, heretofore referred to, or by an arrangement whereby it is to pay such costs upon being billed therefor, whichever procedure is more desirable.

B. FEDERAL RELATIONSHIPS

FEDERAL TAX ON AIRPORT OBSERVATION DECK ADMISSIONS

(No. 11153—Commissioner, Public Works—M. H. F.—June 6, 1949.)

In answer to our request made May 5, 1949, we have now received a ruling from the Commissioner of Internal Revenue, Washington, D. C., with respect to the question whether the fees paid for admission to the observation deck of the Administration Building of the Chicago Municipal Airport are subject to the federal admissions tax imposed by section 1700(a) of the Internal Revenue Code as amended. Copy of the ruling is enclosed herewith. The commissioner holds that the tax is applicable.

We have examined into the legal question involved and have reached the conclusion that, if litigated, the courts would probably uphold the internal revenue department's decision. Our recommendation, therefore, is that immediate steps be taken to collect and remit the tax in accordance with the terms of the federal statute.

The tax is 1 cent for each 5 cents or major fraction thereof of the amounts paid for admission to the deck, with the exception that no tax attaches to an admission charge of less than 10 cents for a child under twelve years of age, and should be paid by the person paying for the admission, and should be collected by the city and remitted monthly to the collector of internal revenue, Chicago, Illinois, with the form of return prescribed by the Treasury Department.

Our understanding is that you are now using turnstiles with coin boxes attached for the purpose of collecting an admission charge of 10 cents per person regardless of age. To comply with the law it will be necessary, in turning the money over from the coin boxes to the city collector, that the amount of the tax be ascertained and that amount, by arrangements made between the comptroller and the city collector, held in a separate account available for remittance to the Treasury Department at the end of each month. The mechanics should be worked out between you, the city comptroller, and the city collector.

Whether or not to increase the amount of the admission fee to the observation deck is a matter for the determination of the city council. The present fee of 10 cents is now fixed by city ordinance. If tickets of admission are used this law requires that the price (exclusive of the tax to be paid by the person paying for admission) at which every admission ticket is sold shall be conspicuously and indelibly printed, stamped, or written upon the face or back of that part of the ticket which is to be taken up by the management of the place. If tickets are not used we are informed by the local collector that a sign should be displayed by you at each turnstile to apprise the public that the tax is included in the price of admission.

Regarding payment of the tax collected up to the time when the local collector called your attention to the fact that the tax was applicable, you will note the commissioner of internal revenue states in the last paragraph of his decision that if the city failed to collect the tax in the belief that no tax was due, it will not be required to pay the tax which was not collected. We understand that the local collector's office will conduct a hearing at which the city's officials may give evidence that the tax was not collected and that until informed by the agent of the collector's office that it was assessable, was under the belief that the tax was not due.

BOILER INSPECTION FEES—GOVERNMENT PLANT

(No. 11400—Chief Boiler Inspector—M. J. N.—July 5, 1951.)

This will acknowledge receipt of your letter of June 13, 1951, in which you ask for an opinion concerning your jurisdiction over the machinery in a plant located at 7401 S. Cicero Avenue. You state that this plant is now known as the Aircraft Engine Division, Ford Motor Company, is owned by the U. S. Government and contains several boilers and pressure vessels. You state that it is your understanding that the plant has not been turned over to the Ford Motor Company as yet but will be in the near future.

The question of municipal jurisdiction over plants and equipment owned by the U. S. Government, its agencies, and the obligation of contractors, was considered in an exhaustive opinion issued March 1, 1943, to Honorable James B. Bowler, Chairman of the Committee on Finance at that time, a copy of which was sent to you. A subsequent opinion on this subject was issued May 26, 1943, to the Chairman of the Finance Committee (Opinions of the Corporation Counsel and Assistants, Volume 22, Page 305). Therein is pointed out the distinction between properties owned by the U. S. Government and obtained by cession from the State Clause, 8th Section of the First Article of the Constitution of the United States and property otherwise acquired by the Federal government.

Your letter does not state facts sufficient for us to determine in which category this property falls. While you state that the plant is

owned by the U. S. Government, you also state that it is to be turned over to the Ford Motor Company. Information to show the precise ownership situation is necessary before we can answer your question in the light of the foregoing opinions.

BUILDING PERMIT FOR TWIN-TOWERS HOUSING PROJECT

(No. 11422—Building Commissioner—M. J. N.—September 18, 1951.)

We reply to your letter of July 30, 1951, requesting advice concerning the contents of a letter to you from Mr. Clarence W. Beatty, Special Assistant to the United States Attorney, in which he advises that the United States owns tile to a parcel of real estate at 50th and Lake Shore Drive, acquired under condemnation proceedings in the Federal Court, upon which the Government intends to erect a building to contain 252 dwelling units.

Mr. Beatty advises that in his opinion "a building permit is wholly unnecessary and if one should be issued it is of little or no effect." In support of this contention he cites:

> *(United States* v. *City of Chester,* 144 Fed. 2d. 415; *Stewart & Co.,* v. *Sadra-Kula,* 309 U. S. 94; *United States* v. *Unzenta,* 281 U. S. 138; *Hunt* v. *United States,* 278 U. S. 96.)

Section 29, Chapter 143 of the State Statute provides:

> "That the consent of the State of Illinois is hereby given, * * * to the acquisition by the United States, by purchase, condemnation or otherwise, of land in this State, which has been, or may hereafter be acquired for custom houses court houses, post offices, arsenals, other public buildings whatever, or for any other purposes of the Government."

Section 30 provides, among other things:

> "Exclusive jurisdiction in and under any land so acquired by the United States shall be and the same is hereby ceded to the United States, * * *; but the jurisdiction so ceded shall continue no longer than the said United States shall own such lands."

Similar inquiries heretofore were made of us by your office and on October 15, 1931 (Opinion No. 7188) the Corporation Counsel advised:

> "The jurisdiction of the City and the State, where property owned by the United States Government and used for governmental purposes is concerned, is confined to arresting criminals and serving processes."

Again, under date of October 31, 1931 (Opinion No. 7240) the Corporation Counsel advised your office:

> "As the Legislature authorized the acquisition of a particular tract of ground by the United States, no building permit is required of the United States to build the new post office on such land and the responsibility for the proper erection of this building lies within the control of the United States government."

Having examined the cases cited by Mr. Beatty and the application of the above Statute, and the interpretation heretofore given by this office, we are of the opinion that in the present instance our Building Code and the need for a building permit thereunder does not apply to the United States while the Government holds title to the parcel of real estate in question.

TAXATION OF FEDERAL BUILDINGS

(No. 11556—Mayor—J. F. G.—June 27, 1952.)

Reference is made to a news item appearing in a Toronto newspaper reporting that the mayor of that city will ask the Canadian Minister of Finance to pay for police and fire protection and other services provided to post offices and other federal government buildings. It appears that the right to tax provincial properties was granted to Canadian municipalities, but not specifically or sufficient for payment of municipal services.

The question submitted to us is why United States federal buildings are not taxed?

The relations between the federal government and the States is such that neither government can tax the property of the other under our constitutional system. No State can tax the property of the United States without its consent. *Van Brocklin* v. *State of Tennessee* (1886) 117 U. S. 151, 175. The principle applies not only to property held in the name of the United States but in the name of any government agency or corporation created by the United States for its governmental purposes. *United States* v. *Milwaukee* (1944) 140 F. 2d 286, certiorari denied by U. S. Supreme Court, 88 L. Ed. 1568. It also applies to private property upon land owned and acquired by the United States with the consent of the State and cession of exclusive jurisdiction and legislation over such territory to the United States, without adequate reservation for taxation of property thereon not owned by the United States. *Fort Leavenworth R. R. Co.* v. *Lowe* (1883) 114 U. S. 151.

The State of Illinois in 1923 granted the necessary consent and exclusive jurisdiction to exempt not only the property of the United States but also private property upon lands title to which has been acquired by the United States so long as said lands shall remain the property of the United States. For full discussion of this subject see opinions of corporation counsel, March 1, 1943 addressed to Hon. James B. Bowler, Chairman, Committee on Finance, re. assessment of defense plants and defense housing projects.*

It should be noted that by acts of Congress passed in recent years federal jurisdiction over certain lands owned by the United States has been relinquished and consent has been given for local taxation of some federal property or for payments in lieu of such taxes.

Section 255 of Title 40, U. S. Code, relating to public buildings, property and works provides:

> "Notwithstanding any other provision of law, the obtaining of exclusive jurisdiction in the United States over lands or interests

* See page 304

therein which have been or shall hereafter be acquired by it shall not be required; but the head or other authorized officer of any department or independent establishment or agency of the Government may, in such cases and at such times as he may deem desirable, accept or secure from the State in which any lands or interests therein under his immediate jurisdiction, custody, or control are situated, consent to or cession of such jurisdiction, exclusive or partial, not theretofore obtained, over any such lands or interests as he may deem desirable and indicate acceptance of such jurisdiction on behalf of the United States by filing a notice of such acceptance with the Governor of such State or in such other manner as may be prescribed by the laws of the State where such lands are situated. Unless and until the United States has accepted jurisdiction over lands hereafter to be acquired as aforesaid, it shall be conclusively presumed that no such jurisdiction has been accepted."

The foregoing provision was added by Act of Congress passed February 1, 1940. (Note to Sec. 255, Tit. 40, U. S. C. A.)

Section 255 above quoted requires careful reading and consideration. Consent and exclusive jurisdiction over lands acquired by the United States prior to February 1, 1940, is presumed to have been accepted, if granted by the State before that time.

Section 1413, Title 42, U. S. Code, relating to low rent housing, provides that the acquisition by the Public Housing Administration of real property shall not deprive any state or political subdivision thereof of its civil and criminal jurisdiction in and over such property or impair the civil rights under the state or local law of the inhabitants of such property; and, in so far as any such jurisdiction may have been taken away or any such rights impaired by reason of the acquisition of any property transferred to the Administration, such jurisdiction and such rights are fully restored; also that the Administration may enter into agreements to pay annual sums in lieu of taxes to any state or political subdivision thereof with respect to any real property owned by the Administration provided that the amount paid for any year shall not exceed the taxes that would be paid if it were not exempt from taxation. Similar provisions are contained in the acts of Congress relating to defense housing and defense installations. Secs. 1546 and 1547, Tit. 42 U. S. Code.

Notwithstanding relinquishment of federal jurisdiction over lands acquired by the United States with the consent of the states, it is clear from the most recent decisions of Federal and State Courts, including the U. S. Supreme Court, that lands acquired by the United States and buildings constructed for national defense or other purposes of government with or without consent of the state, are subject to paramount control of Congress as to the extent of regulation and taxation which may be imposed thereon by the states.

In *United States* v. *City of Chester* (1944) 144 F. 2d 415, it was held that by virtue of the supremacy clause of the Federal constitution and statutes authorizing the erection of houses for persons engaged in national defense activities and their families, the Federal Works Administrator had authority to proceed with construction of emergency housing to house war workers without regard to the application of municipal building regulations, although it was provided in the Lanham Act under which the Federal Works Administrator was providing the housing, that consultation shall be had with local public officials and local housing authorities to the end that projects constructed under the provisions of the act, shall, as far as may be practicable, conform in location and design to local planning and tradition. The Lanham Act, however, expressly authorized the Administrator to construct the buildings without regard to any federal, state, or municipal laws, ordinances, rules or regulations relating to plans and specifications.

In *United States* v. *City of Philadelphia* (1945) 147 F. 2d 291, involving the erection of permanent housing under the Lanham Act, the U. S. Circuit Court of Appeals, which had decided the case of *United States* v. *City of Chester*, followed its decision in the Chester case, and the U. S. Supreme Court denied certiorari to review that decision. 89 L. ed. 1989.

Section 610, Tit. 15 U. S. Code, relating to exemption from taxation of the Reconstruction Finance Corporation, excepts from such exemption real property of the Reconstruction Finance Corporation and its subsidiaries. Such real property is subject to special assessments for local improvements and to state, county, municipal and local taxation to the same extent, according to its value, as other real property is taxed. *Reconstruction Finance Corp.* v. *Beaver County* (1945) 90 L. ed. 1172.

The National Housing Act provides that real property acquired and held by the Federal Housing Commissioner in extinguishment of an insured mortgage indebtedness or pursuant to foreclosure shall be subject to taxation by any state or political subdivision thereof to the same extent, according to its value, as other real property is taxed.

While consent to state taxation of property of the United States is in control of Congress, exemption from such taxation is governed by the laws of the State. We gave consideration to the exemption laws of Illinois affecting property of the United States, in our opinion of March 1943, to which we have referred earlier in this letter. We then concluded that there was no Illinois constitutional basis for those exemption laws; that the exemption of property of the United States from state taxation rests upon the constitution of the United States; and that the provisions in our state law exempting United States government lands and buildings were merely a recognition of the constitutional immunity from state and local taxation of the property and instrumentalities of the United States.

We have no doubt that the officers of the Federal government will concede the right of the State and its political subdivisions to impose taxes upon the property of the United States and its instrumentalities when consent to such taxation has been given by Congress but a situation may arise where a lessee of such property may protest the levy of such taxes because of our State laws exempting the property of the United States from taxation. Such a case occurred in the State of Washington. In that case the constitution provided, as required by the enabling act, that no taxes shall be imposed by the State on property of the United States without the consent of the United States. Accordingly, it was provided, by the statute, that the following property shall be exempt from taxation: "All property, whether real or personal, belonging exclusively to the United States, the state, any county or municipal corporation."

In 1945, the State Legislature of Washington passed an act which provided:

> "Notwithstanding anything to the contrary in the laws of the State of Washington, expressed or implied, the United States and its agencies and instrumentalities and their property are hereby declared to be taxable, and shall be taxed under the existing laws of this state or any such laws hereinafter enacted, whenever and in such manner as such taxation may be authorized or permitted under the laws of the United States."

The Washington Supreme Court held that a corporation engaged in the manufacture of airplanes for the United States on property owned by Reconstruction Finance Corporation under lease to the manufacturing corporation from Defense Corporation, a division of Reconstruction Finance Corporation, was liable for the state taxes levied on that property. The State law of 1945 declaring the property of the United States to

be taxable was one of the major considerations by the court, though Congress had already enacted Section 610, Title 15, U. S. Code authorizing state and local taxation of the property of Reconstruction Finance Corporation and its subsidiaries to the same extent, according to its value, as other real property is taxed. *Boeing Aircraft Co.* v. *Reconstruction F. Corp.* (1946) 171 P. 2d 838.

Caution dictates that the State of Illinois should adopt proper legislation to repeal the Cession Act of 1923 giving consent to the acquisition of property in this State by the United States, ceding exclusive jurisdiction to the United States over such property and exempting it from taxation. The provision in Section 19 of the Revenue Act exempting property of the United States from taxation should be amended to subject such property to taxation whenever authorized or permitted under the laws of the United States.

TAXATION OF FEDERAL BUILDINGS

(No. 11098—Chairman, Finance Committee—J. F. G.—March 1, 1943.)

We have your letter of December 11, 1942 in which you say that the tax examiner employed by your committee has raised the question whether the valuation of defense plants and project houses for defense workers in the course of construction or completed since the quadrennial assessment of the tracts or lots of land affected may be added in the assessment books for taxation and you ask us to furnish your committee with our opinion upon this question.

It appears from the file submitted by you that the lands upon which these improvements have been erected were assessed for taxation and that the taxes upon these lands have been paid by the owners. Among these are payments made by private persons and by the Defense Plant Corporation. It is assumed, therefore, that the improvements involved are owned either by private persons or by the Defense Plant Corporation.

Section 43 of the Revenue Act of 1929 (Ill. Rev. Stats. 1941, Chap. 120 Par. 524) provides that the value of each tract or lot of land listed for taxation shall be determined by the assessor quadrennially and that the value of lands and improvements shall be separately fixed and set down in separate columns in the assessor's books. Section 44 of that Act (id. 525) provides that on or before the first day of June in each year other than the year of the quadrennial assessment the assessor shall make and return a list of all new or added buildings, structures or other improvements of any kind the value of which shall not have been previously added to or included in the valuation of the tract or lot on which such improvements shall have been erected or placed and the value which, in his opinion, has been added to such tract or lot by the erection thereof.

The validity of the foregoing provisions of the Revenue Act and the propriety of adding the value of buildings and improvements for taxation, whether fully completed or partially completed since the quadrennial assessment of the land upon which such buildings and improvements have been erected, have been acknowledged by our Supreme Court.

The People v. *Sheridan-Brompton Corp.*, (1928) 331 Ill. 495.

The People v. *Jenkins*, (1932) 347 Ill. 278.

However, it was pointed out in the foregoing cases that if a new improvement is assessed it cannot be reassessed, without notice to the owner,

on the ground that when originally assessed the improvement was not complete, unless the assessor sets down in a separate column the value of additions made since the original assessment or unless the reassessment is made in the quadrennial year.

Since no objection has been made by any of the owners to the payment of taxes upon the tracts or lots of land affected, there would seem to be no reason for hesitating to add in the assessment books for taxation the value of the improvements involved, as required by the Revenue Act of 1939.

In the case of the Defense Plant Corporation, however, we prefer to determine the right to add the value of the new improvements upon the more fundamental consideration of the power to tax property of the United States.

The Defense Plant Corporation was organized and financed by the Reconstruction Finance Corporation pursuant to Section 608b of Tit. 15, U. S. Code, to produce, acquire and deal in implements of war and materials necessary to the national defense and to acquire land and to construct or acquire buildings by purchase, lease or otherwise for the manufacture of such implements and materials.

The Reconstruction Finance Corporation was created by Sections 601 and 602 of Tit. 15, U. S. Code, with capital wholly subscribed by the United States Government.

Section 610 of Tit. 15, U. S. Code, relating to the obligations of the Reconstruction Finance Corporation and its subsidiaries provides:

> "* * * The corporation, including its franchise, its capital, reserves, and surplus, and its income shall be exempt from all taxation now or hereafter imposed by the United States, by any Territory, dependency, or possession thereof, or by any State, county, municipality, or local taxing authority; *except that any real property of the corporation shall be subject to State, Territorial, county, municipal, or local taxation to the same extent according to its value as other real property is taxed.* The exemptions provided for in the preceding sentence with respect to taxation (which shall, for all purposes, be deemed to include sales, use, storage, and purchase taxes) shall be construed to be applicable not only with respect to the Reconstruction Finance Corporation but also with respect to (1) the Defense Plant Corporation, the Defense Supplies Corporation, the Metals Reserve Company, the Rubber Reserve Company, and any other corporation heretofore or hereafter organized or created by the Reconstruction Finance Corporation under section 606b of this title, as amended, to aid the Government of the United States in its national-defense program, (2) The RFC Mortgage Company, the Federal National Mortgage Association, and any other public corporation heretofore or hereafter organized by or at the instance of the Reconstruction Finance Corporation, and (3) the Disaster Loan Corporation, and any other public corporation which is now or which may be hereafter wholly financed and wholly managed by the Reconstruction Finance Corpporation. Such exemptions shall also be construed to be applicable to the loans made, and personal property owned, by the Reconstruction Finance Corporation or by any corporation referred to in clause (1), (2), or (3) of the preceding sentence, *but such exemptions shall not be construed to be applicable in any State to any buildings which are considered by the laws of such State to be personal property for taxation purposes.*" As amended June 10, 1941, c. 150, Sec. 3, 55 Stat. 548.

The foregoing provision of the U. S. Code should settle the question whether the lands and buildings of the Defense Plant Corporation are subject to State and Local taxation, but whether such property is exempt from taxation in this State depends upon the laws of the State of Illinois.

EFFECT OF STATE LEGISLATION CEDING EXCLUSIVE JURISDICTION OVER LANDS ACQUIRED BY UNITED STATES

In opinions rendered by this department upon questions relating to the right of the City to exercise control of buildings and equipment by issuing permits, making inspections and exacting permit fees and inspection fees we have had occasion to make reference to "An Act in relation to the acquisition of land in this state by the United States for governmental purposes," approved June 30, 1923. We held that by this Act exclusive jurisdiction and control was ceded to the United States over all lands acquired by it for governmental purposes. (Ops., Corp. Counsel No. 9000 Vol. XIX p. 300; Mar. 4, 1937; Feb. 26, 1942; Aug. 20, 1942; Sept. 24, 1942.) It was assumed that lands acquired by the Defense Plant Corporation, or any other corporation organized and owned by the United States, were subject to the Act of 1923. This assumption seems to have support of the Supreme Court of the United States and other courts of last resort which hold in effect that the property of a corporation organized for the convenience of the United States to carry out its ends is the property of the United States.

Clallam County v. *United States.* (1933) 263 U. S. 341, 66 L. Ad. 328.

People v. *House,* (Calif. 1923) 563 Pac. 944, Certiorari denied by U. S. Supreme Court, 73 L. Ed. 536.

Clifton v. *State Board of Tax Appeals.* (1941) 126 N. J. J. 205.

Insufficient consideration heretofore given to the purposes of the Act of 1933 and recent Federal legislation affecting the administration of the laws of the State and its political subdivisions within the limits of lands acquired by the United States and its agencies prompts us to review this subject.

As early as the year 1867 our State legislature passed an Act to cede jurisdiction to the United States over certain land in Cook County, now within the corporate limits of Chicago, purchased by the United States for the purpose of erecting thereon a marine hospital (Laws of 1867, p. 175). At the same session another Act was passed ceding jurisdiction over certain lands in the County of Rock Island for the establishment of an arsenal and armory (id. p. 175). In each of these Acts the right was reserved to execute all civil and criminal process issued under authority of the State of Illinois and the property involved was expressly exempted from all State, county and municipal taxation.

Other Acts ceding jurisdiction to the United States over certain lands therein designated were passed from time to time. One granted exclusive jurisdiction without reservations (Laws of 1875, p. 85); others reserved the right to serve civil or criminal process; and one reserved also the right of suffrage at State and local elections to persons residing on said lands (Laws of 1897, p. 299).

The first general law to cede jurisdiction to the United States over lands acquired by the United States by purchase or condemnation was passed in 1871 (Laws of 1871-2, p. 551). It granted power to the United States to purchase or condemn, in the manner prescribed by law, upon making just compensation therefor, any land in the State of Illinois required for custom houses, arsenals, light houses, national cemeteries or for other purposes of the government of the United States. It granted the right of exclusive legislation and *concurrent* jurisdiction, together with the State of Ilinois, over such land and structures thereon and provided that the United States shall hold the same exempt from all State, county and municipal taxation.

By an Act approved April 11, 1899 consent of the State of Illinois was given to the acquisition by the United States, by purchase, condemnation or otherwise, of any land in this State required for custom houses, court houses, post-offices, arsenals or other public buildings whatever, or for any other purposes of the government (Laws of 1899, p. 287). This Act granted exclusive jurisdiction over any lands so acquired by the United States for all purposes except the *administration of the criminal law* and the service of all civil processes and provided that the same shall be and continue exempted and exonerated from all State, county and municipal taxation, assessment or other charges which may be levied or imposed under the authority of this State.

In 1923 another Act complete in itself, without reference to any previous Act of this State, was passed to cover any land in this State which has been or may hereafter be acquired for the purposes of the government. It differed from the Act of 1899 in the recital that the consent was given in accordance with the *Seventeenth* clause, eighth section of the first Article of the Constitution of the United States instead of the sixteenth clause as recited in the Act of 1899; in the scope of its application to land which *has been or may hereafter be acquired* for custom houses, court houses, post-offiices, arsenals, other public buildings whatever, or for any other purposes of the government, instead of any land required for such purposes (after the effective date of the Act of 1899); and in limiting the right of the State to *serve all civil and criminal process* instead of to administer the criminal laws and serve all civil processes of this State.

The provisions of the Act of 1923 which govern the subject matter at this time are as follows (Ill. Rev. Stats. 1841, Chap. 143, Pars. 29 30, 31):

> "29. Acquisition of land authorized.) That the consent of the State of Illinois is hereby given, in accordance with the *seventeenth clause*, eighth section, of the first Article of the Constitution of the United States, to the acquisition by the United States, by purchase, condemnation or otherwise of any land in this State which has been, or may hereafter be acquired for custom houses, court houses, post-offices arsenals, other public buildings whatever, or for any other purposes of the government.
>
> "30. Jurisdiction ceded except for service of process and making arrests.) That exclusive jurisdiction in and over any land so acquired by the United States shall be, and the same is hereby, ceded to the United States for all purposes except that the State retains the right to serve thereon all civil and criminal process issuing under authority of the State and the right to make arrests thereon of persons violating State laws; but the jurisdiction so ceded shall continue no longer than the said United States shall own such lands.
>
> "31. Exemption from taxation.) The jurisdiction hereby ceded shall not vest until the United States shall have acquired the title to the said lands by purchase, condemnation or otherwise; and so long as the said lands shall remain the property of the United States when acquired as aforesaid, and no longer, the same shall be and continue exempt and exonerated from all State, county and municipal taxation, assessment or other charges which may be levied or imposed under the authority of this State."

It will be observed that this legislation was prompted by and based upon the seventeenth clause, eighth section of the first Article of the Constitution of the United States which granted to the Congress of the United States power:

> "To exercise exclusive Legislation in all Cases whatsoever over such District (not exceeding ten Miles square) as may, by Cession of particular States, and the Acceptance of Congress, become the

Seat of the Government of the United States, and to exercise like authority over all Places purchased by the Consent of the Legislature of the State in which the same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yard, and other needful Buildings;—"

The circumstances which brought about the adoption of this clause in the Constitution of the United States are disclosed in the leading case of *Fort Leavenworth R.R. Co.* v. *Lowe,* (1883) 114 U. S. 525, at page 638 as follows:

"The necessity of complete jurisdiction over the place which should be selected as the seat of government was obvious to the framers of the Constitution. Unless it were conferred the deliberations of Congress might in times of excitement be exposed to interruptions without adequate means of protection; its members, and the officers of the government, be subjected to insult and intimidation, and the public archives be in danger of destruction. The Federalist, in support of this clause in the Constitution, in addition to these reasons urged that 'a dependence of the members of the general government on the State comprehending the seat of the government for protection in the exercise of their duty, might bring on the national councils an imputation of awe or influence, equally dishonorable to the government and dissatisfactory to the other members of the confederacy.'

"The necessity of Supreme legislative authority over the seat of government was forcibly impressed upon the members of the constitutional convention by the occurrences which took place near the close of the Revolutionary War. At that time, while Congress was in session in Philadelphia, it was surrounded and insulted by a body of mutineers of the Continental Army. In giving an account of this proceeding, Mr. Rawle, in his Treatise on the Constitution says of the action of Congress: 'It applied to the executive authority of Pennsylvania for defense; but, under the ill-conceived constitution of the State at that time, the executive power was vested in a council, consisting of thirteen members, and they possessed or exhibited so little energy, and such apparent intimidation, that the Congress indignantly removed to New Jersey, whose inhabitants welcomed it with promises of defending it. It remained for some time at Princeton without being again insulted, till, for the sake of greater convenience, it adjourned to Annapolis. The general dissatisfaction with the proceedings of the executive authority of Pennsylvania, and the degrading spectacle of a fugitive Congress, suggested the remedial provisions now under consideration.' Rawle, Constitution of the United States, 118. Of this proceeding Mr. Justice Story remarks: 'If such a lesson could have been lost upon the people, it would have been as humiliating to their intelligence as it would have been offensive to their honor.' Story Constitution Sec. 1219.

"Upon the second part of the clause in question, giving power to 'exercise like authority,' that is, of exclusive legislation 'over all places purchased by the consent of the Legislature of the State in which the same shall be, for the erection of forts, magazines, arsenals, dock-yards, and other needful buildings,' the Federalist observes that the necessity of this authority is not less evident. 'The public money expended on such places,' it adds, 'and the public property deposited in them, require that they should be exempt from the authority of the particular State. Nor would it be proper for the places on which the security of the entire Union may depend to be in any degree dependent on a particular member of it. All objections and scruples are here also obviated by requiring the concurrence of the States concerned in every such establishment.' 'The power,' says Mr. Justice Story repeating the substance of Mr. Madison's language, 'is wholly unexceptionable, since it can only be exercised at the will of the State, and therefore it is placed beyond all reasonable scruple.' "

In the case just cited it appears that the legislature of the State of Kansas ceded jurisdiction to the United States over the territory of Fort Leavenworth Military Reservation saving, however, to the State not only the right to serve civil or criminal process within said Reservation but also the right to tax railroad, bridge and other corporations, their franchises and property on said Reservation. The Reservation was acquired by the United States before Kansas became a State. The right of the State to subject to taxation the property of a railroad upon the Military Reservation was upheld.

It is evident from the Fort Leavenworth case that the United States may acquire property for governmental purposes by purchase, condemnation or otherwise *without the consent of the State* and that property so acquired and used is free from taxation or such regulation by the State "as would defeat its use for those purposes;" that when title to any "places" is acquired by *purchase with the consent* of the legislature of the State for "the erection of forts, magazines, arsenals, dock yards and other needful buildings" the federal jurisdiction is exclusive of all State authority. Persons residing in these places are not residents of the State so as to entitle them to vote as such, nor are they entitled to the benefits of the State common schools for their children. They are not subject to the taxes and other obligations of citizens of the State. Offenses committed in such places are not committed against the laws of the State and are not punishable by the courts of the State unless Congress should give these courts jurisdiction thereof.

The court distinguished between land acquired by purchase and State legislation ceding exclusive jurisdiction over lands acquired in any other way, saying that in the latter case the cession may be accompanied with such conditions as the State may see fit to annex, not inconsistent with the free and effective use of the land by the United States in the execution of its powers. Stressing this distinction the Supreme Court in the very next case following the *Fort Leavenworth* decision held the railroad liable for the value of a cow killed by a train within the limits of the Reservation where the road was not enclosed with a fence as required by a statute of the State of Kansas. The reason given was that whenever political jurisdiction and legislative power over any territory are transferred from one sovereign to another the laws of the former government which are intended for the protection of private property and private rights and all laws "designed to secure good order and peace in the community and promote its health and prosperity, which are strictly of a municipal character" continue in force until abrogated or changed by the new sovereign.

Chicago & Pacific Railway Co. v. *McGlinn,* (1885) 114 U. S. 542.

However, the distinction between the jurisdiction obtained by the United States from a State by consent to purchase or by cession is no longer tenable. In either case the jurisdiction may be qualified by express reservations.

Collins v. *Yosemite Park & C. Co.,* (1938) 304 U. S. 518, 82 L. Ed. 1502, 1509.

But when exclusive jurisdiction is ceded without reservation over land acquired by purchase, condemnation or otherwise for the purposes enumerated in clause seventeen or for any other purpose of the government, the result is the same. The land is removed from the jurisdiction of the State just as effectively as though it were not within its geographical boundaries, except that the laws of the State affecting private rights in effect at the time of the transfer which are not in conflict with federal laws continue in effect as the law of the United States.

James Stewart & Co. v. *Sadrakula,* (1940) 309 U. S. 34, 84 L. Ed. 396.

In the case last cited the court held that the provisions of a State labor law requiring contractors constructing buildings to board over all open steel tiers for the protection of their employes are applicable to a contractor constructing a postoffice upon a site purchased by the United States with the consent of the State.

Notwithstanding the dicta in the *Chicago & Pacific Railway* case (1885) relating to the continuing effect of the "municipal law," all cases adjudicated since clearly indicate that neither the State nor any of its political subdivisions may exercise any control over any governmental agency, private person or corporation within the limits of any land over which exclusive jurisdiction has been ceded to the United States without reservation.

Moline Water Power Co. v. *Cox,* (1911) 353 Ill. 348.

Arlington Hotel Co. v. *Fant,* (1929) 378 U. S. 438, 73 L. Ed. 447.

Surplus Trading Co. v. *Cook,* (1929) 231 U. S. 647, 74 L. Ed. 1091.

Standard Oil Co. v. *California,* (1934) 391 U. S. 245, 72 L. Ed. 775.

James v. *Drays Contracting Co.,* (1937) 302 U. S. 134, 62 L. Ed. 155.

STATUS OF FEDERAL AGENCIES

It must be clear to one who is informed of the circumstances in which clause seventeen was adopted and the effect of State legislation ceding exclusive jurisdiction over lands acquired by the United States as interpreted by our courts of last resort that recent expansion of the activities of the National Government into fields which traditionally have been occupied by private enterprises necessitates careful discrimination between the places acquired by the United States, the purposes for which they were acquired and the agencies or instrumentalities created by the Congress to accomplish these purposes. It seems incredible that the framers of the United States Constitution or that our own State legislature, even as late as the year 1923 intended that lands acquired by the United States to protect its loans to home owners and others who applied to the government for financial assistance during the great depression, to improve the living conditions of persons with low income, to provide housing facilities for workmen in the vicinities of projects essential for national defense and to provide for the manufacture of implements of war by contract with private persons and corporations, should be free from control of the State and the municipalities in which they are located for all purposes; that such lands should be free from taxation; that the houses, factories and other buildings thereon need not comply with the zoning or sanitary regulations or even the fire prevention ordinances necessary not only for the protection of the occupants of the property of the government but for the protection of adjacent property and the health and safety of the community; that the people occupying such government lands must lose their right of sufferage; that their private property may not be assessed for State and local taxation; that they may not be tried for offenses committed on such lands under State laws; and that they may not be sued in the local courts.

That there are certain functions of the General Government which must be free from State and local interference or control, with or without the consent of the State is clearly and firmly established.

In *Ohio* v. *Thomas,* (1899) 175 U. S. 276, 43 L. Ed. 699, it was held that the governor of a soldiers' home, which was under the sole

jurisdiction of Congress was not subject to a State law requiring every person in charge of a place for eating to display a placard with the inscription, "Oleomargarine sold and used here" when furnishing that article to the inhabitants of the home as part of the ration under appropriations made by Congress.

In *Clallam County* v. *United States,* (1923) 263 U. S. 341, 68 L. Ed. 328, it was held that a State could not tax the property of a corporation organized by the Federal Government to produce aircraft for the use of the United States in the first World War.

In *Arizona* v. *California,* (1930) 263 U. S. 423, 75 L. ed. 1154, it was held that the United States in constructing a dam storage reservoir, and hydrolelectric plant on the Colorado River, under the direction of the Secretary of the Interior, for the purpose of controlling floods, improving navigation, reclaiming public lands and other beneficial uses was not obliged to conform with the law of the State in which the project was located requiring submission of plans and specifications therefor to the State engineer for approval.

Upon the authority of these decisions and others of like import this department advised the Commissioner of Buildings on June 5, 1936 that he had no power to require submission for his approval of plans and specifications for federal housing projects. (19 Op. Corp. Counsel 300 (1936-1937)) and advised the Superintendent of the Bureau of License March 13, 1936 that the Works Progress Administration, in order to relieve unemployment in the theatrical profession, may produce performances in a theater without payment of the license tax required by city ordinance (19 Op. Corp. Counsel 300 (1936-1937)).

These decisions were not based upon the fact that the State had ceded exclusive jurisdiction to the United States and they hardly warrant the conclusion that all agencies and instrumentalities created or employed by the Federal government to accomplish its purposes may ignore nondiscriminatory State laws and municipal ordinances which do not defeat or impair these purposes.

Compare: *Johnson* v. *Maryland,* (1920) 234 U. S. 51.

The Illinois Cession Act of 1923 cedes exclusive jurisdiction "for all purposes except that the State retains the right to serve thereon all civil and criminal process issuing under authority of the State and the right to make arrests thereon of persons violating State laws." Apparently this provision does not reserve the right to make arrests of persons violating State laws within bounds over which exclusive jurisdiction has been ceded to the United States. It serves only to prevent the lands ceded from becoming a sanctuary for debtors and fugitives from justice.

Fort Leavenworth R. R. Co. v. *Lowe,* (1885) 114 U. S. 523, 535.

United States v. *Unzauta,* (1920) 251 U. S. 139, L. ed. 761.

Does the Act of 1923 apply to places acquired by the Reconstruction Finance Corporation or by the Home Owner's Loan Corporation as security for loans made by these agencies or in liquidation of indebtedness to these agencies? It should be observed that the Act itself declares that the consent of the State is given "in accordance with the seventeenth clause, eighth section, of the first Article of the Constitution of the United States." That clause covers places acquired by purchase only whereas the Act of 1923 purports to cover any land acquired by purchase, condemnation or otherwise. Clause seventeen also limits the purposes for which the places are to be purchased with consent to "the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful

Buildings" whereas the Act of 1923 purports to cover land acquired "for custom houses, court houses, postoffices, arsenals, other public buildings whatever, or for any other purposes of the government." Although the fact that this Act departs from the seventeenth clause by adding lands acquired by condemnation or otherwise than by purchase may not destroy its effect as a cession of exclusive jurisdiction *(Collins* v. *Yosemite, Park & Co., supra)* the reference to clause seventeen must be given consideration in determining the scope or character of the land ceded.

There can be no doubt that custom houses, court houses, postoffices, locks and dams to improve navigation, and other buildings, structures or improvements required for the purposes of the Federal Government are "needful buildings" within the meaning of clause seventeen.

Silas Mason Co. v. *Tax. Comm. of Washington,* (1937) 302 U. S. 196, 32 L. Ed. 187, 200.

But no one will contend that land acquired for "any other purposes of the government" is in accordance with clause seventeen if it is improved for ordinary business or residential purposes or acquired as security for a loan or in liquidation of an indebtedness to any governmental agency although it may be held, managed and disposed of by authority of the government.

Elliott v. *Voorst,* (1860) 8 Fed. Cas. 538, 540.

Are lands acquired for the erection of low-rent housing needful in the execution of the powers of the Federal Government? The question is not easy to determine. The courts are not in agreement that it is within the power of the National Government to acquire land for such purpose and disagree even as to its character as a public purpose.

United States v. *Certain lands of Louisville,* (1935) 75 F. (2d) 624.

Oklahoma City v. *Sanders,* (1935) 94 F. (2d) 323.

New York City Housing Authority v. *Muller* (1936) 270 N. Y. 233, I N. Y. (2d) 153.

Columbus Metropolitan Housing Authority v. *Thatcher,* (1942) 140 Ohio St. 35, 42 N. E. (2d) 437.

It is sufficient to say that in so far as it affects the application of any Act ceding exclusive jurisdiction to the United States, Congress has answered the question by expressly providing that the acquisition by the United States Housing Authority, of any real property "shall not deprive any State or political subdivision thereof of its civil and criminal jurisdiction in and over such property, or impair the civil rights under the State or local law of the inhabitants on such property; and, insofar as any such jurisdiction may have been taken away or any such rights impaired by reason of the acquisition of any property transferred to the Authority pursuant to section 1404 (d) of this title, such jurisdiction and such rights are hereby fully restored." (U. S. C. 1940 ed. Tit. 42, Sec. 1413 (b).)

The foregoing provision was construed by the United States Circuit Court of Appeals, Tenth Circuit, in the *Oklahoma City* case, supra, saying that it is merely a recognition on the part of Congress that the State had retained control for service of civil and criminal process and that there was no attempt to recede complete and general jurisdiction. The court then held that municipal ordinances relating to license, bonds, and inspections in course of construction of low-cost housing under building contracts with the United States do not apply to the contractor.

We venture to say that the construction of the Act of Congress by the United States Circuit Court of Appeals in the Oklahoma City case is unsound. It is unbelievable that Congress would adopt such explicit means to give recognition to State action reserving to itself the minimum of control within the boundaries of parcels of land acquired by the United States for low-cost housing, knowing the effect of the consent of the State to such acquisition, and the effect of a State Act of cession of jurisdiction, with reservations. The Act of Congress, so construed, was an idle gesture. But what could the Court say was the purpose of the Act of Congress as to lands in States which had ceded jurisdiction without reservations? Was its purpose to differ in the various states, according to the intent of the legislature of each State? We cannot so lightly brush aside the mandate of Congress that the acquisition by the United States of any real property shall not deprive any State or political subdivision thereof of its jurisdiction and in so far as it may have been taken away by transfer of property such jurisdiction and the civil rights under the State or local law of the inhabitants on such property "are hereby fully restored."

The reasoning of the Court in the Oklahoma City case is not consistent with the expression of the United States Supreme Court about the same time that while acceptance of exclusive jurisdiction granted by a State may be presumed in the absence of evidence of a contrary intent, there is no constitutional principle which compels acceptance by the United States of such jurisdiction contrary to its own conception of its interests.

Atkinson v. *State Tax Commission of Oregon,* (1938) 303 U. S. 20, 32 L. ed. 621.

See also: *James Stewart & Co.* v. *Sadrakula,* (1940) 209 U. S. 94, 64 L. ed. 393.

Lands acquired by the United States for defense housing or for defense public works (not to be confused with defense plants) certainly are more directly involved in the performance of the functions of the National Government, yet Congress has provided that the acquisition of any real property for these purposes shall not deprive any State or political subdivision thereof of its civil and criminal jurisdiction in and over such property or impair the civil rights under the State or local law of the inhabitants on such property. (U. S. C. 1940 ed. Sup. I, Tit. 42, Sec. 1547.)

The Act creating the Reconstruction Finance Corporation and authorizing the incorporation of the Defense Plant Corporation contains no provision relinquishing Federal jurisdiction over lands acquired for the erection of buildings and structures needed for the production of implements of war. But by an Act approved February 1, 1940, Section 355 of Title 40, U. S. Code, relating to public buildings, property and works and Section 175 of Title 50, U. S. Code, relating to war, were amended so as not to require the obtaining of exclusive jurisdiction in the United States "over lands or interests therein *which have been or* shall hereafter be acquired by it." And it was further provided "unless and until the United States has accepted jurisdiction over lands *hereafter to be acquired* as aforesaid it shall be conclusively presumed that no such jurisdiction has been accepted."

Reference to a copy of the charter of Defense Plant Corporation, made available by the courtesy of the attorney for the corporation, disclosed that it was incorporated on August 22, 1940, so that all real property acquired by this corporation is subject to the Act approved February 1, 1940.

It must be clear now that the Act of 1923 ceding exclusive jurisdiction and legislation to the Federal Government over lands acquired by

the United States does not apply to any real property acquired by the Reconstruction Finance Corporation, the Home Owner's Loan Corporation, or the Federal Public Housing Authority and that it does not become effective as to any land acquired after February 1, 1940 by the Defense Plant Corporation or by the United States for any purpose until the Federal authorities by affirmative action have accepted exclusive jurisdiction.

EFFECT OF ILLINOIS REVENUE ACT

In the beginning we said, in effect, that though the United States by Act of Congress may consent to the taxation of its property to the same extent as other like property is taxed by the State such property may nevertheless be exempt from taxation by virtue of the laws of the State. For that reason we gave consideration to the effect of the express exemption from taxation of lands over which exclusive jurisdiction was ceded by the State. We have concluded that the Act of 1923 does not apply to defense housing or to property of the Defense Plant Corporation.

However, Section 19 of the Revenue Act of 1939 provides:

> "All property described in this section to the extent herein limited, shall be exempt from taxation, that is to say:
>
> * * *
>
> "(4) All unentered government lands, all public buildings or structures of whatsoever kind, and the contents thereof, and the land on which the same are located belonging to the United States."

Has the State legislature power to grant such exemption from taxation independent of the right of the United States to claim or waive immunity of the means employed by the government for the execution of its powers?

Section 3 of Article IX of the Constitution of this State provides:

> "The property of the state, counties, and other municipal corporations, both real and personal, and such other property as may be used exclusively for agricultural and horticultural societies, for school, religious, cemetery and charitable purposes, may be exempted from taxation; but such exemption shall be only by general law. * * *"

It will be noted that the property of the United States is neither enumerated nor described in this constitutional provision. No doubt that omission was deliberate because at the time of the adoption of the Constitution of the State of Illinois the right of the State to tax the property of the United States had been denied.

The People v. *U. S. America,* (1879) 93 Ill. 30.

Fort Leavenworth R. R. Co. v. *Lowe,* (1885) 114 U. S. 525, 527, 531, 539.

Clallam County v. *United States,* (1923) 263 U. S. 341, 68 L. ed. 228.

It must be obvious that by expressly exempting United States Government lands and buildings the State legislature gave nothing to the nation which it did not have by constitutional right alone. Therefore the provision in the Revenue Act of 1939 is merely a recognition of the constitutional immunity from State and local taxation of the property and instrumentalities of the United States and is ineffective as to property which the United States Government has consented shall be subject to State and local taxation.

Baltimore Nat. Bank v. *State Tax Commission,* (1936) 297 U. S. 200, 80 L. ed. 586.

Owensboro National Bank v. *Owensboro,* (1899) 173 U. S. 664, 669.

First National Bank v. *Adams,* (1923) 238 U. S. 362, 66 L. ed. 661.

Des Moines National Bank v. *Fairweather,* (1923) 263 U. S. 103, 106, 68 L. ed. 191.

CONCLUSIONS

1. We are constrained to recant our opinions relating to the immunities of the United States and its instrumentalities, based upon the Illinois Cession Act of 1923, but it is not to be implied from this that United States Government authorities or corporations must obey any local law or ordinance which interferes with the execution of the powers of the government.

In this connection it should be observed that the 77th Congress amended Title 42, Section 1545, U. S. C. (relating to defense housing and defense public works) by adding the following:

> "* * * Consultation shall be had with local public officials, and local housing authorities to the end that projects constructed under the provisions of this Act shall, so far as may be practicable, conform in location and design to local planning and tradition."
>
> Public Law 409, U. S. C. Congressional Service, Chapter 14, page 11.

2. The buildings and structures erected since the quadrennial assessment of real estate in Cook County, whether owned by private persons, by Defense Plant Corporation or any other United States Government authority should be added in the assessment books for taxation, but if an incompleted building is assessed it cannot be reassessed, when completed, without notice to the owner, unless the reassessmment is made in the quadrennial year, or unless the assessor sets down in a separate column the value of additions made since the original assessment.

Your attention is directed to Title 42, Section 1546, U. S. C. (relating to defense housing and defense public works) as amended by the 77th Congress, which reads as follows:

> "The Administrator shall pay from rentals annual sums in lieu of taxes to any State and/or political subdivision thereof, with respect to any real property acquired and held by him under this Act, including improvements thereon. The amount so paid for any year upon such property shall approximate the taxes which would be paid to the State and/or subdivision, as the case may be, upon such property if it were not exempt from taxation, with such allowance as may be considered by him to be appropriate for expenditure by the Government for streets, utilities or other public services to serve such property."
>
> Public Law 409, U. S. C. Congressional Service, Chapter 14, page 11.

We return herewith plats, photographs and memoranda submitted with your request for this opinion.

C. CHICAGO PARK DISTRICT

REMOVAL OF CITY BUILDINGS FROM PARK DISTRICT PROPERTY

(No. 11576—Commissioner of Public Works—J. L. F.—August 8, 1952.)

You recently advised us that the President of the Chicago Park District has demanded that the City remove certain temporary construction buildings heretofore erected by and for the use of the City from Chicago Park District property near 47th Street and the Illinois Central railroad.

You further informed us that the said Park District President has stated that the area is required for the rebuilding of the Outer Drive and that the City has no further use for these buildings.

Under Chapter 8, Section 5 of the Municipal code of Chicago of 1939, as amended, the Commissioner of Public Works has the duty to take special charge and superintendence of all public buildings in the city belonging to the City, and under Section 13 of said chapter of the Code, the Commissioner of Public Works may direct the removal of any article or thing whatsoever, which may encumber or obstruct any public way in the city.

In the light of the above, and upon our examination of the proposed Council Order which you have submitted to us, we are of the opinion that the Commissioner of Public Works has the authority to comply with the request of the Chicago Park District to remove the aforementioned temporary buildings, and we are herewith returning the proposed Council Order with our approval as to form and legality indicated thereon.

SECTION II

POLICE POWERS OF THE CITY

CHAPTER V — REGULATION OF PUBLIC HEALTH, SAFETY AND WELFARE

A. FOODS AND DAIRY PRODUCTS

MILK INSPECTION OUTSIDE CITY

(No. 11105—Chairman, Finance Committee—A. J. R.—December 16, 1947.)

This is in reply to your request for an opinion "as to whether or not the City has the power to make and charge for the inspection of milk purchased or inspected outside of the Chicago area; or has the power to make and charge for the inspection of farms or milk stations located outside the City of Chicago."

We shall consider first the power to make the inspection and secondly the power to charge for it.

In the exercise of its power to regulate the sale of foods and beverages for human consumption and to promote the general health the City has the power to control through the limitations of a licensing ordinance any business whose operation directly effects the matters to which these powers relate; *Fligelman* v. *City of Chicago*, 348 Ill. 294 (1932); *Klever Shampay Karpet Cleaners* v. *City of Chicago*, 323 Ill. 368 (1926). Under these powers the city has long regulated the furnishing of milk for human consumption in the city of Chicago.

Section 8-1 of the Revised Cities and Villages Act, (Ill. Rev. Stats. 1947, chap. 24, par. 8-1), provides that:

> "The corporate authorities in all municipalities have jurisdiction in and over all places within one-half mile of the corporate limits for the purpose of enforcing health and quarantine ordinances and regulations."

Since the inspections to which your questions refer are concerned only with the exclusion from the limits of Chicago of milk and consumption of which might endanger the health of the city's people they do not involve such an exercise of jurisdiction of *places* as is limited by this provision of the statute. If inspection of a *place* outside the city limits discloses reasons for preventing the sale or distribution in Chicago of milk from that place, the city has no power to compel any change in the place or to impose any fine or imprisonment for failure to change it. But it does have power by action taken within the city limits to prevent the sale or distribution of the milk to the people of Chicago. This is not exercising jurisdiction over the *place*; it is exercising jurisdiction over the sale or distribution of the milk when it reaches Chicago.

The power of a municipality to make such inspection beyond its corporate limits has been sustained by well considered decisions of the courts of other states. In *State* v. *Nelson*, 66 Minn. 169 (1895), the court had before it an ordinance providing for the inspection of dairies and dairy herds outside the city limits but from which milk was obtained for sale within the city. In sustaining the power of the city to enact and enforce the ordinance the Supreme court of Minnesota said:

"It is a matter of common knowledge that much of the milk sold in a city is produced in dairies situated outside the city limits. Any police regulations that did not provide means for insuring the wholesomeness of milk thus brought into the city for sale and consumption would furnish very inadequate protection to the lives and health of the citizens. It is also a matter of common knowledge, as well as of proof in this case, that the wholesomeness of milk cannot always be determined by an examination of the milk itself. To determine whether it does or does not contain the germs of any contagious or infectious disease it is necessary to inspect the animals which produce it. The inspection of dairies or dairy herds outside the city limits provided for by this ordinance applies only to those whose milk product it is proposed to sell in the city. The provisions of the ordinance in that regard go only so far as it is reasonably necessary to prevent the milk of diseased cows being sold within the city. This inspection is wholly voluntary on part of the owner of the dairy or dairy herd. If he does not choose to submit to such inspection, the result merely is that he or the one to whom he furnishes milk cannot obtain a license to sell milk within the city. The ordinance has no extraterritorial operation, and there has been no attempt to give it any such effect. The only subject upon which it operates is the sale of milk within the city."

In *State of Tennessee ex rel. Lowry* v. *Davis*, 1 C. C. A. 10, 550 (1911), the court passed on a question closely resembling that decided in the *Nelson* case and said:

"It is competent for a city council to require that an applicant for a license to sell milk within the city shall consent that the dairy herd from which he obtained his milk may be inspected by the commissioner of health of the city, although the herd is kept outside the city limits. Also that he may be required as a condition precedent to permit his cows to be tested by the tuberculin test. *State of Minnesota* v. *Hans C. Nelson*, 34 L. R. A. 318; *Norfolk* v. *Flynn*, 62 L. R. A. 771; *State* v. *Dupaquier*, 26 L. R. A. 162."

On February 3, 1939 this department rendered an opinion to the then acting president of the board of health to the effect that a milk-receiving station located outside the state of Illinois is not, as regards its milk shipped into the city to be sold and distributed here for human consumption, exempt from the ordinances of the city and the regulations of the board of health pertaining to milk produced, processed, transported, sold and distributed for such consumption within the city. It was pointed out that the ordinances of the city and the regulations of the board of health pertaining to such milk are valid and have no extraterritorial effect, as they are operative only when the milk is distributed or offered for sale for consumption within the city, (Ops. of Corporation Counsel and Assistants, Vol. XX, p. 31).

The act by which such an inspection is made effective is the preventing of the sale or distribution of the milk in Chicago if it is not approved and the permitting of its sale if it is. Either of these acts takes place within the city limits. One of the regulatory powers by which the exclusion of the unapproved milk is effected is the revocation of the existing license of a seller or distributor of milk who obtains his supply from an unapproved source, or the refusal to grant a license to an applicant whose source of supply is not approved.

In our opinion it is clear that the city has the power to make the inspections beyond the Chicago area although it has no power to impose any form of compulsion beyond the city limits to force any person to permit the inspection or to abide by the ordinances of the city or the rules and regulations of the board of health, its only power in this respect being to exclude the unapproved milk from the limits of the city.

Licenses granted by the city to those engaged in the sale and distribution of milk within its limits are regulatory measures, and it is therefore required that the fees which the city exacts for their issuance must bear a reasonable relation to the additional burdens imposed upon the city's administrative and law-enforcement agencies by the business or occupation licensed. This is the general rule with reference to licenses issued under regulatory powers. *The Metropolis Theatre Company et al.* v. *The City of Chicago,* 246 Ill. 20 (1910).

In the *Fligelman* case, referred to above, the Supreme court laid down the rule as follows:

> "It is an established principle that where the power to license is impliedly conferred upon a city as an incident to regulation it may only be exercised in connection with other proper regulations of the business or occupation for which the license is granted. The city has no power to exact such a license fee solely for the purpose of raising revenue. In the exercise of the police power for the purpose of regulation the authority of a municipality is limited to such a charge for a license as will bear some reasonable relation to the additional burdens imposed upon the municipality by the business or occupation licensed and the necessary expense involved in police supervision. (*Metropolis Theatre Co.* v. *City of Chicago,* 246 Ill. 20; *Herb Bros.* v. *City of Alton,* 264 Id. 628, *Condon* v. *Village of Forest Park,* 278 Id. 218; *Aberdeen-Franklin Coal Co.* v. *City of Chicago,* 315 Id. 99; *Bauer* v. *City of Chicago,* 321 Id. 259; *Nature's Rival Co.* v. *City of Chicago,* 324 Id. 566; *Ward Baking Co.* v. *City of Chicago,* 340 Id. 212)."

Since the number of inspections, the time they consume, and the distances travelled to make them are variable factors of labor, expense and responsibility incident to the granting of a license, they may be made the basis of determining the license fee and exacting a larger fee in some instances than in others. This relates to the fee charged when the license is issued. Changes in these items occurring after the license has been paid for and issued can be provided for by a combination of provisions governing regulation and compensation. A license may be (1) forbidden to sell or distribute milk from sources not inspected and approved, (2) compelled to report periodically the sources of his supply, and (3) required as a condition to the continuance of his license to pay additional compensation for all new inspections made necessary by the changes which have occurred with reference to the items we have mentioned.

An illustration of one manner in which this problem may be dealt with is found in provisions of an ordinance drafted in this department a few years ago but which was never used. It required that:

> "At least once during each inspection period the board of health shall inspect all dairy farms, milk producers, milk haulers, milk receiving stations and independent milk distributors and at least twice each calendar month the board of health shall inspect all milk plants whose milk and milk products are intended for consumption within the City of Chicago."

Milk plants were to be required to report periodically their source of supply. This would disclose the dairy farms and other sources of supply which would have to be inspected in order to provide assurance that milk coming into Chicago conformed with the requirements of our ordinances and of the rules and regulations of the board of health.

The compensation which the city would receive for the issuance of a certificate of sanitation (equivalent to the present permit issued by the board of health) was made to correspond with the burdens placed upon the city by the issuance of the certificate. The provision which would accomplish this result was in part as follows:

"Every milk plant having a certificate of sanitation shall pay to the City of Chicago on or before the 16th day of each calendar month an inspection fee of 2½ cents on each 100 pounds of milk received and 7 mills per pound of butterfat received in milk products or for use in the manufacture of milk products during the preceding calendar month, provided, that if the milk plant is located more than three miles beyond the corporate limits of the city it shall pay for each inspection in addition to the fees and charges for the number of pounds of milk and butterfat received, an inspection fee equal to 20 cents for each mile that the milk plant is distant from the city hall to cover the reasonable cost and expenses, including mileage of the city inspectors. Each payment shall be accompanied by a statement in writing on a form prescribed by the board of health of the number of pounds of milk and butterfat received during the preceding calendar month."

It is to be observed that under these provisions a sum representing the cost of inspecting the dairy farms was to be paid by the owner of the milk plant. No provision was made for the payment of any fee by the farmer. The fee was varied according to volume of supply at the plant rather than according to the number of farms inspected.

The payment of any fee by a farmer for the making of any inspection to determine whether he should receive a certificate or permit which would permit the sale or distribution of his milk in Chicago could not be compelled by any measures applied outside the city. The farmer would always have the right to decline to pay the fee and accept the consequent exclusion of his milk from Chicago.

In determining the amount of the city's compensation and the manner of its collection, it may be found that the decision must be based to some extent upon its effect upon the adequacy of the supply of approved milk coming to Chicago. Upon this question the experience of the board of health under the present inspection system might provide some enlightenment.

Y. W. C. A. CAFETERIA FOOD DISPENSER'S LICENSE

(No. 11111—City Collector—M. H. F.—January 11, 1949.)

Your letter of December 20, 1948 transmits a letter received by you from the Director of the West Side Residence, of the Young Women's Christian Association, 105 S. Ashland Boulevard, with reference to the applicability of the city's Food Dispensers license ordinance to the establishment. You request our opinion as to whether the cafeteria operated by the association is subject to license.

The Director's letter states that the association operates a cafeteria at the location; that while in the past the cafeteria was open to the general public, it was later closed as a financial failure; that now only the girls living in the residence are served; that no money is paid over the counter and no separate bills rendered for the food, but that the girls pay for board and room by the week; that the residence is open only to girls of a low salary bracket; that the residents live at the residence on a permanent basis, paying rates ranging from $12.50 to $14.50 a week for board and room.

Wishing additional information we requested you to have the establishment inspected and furnish us information as to its size. You now

tell us that the inspector's report discloses that the establishment contains 114 rooms which are rented out and that the cafeteria contains 80 service accomodations.

Section 130-15, the definitions section of the Food Dispensers ordinance, reads in part as follows:

> "The term 'food dispenser' is hereby defined as any person that keeps for sale and sells, for consumption on the premises, or on the sidewalk or public way contiguous to said premises, any article of food or drink for human consumption. Restaurants, ordinaries, coffee houses, ice cream parlors, lunch rooms, tea rooms, lunch stands, box lunch deliverers, luncheonettes, cafeterias, and retail drug stores serving counter lunches and drinks, caterer and industrial food server dispensing food or drinks to office personnel or employes of industrial plant shall be included among 'food dispensers'."

Section 137.1-1 of the chapter entitled "Hotels" reads as follows:

> "Every building or structure kept, used or maintained as or advertised or held out to the public to be an inn, hotel, family hotel, apartment hotel, lodging house, dormitory or place where sleep or rooming accomodations are furnished for hire or rent, whether with or without meals, in which ten or more sleeping rooms are used or maintained for the accomodation of guests, lodgers or roomers, shall for the purpose of this chapter be defined as a hotel."

It appears from the correspondence that the Y.W.C.A. establishment at 105 Ashland Boulevard is a place of residence for working girls who receive small salaries, for periods of longer than a week and that the establishment is what may be termed an American Plan hotel, catering to a special clientele. Because of its size and the size of the cafeteria maintained therein, and the belief that such an establishment should be required to meet the requirements of the sanitary and public health regulations contained in the Food Dispensers ordinance, it is not seen that it could be exempted from license on the ground that it was a boarding house and that boarding houses were not specifically mentioned in section 130-15. The word "cafeteria" is included within this definition section and our opinion therefore is that the association is subject to the license requirements of the ordinance.

AMBER COLORED MILK BOTTLES

(No. 11433—President, Board of Health—C. P. H.—October 10, 1951.)

We have your letter of September 25, 1951 wherein you state that the Borden Company, Chicago Milk Division, 3638 Broadway, Chicago, has requested permission to use amber colored glass bottles for the sale and delivery of vitamin-mineral fortified milk. The Company desires to use these colored bottles for the delivery of this milk for the purpose of retarding the destruction of the vitamins, riboflavin and ascorbic acid, and to prevent the development of objectionable flavors in such milk when placed in transparent glass bottles. According to several authorities photochemical changes occur in milk thus fortified with vitamins when placed in clear bottles that are exposed to sunlight. You request our opinion as to whether or not amber colored glass bottles are "standard milk bottles" within the meaning of section 154-15 of the Municipal Code of Chicago, which section is hereinafter set forth.

On January 4, 1935, (C. J., pp. 3428-32) the city council passed an ordinance amending sections 3082 to 3099 of the Revised Chicago Code of 1931, to establish standards and requirements for the sale of milk and milk products in the city of Chicago. Section 3094 provided that "any milk or milk products sold in quantities of less than one gallon shall be delivered in standard milk bottles." By section 1-1 of the Municipal Code of Chicago adopted by the city council on August 30, 1939, the said code completely superseded the Revised Chicago Code of 1931. Section 154-15 of the Municipal Code of Chicago contains the same provisions that "any milk or milk products sold in quantities of less than one gallon shall be delivered in standard milk bottles."

While these provisions were in force and effect the Supreme Court of Illinois, on January 20, 1944, decided the case of *Dean Milk Co.* v. *City of Chicago,* 385 Ill. 565. A complete answer to your question is found in this decision. In that case one of the issues was whether or not paper cartons are "standard milk bottles" within the meaning of section 154-15 of the Code. In discussing this issue the Court stated, at page 571:

> "The question here presented is the meaning of the phrase 'in standard milk bottles' and what did the city council intend to include within that term when the ordinance was passed in January, 1935. The definition is to be found not in any conjecture as to what the council would have intended in view of changing circumstances and trade usages, but what the council actually intended it to mean and include when the ordinance was passed. The intent that controls in the construction of an ordinances has reference to the intent of the council which passed it, and the question is what the words used therein meant to the council using them. When such matters are brought into court the only function of the court is to interpret the ordinance and declare the intent of the legislative body in enacting it. They have no legislative powers, and in the interpretation and construction of statutes and ordinances their sole function is to determine and, within the constitutional limits of the legislative power, to give effect to the intention of the legislature. (*Sup* v. *Cervenka,* 331 Ill. 459; *United States* v. *Goldenberg,* 168 U. S. 95.) In this case the court is not concerned with the policy of the ordinance or the propriety of an amendment to permit the sale of milk in single service 'Pure-Pak' containers. No mere omission or failure of the council to amend the ordinance to meet changing conditions will justify any judicial addition to the language of the ordinance. Changes can be made in the ordinance by the city council when it deems such changes are necessary or proper in view of changed conditions."

The court in holding that paper containers are not "standard milk bottles" as those words were used in section 154-15 defined "standard milk bottles" at page 573, as follows:

> "It is inescapable that the words 'standard milk bottles' as used in this ordinance mean the familiar glass milk bottles in common usage when it was adopted and cannot be construed to include 'paper single service containers'."

After the decision in this case the city council passed an ordinance on March 16, 1944, (C. J., p. 1621) amending section 154-15 by providing that for the duration of the war and six months thereafter milk and milk products may be sold and delivered in single service containers. The city council again passed an ordinance on December 3, 1945 (C. J., p. 4543) amending section 154-15 of the Code to provide for the permanent use of single service paper containers by eliminating the limitation of their use to the duration of the war and six months thereafter. Section 154-15, as amended, provides as follows:

> "* * * Any milk or milk products sold in quantities of less than one gallon shall be delivered in standard milk bottles or in single

service containers complying with the standards prescribed in the unabridged form of the 1939 edition of the United States Public Health Service Milk Ordinance printed in Public Health Bulletin No. 220, as amended July 18, 1941, certified copies of which ordinance and amendment shall be on file in the offices of the city clerk. Provided, however, that nothing herein contained shall be construed to prohibit hotels, soda fountains, restaurants, and similar establishments from dispensing milk or milk products from sanitary dispensers approved by the board of health."

The above quoted section expressly provides that milk and milk products sold in quantities of less than one gallon shall be delivered in standard milk bottles. The Court in the *Dean Milk Company* case, defined the term "standard milk bottles" to mean the familiar glass milk bottles in common usage when the ordinance was adopted. This language clearly is beyond the necessity of construction. Since amber colored glass bottles were not in common usage for the sale and delivery of milk and milk products when the ordinance was adopted on January 4, 1935 it is our opinion that they are not standard milk bottles and that their use for the sale and delivery of milk and milk products in quantities of less than one gallon is prohibited by section 154-15 of the Municipal Code of Chicago.

AMBER COLORED MILK BOTTLES

(No. 11452—President, Board of Health—C. P. H.—November 26, 1951.)

Under date of October 10, 1951 we rendered an opinion addressed to you relative to the request of the Borden Company, Chicago Milk Division, 3638 Broadway, Chicago, for permission to use amber colored glass milk bottles for the sale and delivery of vitamin-mineral fortified milk. The Company desired to use these bottles for the delivery of this milk for the purpose of retarding the destruction of the vitamins, riboflavin and ascorbic acid in such milk and to prevent the development of objectionable flavors in such milk when placed in transparent glass bottles.

We stated "since amber colored milk bottles were not in common usage for the sale and delivery of milk and milk products when the ordinance (section 154-15 of the Municipal Code of Chicago) was adopted on January 4, 1935, it is our opinion that they are not standard milk bottles and that their use for the sale and delivery of milk and milk products in quantities of less than one gallon is prohibited * * *" by the section. Section 154-15, in so far as it is pertinent here, provides that any milk or milk products sold in quantities of less than one gallon shall be delivered in standard milk bottles. We stated that in the case of *Dean Milk Company* v. *City of Chicago*, 385 Ill. 565 (1944) the court, in holding that paper containers are not "standard milk bottles" as that term is used in section 154-15, defined "standard milk bottles" at page 573, as follows:

> "It is inescapable that the words 'standard milk bottles' as used in this ordinance mean the familiar glass milk bottles in common usage when it was adopted and cannot be construed to include 'paper single service containers'."

At the time we rendered the opinion we were advised that amber colored milk bottles which we did not have before us at the time we rendered and milk products when the ordinance was adopted on January 4, 1935, and we therefore concluded that they were not "standard milk bottles".

The Borden Company, Chicago Milk Division, has now presented to us documentary evidence and exhibits in the form of amber colored glass milk bottles which we did not have before us at the time we rendered the opinion. This evidence tends to show that Borden-Wieland, Inc., a Division of the Borden Company, produced a cultured buttermilk known as "Kazol", which was sold and delivered in the city of Chicago in quantities of less than one gallon in amber colored glass milk bottles during the period from 1912 to 1939 with the knowledge and consent of the Board of Health. We are advised that there is no evidence in the possession of the Board of Health to refute these facts. We have examined the glass bottles presented to us and find that they are identical in size, shape and thickness to the familiar glass milk bottles in common usage for the sale and delivery of milk and milk products at the time the ordinance was adopted on January 4, 1935, except that the former are amber colored glass bottles whereas the latter are clear transparent glass bottles.

It appears that the purpose of using amber colored glass milk bottles for the sale and distribution of vitamin-mineral fortified milk is to retard the photo-chemical changes which occur in such milk when placed in clear bottles and exposed to sunlight.

In view of the evidence presented by the Borden Company, which we are unable to refute, it is our opinion the conclusion in our letter of October 10, 1951, based upon an erroneous assumption of fact, must be reversed to provide that amber colored glass milk bottles should be considered as coming within the definition of "standard milk bottles" and that their use for the sale and delivery of vitamin-mineral fortified milk in quantities of less than one gallon is permitted under Sec. 154-15 of the Municipal Code.

EVAPORATED MILK AS CREAM SUBSTITUTE

(No. 11512—Secretary, Board of Health—E. R. H.—April 3, 1952.)

We acknowledge your letter of March 20, 1952, attaching thereto a letter from Mr. R. E. Geauque of the Carnation Company, Los Angeles, California, in which he requests approval and permission of the Board of Health for certain customers, presumably eating establishments, to serve canned evaporated milk in substitute for, or mixed with Grade A pasteurized milk or cream, for use in coffee.

You ask our opinion on the following question:

> "Is the Board of Health legally permitted to take such action as is necessary to prevent the use, by restaurants and other eating establishments, of evaporated or condensed milk produced by sources not under the supervision of this Department, when the evaporated or condensed milk is used for purposes other than cooking and is served either as it comes from the can or mixed with a portion of Grade A pasteurized milk or cream?"

Section 220 of Chapter 56½, Illinois Revised Statutes 1051, with reference to the powers of Cities, Villages and Towns in the regulation of milk and milk products, provides:

> "Nothing in this act shall impair or abridge the power of any county, city, village, or incorporated town to regulate the production, handle, storage, distribution, sales, or delivery of milk or milk products, provided the minimum requirements under this act are reserved."

From the above statute the implication is plain that municipal milk regulation may be more exacting than the provisions applicable to the state regulations.

In the case of *Dean Milk Company* v. *City of Chicago*, 385 Ill. 565-73, our Supreme Court said:

> "Power and authority for the regulation of milk was clearly given to the City Council by Sections 50, 53, 66 and 78 of Article 5 of the Cities and Villages Act."

Section 154-1 of the Municipal Code of Chicago, in defining reconstituted or recombined milk or cream, provides:

> "The term 'reconstituted or recombining milk or cream' is hereby defined to mean the products resulting from the recombining of milk constituents with water or other combining substances in accordance with the rules and regulations of the Board of Health, and shall comply with the standards for milk fat and solids—not—fat as defined herein."

Section 154-14 provides:

> "No milk or milk products shall be sold in the city except grade A pasteurized milk and milk products and certified milk and milk products. Grade A pasteurized milk and milk products shall conform with all rules and regulations of the board of health for grade A pasteurized milk and milk products. Certified milk and milk products shall conform with the rules and regulations of the board of health for certified milk and milk products."

The rules and regulations of the Board of Health provide in part:

> "All milk and milk products used in reconstituted milk or cream shall conform to the requirements set forth in the ordinance and rules and regulations of the board of health pertaining to milk and milk products."

Section 130-23.1 of the Municipal Code, relating to the dispensing of milk or milk products by food establishments provides in part as follows:

> "All milk, fluid milk products shall be obtained from sources approved by the board of health. Only grade A pasteurized milk and milk products shall be used."

In conference upon this matter with Mr. James A. Meany of your Department, we were advised that Carnation Evaporated Milk is produced from sources not wholly under the supervision of the Chicago Board of Health, and that ingredients of Carnation Evaporated Milk are not pasteurized Grade A milk and milk products. The use of the evaporated milk as requested by Mr. R. E. Geauque, in his letter of February 21, 1952, would be a violation of the Municipal Code, and, in answer to the question you propound in your letter, you are permitted to take such lawful action as is necessary to prevent the use by restaurants and other eating establishments, of evaporated or condensed milk produced by sources not under the supervision of the Chicago Health Department when such milk is used for purposes other than cooking and is served either as it comes from the can or mixed with a portion of Grade A pasteurized milk or cream.

CLASSIFICATION OF CREAM SUBSTITUTES

(No. 11525—Secretary, Health Department—E. R. H.—April 30, 1952.)

We acknowledge your letter of April 25, 1952, requesting our opinion as to whether the product Mocha Mix, which you state has the physical characteristics of cream, is intended to be and is used as a substitute for cream, shall be classified as a milk product or as a food product; and also, if the records of heat treatment of the product shall be made available to your department under Chapter 95 of the Municipal Code, Section 2.

You advise that the product is a mixture of non-fat milk solids, butter, high-ratio shortening, dextrose, vegetable fat, sugar, salt and water flavoring. The labels do not bear the words milk or cream or the designation grade "A."

Your further advise that on February 8, 1952, the wholesale food license issued to Mocha Mix Corporation was revoked for violation of the Municipal Code and the rules and regulations of the Board of Health, and on inspections since made by your Dairy Inspection Section, all requirements of the milk code are in compliance with exception of the code provision with reference to pasteurization.

The Municipal Code of Chicago, Chapter 154-1 among other things defines the following products:

> "MILK. The word 'milk' is hereby defined to be the lacteal secretion obtained by the complete milking of one or more healthy cows, excluding that obtained within fifteen days before and five days after calving, or such longer period as may be necessary to render the milk practically colostrum free; such secretion shall contain not less than eight and one-half per cent of milk solids-not-fat, and not less than three and one-fourth per cent of milk fat."
>
> "RECONSTITUTED OR RECOMBINED MILK AND CREAM.
>
> The term 'reconstituted or recombined milk and cream' is hereby defined to mean the products resulting from the recombining of milk constituents with water or other combining substance in accordance with the rules and regulations of the board of health, and which comply with the standards for milk fat and solids-not-fat as defined herein."
>
> "MILK PRODUCTS." "The term 'milk products' is hereby defined to mean and include sweet cream, sour cream, vitamin D Milk, buttermilk, cultured buttermilk, skimmed-milk, milk beverages, skimmed-milk beverages, and such other products as may, from time to time, be designated by the board of health."

The last two definitions are the only definitions in the Milk Code which might have any bearing or relationship to Mocha Mix. We quoted the definition of milk to show the required content: eight and one-half per cent of milk solids-not-fat, and not less than three and one-fourth per cent of milk fat.

Obviously, Mocha Mix does not come within the above definition of milk because it does not meet the required content and it has other ingredients.

It does not meet the definition of reconstituted or recombined milk and cream, because it does not have the required content of milk solids-not-fat and milk fat.

Certainly it is not a "milk product," the definition of which includes sweet cream, sour cream, vitamin D milk, buttermilk, cultured buttermilk, milk beverages, skimmed milk beverages, and it is not among such other products designated by the Board of Health to be within this definition.

In our opinion Mocha Mix should be designated as a food product and it would be subject to inspection as provided by Chapter 95, Section 2 of the Code. However, there is no provision in this section with reference to pasteurization or heat treatment and the Mocha Mix Company would not be required to supply you with any recordings of whatever heat treatment its product may be subjected to, the product not being governed by the pasteurization provisions of the Milk Code.

If, in the judgment of the Board of Health, this product should be brought within the provisions of the Milk Code, for the better protection of the public health, the Board of Health may by proper resolution add this product to the definition of "Milk Products" as set forth in the Milk Code.

HORSE MEAT

(No. 11568—President, Board of Health—E. R. H.—July 28, 1952.)

We acknowledge your letter of recent date with which you enclose a copy of a letter from Mr. Charles H. Broman, Secretary-Treasurer of the Associated Food Dealers of Greater Chicago, requesting answers to a number of questions therein contained pertaining to the retail sales of horse meat, and with reference to which you ask our opinion.

Section 130.1-1 of the Municipal Code of Chicago, defining the term "dealer in horse meat" provides:

> "The term 'dealer in horse meat' is hereby defined as any person who sells, offers for sale, or keeps for the purpose of selling, for human consumption, any horse carcass, parts of carcasses, meat or meat food products thereof. The cutting of horse meat into steaks or roasts shall be proof that such horse meat is intended for human consumption. Horse meat or horse meat products sold, offered for sale, or kept for the purpose of selling, which bear any label, statement or design indicating that such horse meat or horse meat product is fit for human consumption, shall be proof that the same is offered for sale as human food or for human consumption."

Section 130.1-2 provides:

> "It shall be unlawful for any person to engage in the business of dealer in horse meat without first having obtained a license so to do."

The first question asked by Mr. Broman in his letter is: "Does a retailer need a license as a dealer in horse meat" if he sells canned horse meat, pure or mixed, fresh or cooked, which he buys from a legitimate pet food manufacturer?"

Presumably, the canned horse meat referred to in this question is not intended for human consumption. If we are correct in this presumption, in our opinion the answer to this question is No.

The second question propounded by Mr. Broman is: "Does he need such license if he sells packaged, fresh or mixed horse meat if the package is marked or labeled with the ingredients and identified as containing horse meat for pet food?"

In this question, the packaged horse meat is not sold for human consumption, but is marked, labeled and identified as containing horse meat for pet food. This packaged horse meat not being sold for human consumption the dealer is not required to have a license under this section of the code.

The third question in Mr. Broman's letter asks, "May a retailer keep packaged, labeled and identified horse meat in his refrigerator or frozen food case with other foods?"

The answer to this question, in our opinion, is Yes. However, if the packaged, labeled and identified horse meat referred to is to be offered for sale or sold for human consumption, the retailer must be licensed as a dealer in horse meat.

The fourth question of Mr. Broman's letter is, "May he sell pure horse meat, whether fresh or frozen, in packages marked and identified as "horse meat for pet food only?"

We presume that the question intended here is, if the retailer is required to have a license as a dealer in horse meat, in case he sells pure horse meat, fresh or frozen, in packages marked and identified as "horse meat for pet food only." If we are correct in this assumption, in our opinion, the answer to this question is No. The horse meat referred to is not intended to be sold for human consumption, and a license is not required.

Mr. Broman's fifth question is, "Does he need a special license if he sells horse meat for pet food only, which he buys in chunks or pieces from a licensed horse meat dealer, and which he cuts up and processes into containers, which he clearly labels "horse meat not for human consumption?"

The horse meat referred to in this question is processed into containers clearly labeled "horse meat not for human consumption." The code requires a license as a dealer in horse meat only where the person sells, offers for sale, or keeps for the purpose of selling, horse meat or horse meat food products for human consumption. In our opinion, the answer to this question is No.

In the sixth question in Mr. Broman's letter, it is asked, "May he store such home processed horse meat (marked and identified) in his refrigerator or frozen food case?"

Presumably, the horse meat referred to in this question is of the same character described in Mr. Broman's fifth question. If our presumption is correct in this respect, it is our opinion that the retailer may so store this horse meat in his refrigerator or frozen food case.

HOT DOG PEDDLERS

(No. 11606—President, Board of Health—E. R. H.—October 31, 1952.)

We acknowledge your letter of October 21, 1952 requesting an opinion as to the interpretation of provisions of Chapters 130 and 160 of the Municipal Code of Chicago, governing food dispensers and peddlers, in which you state that there is no code provision for reference of a peddler's license application to the Board of Health and that many purveyors of red hots, hot tamales and hamburgers, operate under a peddler's license. You further state that some of these purveyors move from place to place

while others establish themselves in a fixed location or stand. You also request an opinion "as to whether a peddler's license may be issued for the sale of food other than fish and farm produce," and as to whether "the term farm produce covers food items such as hamburgers, tamales and red hots."

Section 130-15 of the Municipal Code of Chicago provides in part:

"The term 'food dispenser' is hereby defined as any person that keeps for sale and sells, for consumption on the premises, or on the sidewalk or public way contiguous to said premises, any article of food or drink for human consumption. Restaurants, ordinaries, coffee houses, ice cream parlors, lunch rooms, tea rooms, lunch stands, box lunch deliverers, luncheonettes, cafeterias, and retail drug stores serving counter lunches and drinks, caterer and industrial food server dispensing food or drinks to office personnel or employes of industrial plant shall be included among 'food dispensers'."

Section 160-1 of the code provides:

"The word 'peddler' is hereby defined to mean any individual who, going from place to place shall sell, offer for sale, sell and deliver, barter, or exchange any goods, wares, merchandise, wood, oil, fish, fruits, vegetables, or country produce from a vehicle or otherwise."

We rendered an opinion under date of June 30, 1933, (Volume 18, page 521, No. 8105, Opinions of the Corporation Counsel) upon a similar question under ordinances substantially the same as the present ordinances above quoted in which we said:

"If the food sold is for consumption at a stand, the seller comes under the classification of 'food dispenser'. * * *

A person selling food at retail from an automobile or other vehicle which is parked permanently at a fixed site or which is allowed to stand for a length of time greater than is necessary to complete a peddler's transaction, * * * should be considered as conducting businesses from stands or establishments and are therefore subject to the retail food establishments' ordinance."

Food items such as red hots, hot tamales and hamburgers do not come within the articles dealt in by a peddler as set forth in Section 160-1 above. Such food items cannot be held to come within the ordinary meaning of "goods, wares and merchandise," and those items are not enumerated with other specific articles therein set forth. The only food items specifically mentioned are "fish, fruits, vegetables or country produce." Certainly such items do not embrace, red hots, hot tamales and hamburgers. One holding a peddler's license has no right or authority thereunder to sell red hots, hot tamales and hamburgers, nor has one holding a peddler's license, and right or authority thereunder to sell such food items at retail from a fixed location or stand, or from an automobile or other vehicle parked at a fixed site or which stands for a length of time greater than peddler's transactions require. Such operators or vendors are "food dispensers" as defined in Section 130-15 above and must be licensed as such.

It is our opinion, therefore, that a peddler's license does not legally authorize the holder thereof to sell such food items as red hots, hot tamales and hamburgers; that such food items are not embraced in the words "country produce" contained in the defintion of "peddler" in Section 160-1 above and that those vendors, referred to in your letter, who establish themselves at a fixed location or stand, or vendors who sell such items at retail from an automobile or other vehicle which stands for a length of time greater than is necessary to complete a peddler's transaction come within the meaning of the term "food dispenser" as defined in Section 130-15 above and must be licensed as such.

MILK HANDLING RESEARCH

(No. 11635—President, Board of Health—E. R. H.—January 15, 1953.)

We acknowledge your letter of January 7, 1953 asking our opinion upon the legality of an agreement between the Board of Health and the Asociatd Milk Dealers, Inc., to conduct an experiment on a newer system of milk handling adaptable to the Chicago market. The cost thereof would be borne and advanced by the Associated Milk Dealers and we have examined the proposed written agreement to be entered into by the Associated Milk Dealers and the Board of Health.

In our opinion it would be lawful for the Board of Health to enter into such an agreement upon the authorization of the City Council. We attach proper order for passage by the City Council authorizing the execution of said agreement.

LABELLING HORSEMEAT

(No. 11636—President, Board of Health—E. R. H.—January 16, 1953.)

We acknowledge your letter of January 8, 1953 attaching a request from the Hill Packing Company for approval of labels for horsemeat products used for animal consumption and enclosing a sample of the label sought to be approved. You ask our advice if the label complies with the requirement of Section 130-3 of the Municipal Code of Chicago which provides in part:

> "Each package or can shall be labeled with a label stating that the horsemeat or horsemeat products contained therein is not for human consumption, and such label shall bear a statement, in letters as large as the largest type used on such label, 'FOR ANIMAL FOOD ONLY.'"

Plainly the code provision requires that the label state that the product is not for human consumption and a statement in letters *as large as the largest type used on such label,* "FOR ANIMAL FOOD ONLY."

The sample label attached bears the name HILLS and the words, CHOPPED, FROZEN, HORSEMEAT for DOGS and CATS. The letters in the name HILLS are larger than any other printed matter on the label.

It is our opinion that the label does not comply with the requirements of the code.

NON-GRADE "A" MILK PRODUCTS

(No. 11644—President, Board of Health—E. R. H.—January 30, 1953.)

We acknowledge your letter of November 29, 1952 in which you state that a concern in the City of Chicago operating as a dairy establishment under a grade A permit issued by the Board of Health desires to manufac-

ture in its plant a non-grade A butter cream for sale only outside of the City of Chicago. The product will combine grade A skim milk and butter made from cream which normally comes from uninspected sources. The product will not bear a grade A label. You refer us to sections 154-8 and 154-14 of the Municipal Code which you quote in part.

You further state that the Board of Health has never objected to the manufacture of grade A and ungraded or uninspected milk products under the same roof, provided, however, that the operations of manufacture were physically separated and that the equipment used for grade A was not used in the manufacturing or processing of other non-grade A products. You further state that it has been the policy of the Board of Health for many years not to permit ungraded products to come in contact with grade A equipment.

You ask our opinion as to the legality of manufacturing a non-grade A butter cream to be sold only outside the City of Chicago, the product being processed with the same equipment used in processing grade A products. The product will not bear a grade A label. You also ask our opinion as to the power of the Board of Health to prohibit such processing by rule or resolution.

Sections 154-8 and 154-14 referred to in your letter do not expressly prohibit the operation mentioned and we find no express rule or regulation of the Board of Health barring such operation where the product is to be sold outside Chicago and is not labelled grade A.

The next question presented for determination is whether the Board of Health has the power to pass a rule or regulation to prohibit the manufacture of grade A and ungraded or uninspected milk and milk products with the same equipment.

The legislature has delegated to the City Council of the City of Chicago among other powers, the following powers provided in chapter 24, Ill. Rev. Stats. 1951:

> "Par. 23-81. To do all acts and make all regulations, which may be necessary or expedient for the promotion of health or the suppression of disease.
>
> Par. 23-82. To provide for and maintain a Board of Health, consisting of more than one person, and to prescribe its powers and duties * * *."

In the case of *Dean Milk Company* v. *City of Chicago*, 385 Ill. 565, 73, the Supreme Court said:

> "Power and authority for the regulation of the sale of milk was clearly given to the City Council * * *."

Section 220 of chapter 56½, Ill. Rev. Stats., 1951, with reference to the powers of cities, villages and towns in the regulation of milk and milk products provides:

> "Nothing in this Act shall impair or abridge the power of any county, city, village or incorporated town to regulate the production, handling, storage, distribution, sale or delivery of milk or milk products, provided the minimum requirements under this Act are observed."

Clearly from the above provision of the statute, municipal milk regulation may be more exacting than State regulations.

Under the power and authority vested in it by the legislature, the City Council enacted chapter 154 of the Municipal Code of Chicago sometimes called the Milk Code vesting its administration in the Board of Health and the power of the Board of Health is limited by the provisions of the Milk Code.

The rule or regulation which you seek to adopt prohibiting the processing or manufacture of grade A milk or milk products using the same equipment would have the effect of law and would be enforceable by the revocation of permits or by other appropriate sanctions. Such a rule or regulation if adopted by the Board of Health would be subject to legal attack upon the ground that the adoption of such a rule or regulation by the Board of Health was an exercise of a legislative power not delegated to it or possessed by it.

In passing upon a similar question, in our opinion to Dr. Bundesen dated February 27, 1940, Opinions of the Corporation Counsel and Assistants, volume XXI, page 26, No. 10206, we said:

> "In our opinion these regulations, if adopted as regulations of the Board of Health might be vulnerable to attack upon the ground that their adoption was the exercise of a legislative power not delegated, or improperly delegated, to the Board of Health. We believe, however, that the substance of the regulations may properly be adopted in the form of an ordinance by the City Council * * *."

It is our opinion such a rule or regulation as you refer to in your letter, if adopted by the Board of Health might be vulnerable to attack upon the ground that its adoption was the exercise of a legislative power not delegated, or improperly delegated, to the Board of Health. However, such rule or regulation may properly be adopted in the form of an ordinance by the City Council and if you desire we shall assist you in putting such rule or regulation in proper form for enactment by the City Council.

FOOD VENDING LICENSE FOR GUM MACHINES

(No. 11648—City Collector—C. P. H.—February 9, 1953.)

We have your letter of January 29, 1953 setting forth a copy of a communication you received under date of January 28, 1953 from Lions International, 332 S. Michigan Avenue, Chicago. It appears that the Higgins-Norwood Lions Club located in the City of Chicago contemplates placing several coin operated gum vending machines in stores throughout the city. It is claimed that all profits derived from the operation of these machines will be used solely for charitable purposes. You request our opinion as to whether or not the Higgins-Norwood Lions Club is required to obtain an automatic food vending machine license in order to operate these machines in the city.

Under section 130-32.2 the term "food" is defined to mean any cooked or uncooked article of food, drink, condiment, or confection used for or intended to be used for human consumption. Under the same section the term "automatic food vending machine" means any mechanical container or device, used for the sale of any article of food, the operation of which is governed or controlled by the deposit of a coin or token. Under these definitions it is clear that the coin operated gum vending machines under consideration here are automatic food vending machines.

Section 130-32.3 provides that it shall be unlawful for any person to engage in the business of installing, keeping or maintaining automatic food vending machines within the city without first having obtained a license so to do. The word person as used in this latter section is defined under section 1-9 of the code to mean any natural individual, firm, trust, partnership, association or corporation.

Section 130-32.3 which requires that any person engaged in the business of operating or maintaining automatic food vending machines shall first obtain a license does not expressly contain any exemption. In the absence of an expressed exemption, all persons engaged in this business are required to obtain a license. The fact that the Higgins-Norwood Lions Club will use the profits from the operation of these machines for charitable purposes does not exempt it from obtaining a license.

It is therefore our opinion that it would be unlawful for the Higgins-Norwood Lions Club to engage in the business of operating and maintaining in the City of Chicago the gum vending machines described in your communication without first obtaining an automatic food vending machine license as required by section 130-32.3 of the Code.

FOOD DISPENSER'S LICENSE FOR COLLEGE CAFETERIA

(No. 11649—City Collector—R. G. S.—February 10, 1953.)

We have your letter of January 20, 1953, requesting our opinion as to whether or not the North Park College which maintains a dining hall and cafeteria serving food to its school family only and making a charge therefor, is required to obtain a food dispenser's license. You also request our opinion as to the basis on which the license fee should be fixed if a license is required by this institution.

Section 3018 of the Revised Chicago Code of 1931 defined the term "food dispenser" as any person, firm or corporation that keeps for sale, sells and serves to the general public, for consumption on the premises, any article of food or drink for human consumption. By Section 1-1 of the Municipal Code of Chicago, adopted by the city council on August 30, 1939, the said Code completely superseded the Revised Chicago Code of 1931. Section 130-15 of the Municipal Code of Chicago defines the term "food dispenser" as any person that keeps for sale and sells, for consumption on the premises, any article of food or drink for human consumption. Section 1-9 defines the word "person" as any natural individual, firm, trust, partnership, association, or corporation.

From an examination of these two definitions of the term "food dispenser" it is clear that the city council, by eliminating all reference to the general public in Section 130-15, manifestly intended to broaden the scope of the definition to include all food establishments that keep for sale and sell for consumption on the premises any article of food or drink for human consumption, regardless of whether or not such establishments sell and serve food to the general public or to a particular class or classes of persons. The food dispensers' ordinance was not designed to regulate an occupation as such but the places where food is dispensed. The purpose of the ordinance is to promote health and suppress disease by guarding against deleterious foods. It tends to protect the public from the hazards of unsanitary places for dispensing foods and drinks. *City of Chicago* v. *R. & X. Restaurant*, 369 Ill. 65 (1938).

In an opinion addressed to the City Collector dated January 11, 1949 we held that the Young Women's Christian Association, located at 105 S. Ashland Boulevard, which sells and serves food only to young women living in the residence located at this address, was required to obtain a food dispenser's license. In another opinion to the City Collector, dated April 19, 1948, we held that a manufacturing concern operating cafeterias within the confines of its plant and serving employees of the plant exclusively was required to obtain a food dispenser's license (Opinions of the Corporation Counsel, Vol. XXII, p. 237).

In the case of *South Shore Country Club* v. *The People*, 228 Ill. 75 **(1907) the court held that a social club, incorporated or unincorporated,**

open only to members and their guests and not to the general public, which dispenses intoxicating liquor to members, even though no profit is made, is within the meaning of the Dram-Shop Act, notwithstanding the club is organized in good faith for social purposes, and not as a mere device to evade the statute requiring a Dram-Shop license for the sale of alcoholic liquor. To the same effect is the case of *The People* v. *Law and Order Club*, 203 Ill. 127 (1903). Furthermore, we have repeatedly held that private clubs that sell alcoholic liquor to members only must obtain retail liquor dealers' licenses (Opinions of the Corporation Counsel, Vol. XXII, p. 239; Vol. XVIII, p. 509).

The City of St. Louis, Missouri has an ordinance making it unlawful to operate a restaurant in the City of St. Louis without first obtaining a permit. The ordinance defines restaurant to mean any eating or drinking establishment where food is offered for sale and eaten at such place. The Health Commissioner of the City of St. Louis sought a declaratory judgment as to the application of the above ordinance to school lunchrooms operated by the Board of Education of the City of St. Louis. The court said in deciding this question in *Bredeck* v. *Board of Education of St. Louis*, 213 S.W. 2d 889 (Mo.) at page 893:

> "It must be accepted that the police powers of the city generally extend to all within its boundaries and unless an express statutory exception is extended to other state agents or agencies within it, they are subject to the ordinances of the city; citing *Kansas City* v. *School District of Kansas City*, 201 S.W. 2d 930 (Mo.). *State ex rel. Andrain County* v. *City of Mexico*, 197 S.W. 2d 301 (Mo.); *Kansas City* v. *Fee*, 180 S.W. 537 (Mo. App.)."

In this case the court also said:

> "No contention is raised that the requirements of the ordinance are unreasonable, so it is obvious that if the school restaurants equal or exceed these sanitary standards no inconvenience can be suffered by the board and its employees because of such inspection, and if the restaurants do not meet the required provisions the board and its employees should welcome the assistance of the Health Commissioner in bringing school lunchrooms up to the standards required of commerical restaurants. Under the ruling in *Kansas City* v. *School District of Kansas City*, above cited, the restaurants so operated come under the ordinance and any legislative intent to the contrary finds no support in the words of the statutes considered."

Our opinion, therefore, is that the North Park College may not lawfully maintain a dining hall and cafeteria which serves food to its school family with out first procuring a food dispenser's license.

In answer to your second question as to the basis upon which a license fee shall be determined Section 130-18 of the Municipal Code provides in part as follows:

> 130-18. * * * "Where the general public is not served on the licensed premises, then the annual license fee shall be graded upon the basis of the number of persons engaged in the plant or establishment wherein the food dispenser's establishment is maintained as follows:
>
> | | |
> |---|---|
> | 1 to 100 persons engaged | $ 10.00 |
> | 101 to 300 persons engaged | 25.00 |
> | 301 to 500 persons engaged | 40.00 |
> | 501 to 750 persons engaged | 65.00 |
> | 751 to 1000 persons engaged | 100.00 |
> | 1001 to 1500 persons engaged | 125.00 |
> | 1501 to 2000 persons engaged | 150.00 |
> | 2001 to 2500 persons engaged | 175.00 |
> | 2501 to 3000 persons engaged | 200.00 |
> | 3001 and over persons enagaged | 250.00" |

We are of the opinion that if the dining hall and cafeteria in question are open to the school family use only, and not to the general public the license fee may be determined according to the provisions of Section 130-18 herein above quoted.

LABELLING MILK

(No. 11662—President, Board of Health—M. I. W.—March 13, 1953.)

We have your letter of February 19, in which you state that Chicago milk plants located outside the city which hold board of health milk plant permits for the distribution of pasteurized grade A milk and products in Chicago, also distribute pasteurized grade A milk and milk products, pasteurized in these milk plants to cities and towns located in Illinois and Indiana which do not limit the time that milk, cream and skimmed milk shall be sold.

You quote section 16 of Chapter 154 of the Municipal Code requiring that all pasteurized milk, cream and skimmed milk must be sold not later than the day beginning twenty-five hours after the day of pasteurization and that such maximum time limit shall be designated on the label. You also cite a board of health resolution dated August 8, 1940, which provides as follows:

> "All caps and labels on cans, bottles and other containers of pasteurized milk, cream and skimmed milk shall include the words 'before midnight' after the words 'to be sold.' "

You request our opinion on the following questions:

> "1. Can the Board of Health legally require that all pasteurized grade A milk, cream and skimmed milk pasteurized in milk plants, holding a Board of Health Permit be labelled in accordance with the above requirements, regardless of where it is to be sold?
>
> "2. Can the Board of Health legally permit pasteurized grade A milk, cream or skimmed milk, pasteurized in a milk plant holding a Board of Health permit to label such milk or milk products with the day beginning 49 hours or more after the day of pasteurization, if the pasteurized grade A milk, cream and skimmed milk is to be sold outside of Chicago?
>
> "3. Can the Board of Health legally prohibit the time limit of sale from being designated on pasteurized grade A milk, cream and skimmed milk, pasteurized in milk plants holding a Board of Health Permit, if the pasteurized grade A milk is to be sold outside of Chicago?"

The power of the city to regulate the sale and distribution of milk within its limits is well settled. *Dean Milk Co.* v. *City of Waukegan*, 403 Ill. 597; (1947) *Higgins* v. *City of Galesburg*, 401 Ill. 87; (1948) *Dean Milk Co.* v. *City of Chicago*, 835 Ill. 565; (1944) and *Koy* v. *City of Chicago*, 263 Ill. 122. (1914) This power is derived from the Cities and Villages Act, Ill. Rev. Stat. 1951 chap. 24, secs. 23-1, 23-63, 23-64, 23-81, and 23-105. These sections granting power to regulate the sale of beverages and food, to inspect food, and to promote health and suppress disease contain neither an express, or implied grant of power to extend such authority beyond the corporate limits.

In the absence of such grant of extra-territorial power by the legislature, no such power exists. *City of Rockford* v. *Hey*, 366 Ill. 533; (1937) 55 A. L. R. 1183; *City of Chicago* v. *Brent*, 356 Ill. 40. (1934).

In previous opinions to the board of health we have held that your board has no jurisdiction over milk or milk products not sold or intended to be sold in the city of Chicago. 20 Op. Corp. Coun. 31 (No. 9950), February 1, 1939; 22 Ops. Corp. Coun. 92 (No. 10983) August 1, 1947.

It is our opinion that the board of health has no authority to enforce the provisions of section 154-16 of the Municipal Code and the board's resolution quoted above as to the labelling of milk where such milk is to be sold outside Chicago.

The answers to your questions are therefore as follows:

1. The board cannot require that all pasteurized grade A milk, cream, and skimmed milk pasteurized in milk plants holding a board of health permit be labelled in accordance with the requirements of section 154-16 and the board's resolution regardless of where it is to be sold. It has no authority to enforce these requirements as to milk to be sold outside the city.

2. The board can legally permit such plants to label milk with the day beginning 49 hours or more after the day of pasteurization, if such milk is to be sold outside Chicago.

3. The board cannot prohibit the designation of a time limit of sale on milk which is to be sold outside Chicago.

SERVING MILK FROM CONTAINER

(No. 11677—President, Board of Health—M. I. W.—April 8, 1953.)

We have your letter of March 5, in which you state that various county, state and federal institutions located in the City of Chicago serve milk and milk products to patients from quart containers.

You quote a resolution adopted as part of the rules and regulations of the board of health at a board of health meeting on November 12, 1935, which reads in part as follows:

> "Be it resolved that all milk and milk products shall be sold, served, or dispensed to the final consumer only in unopened original containers as received from the distributor; and no fractional portion or part of any original package or container shall be served or dispensed for consumption, except for manufacturing purposes."

You point to the provisions of Ill. Rev. Stat., Chap. 56½, sec. 122, which permits hospitals and institutions to serve pasteurized milk from quart containers packaged at a pasteurization plant, a practice not approved under your resolution, and you request our opinion as to whether or not institutions located in the City of Chicago and operated by county, state and federal agencies are subject to the requirements of the above-mentioned board of health resolution.

We shall first consider the question as it relates to county and state institutions. We have had occasion to explore thoroughly the matter of the city's regulatory power over county and state hospitals and institutions. In an opinion to the president of the board of health rendered May 20,

1938, we held that the County Hospital and the Illinois Research Hospital located within the City are subject to ordinances of the City enacted under the police power and must comply therewith. 20 Op. Corp. Coun. 111, No. 9831.

That opinion followed the decision of the Illinois Supreme Court in the case of *County of Cook* v. *City of Chicago*, 311 Ill. 234 (1924), in which the county sought to enjoin the city from enforcing its fire and building ordinances in connection with the construction of the county jail. In that case the court said:

> "Counties are quasi public municipal corporations created for the purpose of convenient local government and exist only for public purposes connected with the administration of the State government . . .
>
> "The powers granted to the counties under the general law do not include the police power. That power is granted to cities and villages . . .
>
> "It is urged that the county is an arm of the state to which there has been committed the control of the county buildings, and that it is not, therefore, subject to the police power of the city. While the county is an agency of the State it is likewise a creature of the State vested with only the powers conferred on it by the State. It is not correct, therefore, to say that the county is part of the State in the exercise of police power.
>
> "We are of the opinion that the police power delegated to the city must be construed as between county and city, as a delegation of a power to the latter which the former is expected to observe."

The only distinguishing feature between that case and the problem you describe is that instead of dealing with building requirements we are are concerned with milk in which connection reference is made to the state statute. Since the legislature is the ultimate source of power for both city and county, any statutory provision will be of a controlling importance. The statute referred to above is part of the act regulating pasteurized milk and milk products and section 122 of Chapter 56½, contains a provision similar to that enacted by the board of health resolution in that it prohibits the selling or serving of milk except in its original container. That section contains an exemption of hospitals and institutions from the requirement of this provision.

It is important to note that the exemption is not confined to *county* or *state* hospitals but is granted to *all* such institutions.

Reading the same act as a whole, however, we come to section 133, which reads:

> "*Nothing in this Act shall impair or abridge the power of any city*, village or incorporated town to regulate the handling, processing, labelling, sale or distribution of pasteurized milk and pasteurized milk products, provided that such regulation does not permit any person to violate any of the provisions of this Act." (emphasis added)

This language is clear and beyond the necessity of construction. *Dean Milk Co.* v. *City of Chicago*, 385 Ill. 565, (1944). The *Dean* case has made it clear that the city is free to enact more vigorous requirements in the protection of its milk supply than the state legislature may have chosen to fix as its minimum standard.

We are, therefore, of the opinion that institutions located in the city and operated by the state and county are subject to the requirements of the resolution in question.

We come now to the problem of federal hospitals. It would be unsound to attempt to draw any definitive conclusions that would apply to all federal institutions. Recent decisions have thrown some question on earlier assumptions that seemed to suggest that all federal property enjoyed an almost automatic and complete exemption from local regulation. That assumption was re-examined in a thorough opinion of this office dated March 1, 1943. On the basis of that opinion, we would recommend that the question you raise be answered in terms of specific institutions rather than in any generic fashion.

In a telephone conversation with a member of your staff, one such institution was named; the Marine Hospital operated by the United States Public Health Service.

In 1867 the Illinois General Assembly passed an Act to cede jurisdiction to the United States over certain land in Cook County, now within the corporate limits of Chicago purchased by the United States for the purpose of erecting thereon a marine hospital. Section 1 of that Act included the following language:

> ". . . exclusive jurisdiction and legislation are hereby ceded to the said United States over said real estate . . ." (Laws of 1867, p. 175).

The only right the State of Illinois retained for itself (and thereby for all its political subdivisions and instrumentalities) was the right to execute all civil and criminal processes.

Into the void thus created, Congress has stepped in and given the Surgeon General power and authority to "control, manage and operate all institutions, hospitals and stations of the (United States Public Health) Service and provide for the care, treatment, and hospitalization of patients . . ." Title 42, Sec. 248, U. S. C. A.

We have here a situation where the state has withdrawn its authority and the federal government has in a proper exercise of its functions chosen to act. In the case of *Ohio* v. *Thomas,* 173 U. S. 276, (1898), the United States Supreme Court had before it a situation where the dairy commissioner of the State of Ohio sought to enforce a state statute regulating the use of oleomargarine against the governor of a soldier's home. The state had ceded jurisdiction over the land which Congress had in turn ceded back retaining only the powers and rights it had conferred upon the federal officials charged with administration of the home. In holding that the state officials were without authority to punish non-compliance with the statute, the court said:

> "Whatever jurisdiction the State may have over the place or ground where the institution is located, it can have none to interfere with the provision made by Congress for furnishing food to the inmates of the home, nor has it power to prohibit or regulate the furnishing of any article of food which is approved by the officers of the home, by the board of managers and by Congress. Under such circumstances the police power of the State has no application."

The same elements present in the *Ohio* case can readily be seen in the case of the Marine Hospital, which is by Act of Congrss under the "control, management and operation" of federal officials. We are, therefore, of the opinion that the board of health is without power to require that institution to observe the board's resolutions pertaining to milk served to patients.

We should like to repeat that other elements may be present in the cases of institutions operated under other federal authority that could result in an opposite opinion. We are reserving such opinions until we are presented with whatever other situations you may now be concerned with or which may arise from time to time.

FOOD PEDDLERS

(No. 11681—City Collector—E. R. H.—April 15, 1953.)

We have your letter of April 8, 1953, with reference to an opinion rendered by this office under date of October 31, 1952*, to the President of the Board of Health wherein we stated that persons licensed as peddlers by the City of Chicago cannot lawfully sell red hots, hot tamales and hamburgers from fixed locations.

You state that since this opinion was rendered you have discontinued issuing licenses to persons to peddle any food whatsoever, including ice cream and candy. You request our opinion as to whether or not you may issue peddler licenses to persons to sell good humors, ice cream, ices, candy, cheese, sausage, macaroni, olive and cooking oils.

Under the provisions of Section 160-1 of the Municipal Code of Chicago, the word "peddler" is defined to mean any individual who, going from place to place shall sell, offer for sale, sell and deliver, barter, or exchange any goods, wares, merchandise, wood, oil, fish, fruits, vegetables, or country produce from a vehicle or otherwise. Section 160-3 provides that it shall be unlawful for any person to engage in the business of peddling without a license so to do.

In an opinion addressed to the Superintendent of the Bureau of License under date of May 29, 1940 (Opinions of the Corporation Counsel, Volume 21, page 156, No. 10283) with reference to the sale of products of the Chicago Good Humor Company, we stated:

> "Whenever any of the company's employees or agents engage in the business of peddling the company's products, going from place to place selling, offering for sale or selling and delivering ice cream from a vehicle or otherwise, each individual so operating would, in our opinion, be required to be licensed under the City's peddlers' license ordinance, chapter 160 of the Municipal Code of Chicago."

In another opinion dated March 25, 1936 (Opinions of the Corporation Counsel, Volume 19, page 171, No. 9103), we stated that if a concern wishes to peddle its food products by means of its trucks traveling upon the highways, it would be subject to the peddlers' license ordinance.

Iin view of the provisions of Section 160-1 of the Code and these opinions referred to above, it is our opinion that you may properly issue peddler's licenses to persons to peddle good humors, ice cream, ices, candy, cheese, sausage, macaroni, olive and cooking oils provided that such persons sell such products from vehicles as peddlers and not from fixed locations.

WHOLESALE FOOD DEALERS

(No. 11721—President, Board of Health—M. I. W.—July 24, 1953.)

We have your letter of May 26, 1953 requesting our opinion as to what constitutes a wholesale food dealer and to what extent a retail food puryeyor may engage in wholesale business operating with a retail license. You state that your department has interpreted the various applicable sections of the Municipal Code to mean that if a retail market also sells food for wholesale that firm would also be required to secure a wholesale license even though he may already have a retail license.

* Opinion No. 11606, page 330.

Section 130-10 of the Municipal Code defines "food purveyors" as follows:

> "The term 'food purveyor' is hereby defined as any person operating a *retail* food establishment that keeps for sale, sells or offers for sale *at retail*, or is in the business of delivering to consumers, any cooked or uncooked meats, agricultural products, drinks, confections, condiments, or any other materials or articles used as food for human consumption * * *" (Emphasis added).

Section 130-11 makes it unlawful to engage in the business of food purveyor, as defined above, without first obtaining a license "so to do."

Section 130-34 requires a license to engage in the business of a *wholesale* food establishment which is defined in Section 130-33 and reads in part as follows:

> "The term '*wholesale* food establishment' is hereby defined to mean any building, room, stand, enclosure, premises, place or establishment used for the preparation, manufacture, canning, bottling, packing, distribution, selling or offering or keeping for sale *at wholesale*, any article of food, confection, condiment, or drink used or intended for human consumption, or any such article which is an ingredient of, used for, mixed with, or which enters into the composition of any such food, confection, condiment, or drink; provided, however, that slaughtering, rendering, or packing establishments, wholesale bakers, manufacturing confectioners, wholesale milk dealers, and other food establishments specifically defined and licensed by this code are not included in such definition and are exempt from the provisions of this chapter * * *"
>
> "The term 'wholesale' is hereby defined to mean the making of sales to the wholesale and retail trade, including such sales by jobbers, manufacturers' agents, and itinerant vendors, and shall also include *sales in quantities or on a large scale* to hotels, restaurants, institutions, and manufacturers, and the supplying of branch or chain establishments from a central depot or store." (Emphasis added.)

From the foregoing it is our opinion that the city council intended to require a license for engaging in the retail food business and for engaging in the wholesale food business and where it is found that a person or firm is engaged in both types of businesses a license must be secured for each.

It is at this point that you describe a difference in interpretation between your department and Mr. Charles Bromann, secretary of the Associated Food Dealers of Greater Chicago who you report as regarding the above sections to mean that if a firm has a retail license, it would not also be required to procure a wholesale license if it sold its products to restaurants, taverns, drug stores with lunch counters or other types of eating establishments since such sales are not made "in quantities" or "on a large scale."

We are of the opinion that under present ordinances your department is correct in its interpretation which regards these sections as meaning that a retail market which also sells food for wholesale must procure a wholesale license in addition to a retail license. However, not all sales for resale, constitute engaging in business as a wholesaler. The ordinance itself, as quoted above defines "wholesale." The definition is not framed in terms of mere resale as constituting wholesale activity. It speaks rather of resale "in quantities or on a large scale."

The obvious purpose of this definition is to exempt from licensing requirements as a wholesaler, those retail dealers who in the course of

their retail business may occasionally and incidentally sell to food dispensing establishments, not in quantities and on a small scale. Once such sales are made "in quantities or on a large scale" the establishment is engaged in the wholesale business for which a license is necessary.

The question as to when an establishment passes the point of "small scale" sales to "large scale" sales is one that can best be determined as each individual case arises in terms of the specific facts presented. We feel it would be inappropriate to attempt at this time to draw a precise line which could be used as an unvarying formula. The use of such formulae in problems of this nature is not novel. A prime example may be found in Ceiling Price Regulation 25, Revised, of the Office of Price Stabilization, Section 20, 21 and 42, forwarded to us as an illustration by Mr. Bromann. The test laid down in that regulation which is concerned with prices of beef is stated in terms of a given percentage of dollar volume of meat sales. The test fixed by the city council is not that precise. The establishment of a more precise test, if it is felt desirable is a matter for the city council.

HOT DOG PEDDLERS

(No. 11722—President, Board of Health—M. I. W.—July 31, 1953.)

In your letter of June 23, you inquire as to whether the sale of red hots, hamburgers, hot tamales, etc., by vendors from vehicles or from devices carried by peddlers moving from place to place on the city streets is illegal for the reason that such items are not embraced in the definition of a peddler found in section 160-1 of the Municipal Code, or whether the sale of such products under a peddler's license becomes illegal only when the peddler establishes himself at a fixed location.

You refer to two opinions, one addressed to you on October 31, 1952* in which we held that:

> ". . . a peddler's license does not legally authorize the holder thereof to sell such food items as red hots, hot tomales and hamburgers; that such food items are not embraced in the words 'Country produce' contained in the definition of 'peddler' in section 160-1 above and those vendors referred to in your letter, who establish themselves at a fixed location or stand, or vendors who sell such items at retail from an automobile or other vehicle which stands for a length of time greater than is necessary to complete a peddler's transaction come within the meaning of the term 'food dispenser' and must be licensed as such."

In the second opinion you quote, dated April 15, 1953** and addressed to the Hon. William T. Pendergast, City Collector, it was stated in part:

> ". . . In view of the provisions of section 160-1 of the Code and these opinions referred to above, it is our opinion that you may properly issue peddler's licenses to peddle good humors, ice cream, ices, candy, cheese, sausage, macaroni, olive and cooking oils provided that such persons sell such products from vehicles as peddlers and not from fixed locations."

The questions which have arisen are based on the interpretation of section 160-1 defining "peddler" which reads as follows:

* Opinion No. 11606, page 330.

** Opinion No. 11681, page 341.

"The word 'peddler' is hereby defined to mean any individual who going from place to place shall sell, offer for sale, sell and deliver, barter or exchange and *goods, wares, merchandise, wood, oil, fish, fruits, vegetables or country produce* from a vehicle or otherwise." (Emphasis added.)

We shall dispose at the outset of any question as to sale of any products of any nature whatsoever, under a peddler's license, from a fixed location. An essential element of a peddler's activity as generally defined by authorities (9 McQuillan on Municipal Corporations, 336, 3rd ed.), and as specifically defined in the ordinance is "going from place to place." One who operates from a fixed location is not a peddler and a license to engage in the business of a peddler does not include any right to operate from a fixed location. In the case of the sale of red hots, hamburgers, hot tamales, etc., from a fixed site, the business is that of a "food dispenser" and must be licensed as such. 18 Op. Corp. Coun. 521 (No. 8105) As to this point we are thus reaffirming both opinions you quote from.

We come now to the more difficult question as to what kinds of products are included in the phrase "goods, vegetables or country produce." In view of the difference of views, we shall re-examine this question in detail.

The opinion of October 31, 1952 said that red hots, hot tamales, and hamburgers did not fall within the ordinary meaning of "goods, wares and merchandise" or of the other items enumerated including "country produce."

Our re-examination of the question has led us to the conclusion that the phrase "goods, wares and merchandise" is unduly limited if held to exclude red hots, hot tamales, etc.

In the case of *Russell* v. *Central Commercial Company*, 33 Ariz. 349, 264 P. 1081, the court held that groceries and meat furnished to feed miners boarding in a mining company's boarding house on mining property were lienable under a state statute giving a lien on a mine for "merchandise of any kind designed or used in or upon any mine or mining claim" since "merchandise" is a very broad word, which is defined as commercial commodity or commodities in general.

In *Pittsburg* v. *Kalchtahaler*, 114 Pa. 547, 7A, 921, the court held "merchandise" as used in an act by the Pennsylvania legislative authorizing the city of Pittsburg to levy an annual tax on goods, wares, and merchandise, and on all other articles of trade and commerce sold in the city, should be construed to include butchers' meat sold by one who slaughtered his own cattle and sold the meat in the city market.

In tracing the history of the use of the term "merchandise" in the case of *Pussaic Mfg. Co.* v. *Hoffman*, N. Y. 3 Daly, 495, the court cited the Glossographia Anglicanea Nova as saying that the word came into use as a term to designate the goods and wares exposed to sale in fairs and markets.

In Illinois the Supreme Court has defined "merchandise" as anything movable, customarily bought and sold for profit. *H. H. Kohlsaat and Co.* v. *O'Connell*, 255 Ill. 271. This definition is broad enough to include the products we are considering.

There are cases which have excluded food from the term merchandise but those cases consist of situations generally under the Bulk Sales Act, where in reaching the assets of a debtor, or one on whose "merchandise" a lien is held, the courts have excluded from attachment those goods required for food and support of the debtor. The situation here and the purposes of the licensing ordinance are thus not comparable.

We next move to an examination of the intent of the City Council in enacting this ordinance as a guide to the interpretation the phrase should be given in the situation before us. Authority to pass such an ordinance flows from the broad grant in the Cities and Villages Act:

> "To license, tax, regulate, or prohibit hawkers, peddlers, pawnbrokers, itinerant merchants, transient vendors of merchandise . . ." Ill. Rev. Stat. 1951, Chap. 24, sec. 23-54.

The ordinance we are concerned with in using the phrase "goods, wares and merchandise" appears to have intended a comprehensive coverage of all sorts of peddling on the streets in order to regulate this activity. If we were to adopt a construction which limits the scope of articles covered by the ordinance, we do not have a prohibition of sale of such articles but have merely excluded such articles from licensing requirements.

By way of illustration, if it is made unlawful to be engaged as a peddler without a license and a peddler is defined as one who peddles articles A, B, C, and D, one who peddles article E is not a peddler, and therefore, does not need a license. He is not prohibited from peddling E by such an ordinance. He is only prohibited from selling A, B, C, and D without a license. Unless there is some other prohibition of the sale of E, he is free to sell E without any license or regulation.

E in the above situation represents red hots, hot tamales, etc. We do not believe that the ordinance intended to exclude such items from a definition which seems designed to broadly cover an infinite variety of items. To read the definition as excluding such products does not prohibit the sale of these items but leaves them free unless elsewhere prohibited from the licensing requirement and regulation. We cannot believe the City Council intended such a result.

We are therefore of the opinion that the proper interpretation of section 160-1 includes the sale of red hots, hot tamales, hamburgers, etc. for which a peddler's license may be issued and which may be sold under such license at other than a fixed location.

If it is felt that there is a sufficient public health reason for the prohibition of the sale in this fashion of any or all of these or other items of food, such prohibition should be enacted into ordinance by the City Council. You might also wish to consider amendment of the ordinance creating a specific category of itinerant food dispensers (retail) in order to insure regulation by the board of health through control over licensing.

GRADE "A" MILK REGULATIONS

(No. 11728—President, Board of Health—M. I. W.—August 6, 1953.)

We have your letter of July 23, in which you request our opinion as to the legality of a resolution designed to give the board of health tighter control of non-grade A milk and milk products sold for manufacturing purposes and which reads as follows:

> "Whereas, it has come to the attention of the Board of Health that none-grade A cream is being sold in the City of Chicago, supposedly for manufacturing purposes only; and

Whereas, investigation of deliveries of such cream disclosed that some was being used for purposes other than manufacturing, namely, as whipping cream; and

Whereas, for the protection of the public health, it is necessary that such products and the distributors thereof be subject to the Rules and Regulations of the Board of Health; and

Whereas, Chapter 154, Section 14, of the Municipal Code of Chicago reads in part as follows:

> ' . . . No milk or milk products shall be sold in the City of Chicago except grade A pasteurized milk and milk products;' therefore,

Be it resolved that any plant, hauler, or distributor holding a Chicago Board of Health Permit, shall not sell non-grade A milk or milk products in the City of Chicago for any purpose without first having obtained permission from the Board of Health. Application for permission to sell non-grade A milk or milk products in the City of Chicago shall show the name, address and permit number of the distributor, the name and address of the purchaser and the specific purpose for which such product or products is to be used."

Section 9-13 of the Municipal Code provides as follows:

"The board of health shall have power to make such rules and regulations, as it may deem necessary or advisable in relation to the sanitary condition of the city and for the prevention and suppression of disease, not inconsistant with the provisions of this code . . ."

Section 154-14 reads:

"No milk or milk products shall be sold in the city except grade A pasteurized milk and milk products and certified milk and milk products.

"Grade A pasteurized milk and milk products shall conform with the rules and regulations of the board of health for grade A pasteurized milk and milk products."

There are also to be found in chapter 154 other provisions relating to the powers and discretion of the board of health which tie in closely to that which you seek to do by this regulation.

Thus the code requires an applicant for a milk license include certain specified data on his application form together with "such further information which may be required by the board of health." (Section 154-3.) By the terms of section 154-9 "all proprietors of stores, cafes, restaurants, soda fountains, and other similar places shall furnish the board of health, upon its request, with the name of the distributor from whom their milk or milk products are obtained." The board of health is also given "the right of entrance to any dairy farm, milk plant, or vehicle, or any other place where milk or milk products are kept or stored, for the purposes of inspection or the collection and examination of samples . . ." (Section 154-8).

The purpose to be served by the proposed regulation is to effectuate the provisions of section 154-14. The new regulation does not seek to prohibit the sale of any products. The ordinance itself prohibits the sale of non-grade A milk or milk products. The regulation, therefore, does not prescribe any new permanent rule of conduct relating to the operation of the milk industry which is not already required by ordinance. The information which it is sought to secure through this regulation is directly related to the enforcement of the ordinance. It is neither arbitrary unreasonable or oppressive.

We are, therefore, of the opinion that you may properly adopt this regulation requiring any plant, hauler or distributor holding a permit to file an application for permission to sell non-grade A milk or milk products in Chicago, which application shall show the name, address and permit number of the distributor, the name and address of the purchaser and the specific purpose for which such product or products is to be used.

FOOD VENDING MACHINES

(No. 11748—President, Board of Health—M. I. W.—September 24, 1953.)

We have your letter of September 15, in which you state that Howard Roberts Inc., 3202 W. Harrison Street, have recently applied for a food vending machine operators license and that some of the machines operated by this firm do not meet the requirements set forth in the board of health regulations. You state that this company has promised to alter existing machines as soon as replacement parts can be obtained and that the company is requesting board of health approval of the issuance of the license pending the making of the corrections.

We understand that the nature of the corrections to be made on the machines of this company involves the change of the dispensing valve. We are also given to understand that other companies with machines in a similar condition are now and continue to be licensed on a renewal basis and that they have been given additional time to get the equipment necessary to bring all machines into compliance.

You request our opinion as to whether the board of health may approve this license under these conditions.

Section 130-32.4 of the Municipal Code of Chicago provides in part as follows:

> "* * * Before any license shall issue the type of vending machine intended to be operated shall be approved by the board of health, which shall also cause an inspection to be made of the premises of the applicant to determine the character and fitness of the premises from the standpoint of insuring protection of the food from improper handling, dust, flies, vermin or other contamination."

By this provision the matter of approving or disapproving the mechanism of a particular machine is left to the discretion of the board of health. There is no specific spelling out in the ordinance itself of the precise design of the machinery.

If that were so we believe the board would have no discretion whatsoever to relax the requirement established by the city council.

Here however, the machine fails to meet a test set by the board of health under authority granted to it by the city council. The board is granted discretion within the framework of safeguarding the public health of fixing the kind of equipment that it will under the discretion granted it deem acceptable. There is no one design required by ordinance. That has been done by regulation.

Section *IV* B of the Regulations Covering Approval of each type of Food and Beverage Vending Machine in Chicago adopted by the board of health reads as follows:

"The Health Department shall inspect and pass on existing equipment and may at their discretion grant permission to use such equipment subject to test for a period of one year upon the stipulation that at the end of that time these machines will be changed to meet the requirements of these regulations, as well as all other requirements of existing food ordinances."

It is our understanding that the year provided for in the above regulation has passed. What the board had power to do when it granted the above extension it has power to do today, provided, now as then, that the use of any particular equipment does not constitute a hazard to public health. This decision rests where the city council has placed it, with the board of health.

It is therefore our opinion that if the board of health does not feel that the present use of the vending machines in question constitutes a hazard to the public health, the board has discretion under section 130-32.4 of the code to authorize the issuance of a license to the operator of such machines. Such a decision, if made, should be implemented by an amendment to the regulations similar to Section *IV* B so as to insure that all persons in the same situation are treated without discrimination.

ICE CREAM ORDINANCES

(No. 11759—President, Board of Health—M. I. W.—November 2, 1953.)

We have your request of October 22, for an opinion as to whether chapter 130, Sections 1 to 9, inclusive, of the Municipal Code of Chicago, which pertains to ice-cream factories, should be made applicable to the installation of counter ice-cream freezers located in restaurants and other food establishments in Chicago.

Chapter 139-1 of the Municipal Code of Chicago defines ice-cream factories as follows:

"The term 'ice-cream factory' is hereby defined to mean any building, room, enclosure, premises, place or establishment in the city used for the purpose of manufacturing, making, or mixing ice-cream, water ices, frozen puddings or any other food product made in part from milk and cream, and frozen, for sale within the city."

The first paragraph of Section 130-31 reads as follows:

"The following regulations governing installation, maintenance and operation of counter ice-cream freezers shall be observed in all such establishments where such counter ice-cream freezers are kept.

There follows a list of regulations numbered (a) through (k), covering approval by the board of health of plans for installation, health of persons using machine, handling and storage of equipment and products used in mixing the ice-cream, etc. The ordinance thus represents a comprehensive regulation of the use of counter ice-cream freezers.

It is our opinion that the city council intended this section to govern the mixing of ice-cream in counter freezers and that the provision of chapter 139, dealing with ice-cream factories were intended to be confined in their operation to "factories" as that term is commonly understood, and not to extend to retail food establishments.

B. LIQUOR

AFFECT OF ANNEXATION ON LOCAL OPTION ORDINANCES

(No. 11119—City Council—M. H. F.—January 20, 1949.)

By an opinion handed down January 19, 1949, copy of which is forwarded herewith, the Supreme Court of Illinois has upheld the city's contention that local option ordinances adopted by municipalities later annexed to the City of Chicago, are not in force and effect at the present time by virtue of section 18 of the Annexation Act of 1889.

In the litigation plaintiffs claimed that certain territory in the Englewood district of Chicago was prohibited territory because it had been made antisaloon territory by an ordinance passed by the Town of Lake in the year 1889, before that town was annexed to the City of Chicago, and that the ordinance was still in force as its existence had been perpetuated by section 18 of the Annexation Act, which governed the annexation of the town to the city.

Section 18, subject to certain provisos, provided that when a part or the whole of an incorporated town, village, or city is annexed to another city, village or incorporated town, and prior to such annexation an ordinance was in force prohibiting the issuing of licenses to keep dramshops within the territory so annexed, or any part thereof, then such ordinance would continue in full force and effect, notwithstanding such annexation.

The Supreme Court holds that both the ordinance and section 18 were repealed by the Prohibition Act of 1921 and were not revived when said act was repealed; also that the rights of cities and villages are now subject to the state law in respect to prohibition and regulation of the sale of alcoholic beverages as contained in the Liquor Control Act of 1934, which act is a complete revision of, and intended as a substitute for, prior laws upon the same subject and repeals all existing laws upon that subject.

Had the court upheld plaintiffs' contention, not only would the area covered by the old Town of Lake ordinance have become dry territory until changed by referendum by the majority vote of the voters of the territory annexed, voting as a whole on the proposition, but the indirect effect of the decision would have resulted in reviving or continuing in force other local option ordinances of other municipalities passed prior to their annexation to the city. Such an adverse decision would have resulted in confusion in the matter of the enforcement of the Liquor Control Act of 1934.

JAM SESSIONS FOR MINORS

(No. 11120—Commissioner of Police—L. V. R.—January 25, 1949.)

We hereby acknowledge receipt of your letter, with attached report from Captain Patrick Crotty, Commanding 1st District, requesting an opinion as to the legality of the Blue Note Tavern and Restaurant, 56 W. Madison Street, permitting minors to congregate and hold "Jam Sessions" therein.

The officers report that "On each Saturday afternoon, from 4:00 P.M. to 6:00 P.M., about three hundred (300) teen-agers, or minors, of both sexes, meet in this place of business to listen to a nineteen piece orchestra. There is no admission or cover charge, although a minimum of one dollar and fifty cents ($1.50) is fixed for each patron.

"The management states that the bar is kept closed during these Jam Sessions, and only soft drinks are served these young patrons. Adults are permitted to enter during these hours and they are charged the same minimum fee of one dollar and fifty cents, but no alcoholic liquor is sold them during the session.

"No dancing is permitted at any time, nor is there space provided on the floor for dancing. None of the patrons are permitted to sit at the closed bar. They are seated at tables and served by waitresses."

Why didn't the officers ascertain for themselves whether or not, what the management stated was true? We suggest that you have an investigation made by some young high school pupils as to what actually takes place at said premises during the hours between 4 and 6 P.M.

If the facts as stated in attached report are correct or verified by supplement investigation and if these so-called "teen-agers" congregate and listen to the orchestra and in all respects behave themselves, we see no objection to it; and nowhere in the statute or code is it prohibited.

The Illinois Revised Statutes, 1947, Chapter 43, Article IV, Section 1 provides among other things as follows:

> "To prohibit any woman or minor, other than a licensee or the wife of a licensee, from drawing, pouring or mixing any alcoholic liquor as an employee of any retail licensee; and to prohibit any minor from at any time attending any bar and from drawing, pouring, or mixing any alcoholic liquor in any licensed retail premises. * * *" Chapter 43, Article VI, Section 12, Illinois Revised Statutes, 1947, provides among other things as follows:
>
> "No licensee shall sell, give or deliver alcoholic liquor to any minor * * *."

Municipal Code of Chicago, Chapter 147, paragraph 14 as follows:

> "It shall be unlawful for any licensee or any officer, associate, member, representative, agent or employee of such licensee to sell, give or deliver alcoholic liquor to any minor. It shall also be unlawful for any such person to engage or employ or permit any minor to work or to entertain, or to act as host or hostess in or upon the licensed premises where the principal business is the sale of alcoholic liquor, while such premises are open for the sale at retail of alcoholic liquor."

These premises were formerly occupied by Mr. Lipschultz known as Lipps Lower Level and whose liquor license was revoked by the Mayor on February 24, 1942 and restored on April 23, 1942 and again revoked on July 9, 1944 and restored on November 22, 1944.

"ONE OUNCE" LAW

(No. 11234—City Sealer—A. F. G.—January 12, 1950.)

In your letter of January 3, 1950 you call attention to a law passed at the last session of the General Assembly which became effective January 1, 1950. The act added sections 23 and 24 to Article VI of an Act entitled "An Act relating to alcoholic liquors" approved January 31, 1934 as amended. Section 23 of the Act is as follows:

> "No unmixed whiskey, unmixed gin or unmixed rum shall be sold or offered for sale at retail for consumption on the premises, except in a container having a minimum capacity of at least one fluid ounce and which contains at the time of sale at least one fluid ounce of the beverage being sold. The provisions of this Section shall not prohibit the sale of unmixed whiskey, unmixed gin or unmixed rum on boats or railroad cars licensed to sell liquor for consumption on the premises in containers regularly used and having a smaller fluid capacity."

You ask to be advised if your department is charged with the responsibility of enforcement of this law.

You then state:

> "It has come to our knowledge that a case is pending in the Superior Court, entitled *Eugene Baim* v. *Charles Fleck et al.*, Case No. 49 S18311, which attacks the validity of this law. If we are advised in the affirmative regarding our first inquiry, will you further advise if we should wait enforcement until this case has been disposed of, or should we enforce this law immediately."

Chapter 100 of the Municipal Code of Chicago provides for the Regulation of Weights and Measures. Section 100-30 of that chapter provides:

> "The inspector of weights shall enforce the provisions of this chapter."

Section 100-29 of that chapter provides in the last sentence of the first paragraph of that section:

> "No person shall sell or offer for sale articles of dry or liquid measurement in other than the legal type of measure required therefor."

and provides penalty for each violation of any of the provisions of this section.

The legal type of measure required by the new Act for the sale at retail of unmixed whiskey, gin or rum is a container having a minimum capacity of at least one fluid ounce and which at the time of sale contains at least one fluid ounce of the beverage being sold.

While it is no part of your duty to enforce the provisions of the Illinois Liquor Control Act, that duty by law being imposed on the mayor as Local Liquor Control Commissioner, it is your duty to enforce the provisions of the Municipal Code relating to the regulation of weights and measures. With the passage of the amendatory act it is unlawful under section 100-29 above cited to sell at retail any liquor of the kinds enumerated in the act in a container other than the type named in the act.

The case referred to as pending in the Superior Court (*Baim* v. *Fleck, et al.*) is prosecuted by a taxpayer under a statute entitled " An Act in relation to suits to restrain and enjoin the disbursement of public money

by officers of the state." (Approved June 27, 1917) Chapter 102, sections 11 to 16 inclusive Illinois Revised stats. 1949 pp. 299 and 300.) Section 1 of the Act provides:

> "A suit in equity to restrain and enjoin the disbursement of public funds by any officer or officers of the State government may be maintained either by the Attorney General or by any citizen and taxpayer of the state."

Section 4 of the Act provides that where a suit is brought by a citizen and taxpayer of the State it shall be commenced by petition for leave to file a suit in equity to restrain and enjoin the defendant or defendants from disbursing the public funds of the State. Such petition shall have attached thereto a copy of the complaint, leave to file which is petitioned for.

The court upon hearing, if the judge is satisfied there is reasonable grounds for the filing of said suit may grant the petition and order the complaint to be filed and process issued.

This case is pending before Judge John Bolton and a hearing is set for January 17, 1949.

All laws are presumptively valid. Any doubt as to the validity of an act must yield to the legal presumption in favor of its validity (*Soble* v. *Gill*, 358 Ill. 261). Under this presumption, we are of the opinion that where you find the provisions of the code being violated it is your duty to prosecute such violators notwithstanding the filing of the petition in the Superior Court.

MINORS AT SERVICE BAR

(No. 11246—A. F. G.—February 2, 1950.)

We have your letter of January 20, 1950 in which you state you have a fully licensed restaurant with tables and booths with a seating capacity for sixty-odd guests. You state you hold both a Food Dispenser and Retail Liquor license. You state also that incidental to merchandising cooked foods you have a service bar about nine feet long, without stools or other facilities for seating; that you serve milk, pop, popcorn, potatoe chips, pie, ice cream, hot dogs, hamburgers, steaks, chops, chicken, etc., and that you solicit and serve both children and adults. You then state.

> "Last night I was told by two city policemen that I could not lawfully serve children food in my restaurant, and if I persisted in so doing they would see that my license be revoked. I have no desire to violate either the letter or the the spirit of the law. Neither do I desire to refrain from selling the type of merchandise that children are lawfully entitled to buy and consume on the premises unless the proximity of liquor makes it unlawful."

You ask our opinion in the matter. You do not say whether liquor is served at the service bar or whether boys and girls are served thereat. If either one is served we think the policemen's warning was right as you would be violating not only the letter of the law but also its spirit.

Section 147-15.1 of the Municipal Code of Chicago concerning Liquor Dealers, is as follows:

"It shall be unlawful for any licensee, his manager, or any other person in charge of the licensed premises to serve any female person unless she is seated at a table removed from any bar, counter or shelf or substitute therefor, or unless she is accompanied at such bar, counter, shelf or substitute therefor by a male escort."

The foregoing section prohibits in a place licensed to sell liquor the serving of females at any counter or bar. While the serving of boys in this manner is not expressly prohibited by the said section an examination of the public policy and the spirit of the law as expressed by the city council, would indicate that the service of young boys at bars and counters is contrary to such policy.

The pubilc policy of the city council is expressed in the preamble to section 147-8 of the said code in the following language:

"Whereas, the sale of alcoholic liquors in the city of Chicago is an industry which in the interest of public policy and morals should be removed from the observation of and influence on minors insofar as the same is possible. * * *

"And whereas, enforcement of the restriction against the sale of alcoholic liquor to minors becomes most difficult and in many instances impracticable, where such sale is conducted in and about the premises of retail establishments necessarily or often frequented by minors."

We would suggest that if it has been your practice to serve boys and girls at the service bar, that such practice be discontinued and that you provide facilities for serving such children at tables removed from such bar.

COUNTY OWNED BUILDINGS

(No. 11281—City Collector—A. F. G.—April 4, 1950.)

With your letter of March 28, 1950 you attach a copy of a letter signed by Joseph A. Power, agent, on the letterhead of the office of the President, Board of County Commissioners of Cook County, Illinois, in which he states that certain enumerated premises are to be demolished for the construction of the superhighway. He requests that you do not issue any licenses, especially liquor licenses, at the given addresses in whose name licenses are already issued. He asks that you acknowledge his letter so that he may inform the Tenant's Relocation Bureau, City of Chicago, so they may proceed to have the said properties vacated.

You ask to be advised as to the action you should take in the matter.

The premises are now occupied by retail liquor dealers whose licenses expire April 30, 1950.

Mr. Power advises us that the premises in question have been acquired by condemnation, by the County of Cook and that no leases have been given to the occupants. In order to prevent loss to the licensees they have been permitted to continue to occupy the licensed premises until the expiration of the present license period.

Under the Liquor Control Act no person may have a liquor license unless he is the owner of the premises for which a license is requested, or has a lease covering the period for which a license is sought, nor can the sale of liquor be permitted in any building belonging to or under the control of the State or any political subdivision thereof.

As none of these liquor dealers can meet these statutory requirements we would advise you not to issue licenses for these premises, and advise Mr. Power of your intention.

DISTRIBUTION OF WINE SAMPLES

(No. 11321—Commissioner of Police—C. P. H.—July 27, 1950.)

We have your letter of July 14, 1950 transmitting a copy of a communication from Mr. Charles C. Flarida, Jr., who is engaged in the Market Research Business, with his offices at 420 Lexington Avenue, New York 17, New York. He requests your permission to conduct a survey in the City of Chicago for a client, a prominent wine manufacturer, to ascertain consumer opinion of the manufacturer's wine product. You ask our opinion as to whether or not it would be unlawful for him to conduct the survey in the manner described herein.

Mr. Flarida advises that his representative, Mrs. Nancy Cooley, 2225 Winnemac Avenue, Chicago, will supervise the survey. We have interviewed Mrs. Cooley to determine the method she will pursue. She explained that, according to her instructions, during the forenoon of each day of the period of the survey labels would be removed from sealed bottles containing wine. The wine then would be transferred from these bottles into thermos containers. These thermos containers would be placed in four or more automobiles that would be parked from time to time on streets in certain neighborhoods throughout the city. Two employees would be assigned to each car, one to stand on the sidewalk near the parked automobile to solicit pedestrians to participate in the survey; the other would remain in the automobile to pour wine from a thermos container into paper cups for dispensing to the persons participating.

The employee soliciting would state to a pedestrian that he has free samples of wine produced by a well known wine manufacturer, and would ask the participant to taste it and say whether he "liked" or disliked" the wine. If the pedestrian consents to test the wine, a cup of wine would be presented to him by the employee dispensing it. The opinion of each participant as to whether he "liked" the wine would then be recorded on a card. The survey would be concluded after obtaining the opinions of one thousand persons.

Sec. 19 of Article VI of the Illinois Liquor Control Act, provides as follows:

> "No person shall transport, carry, possess or have any alcoholic liquor in or upon or about any motor vehicle except in the original package and with the seal unbroken." (Ill. Rev. Stats. 1949, Chap. 43, Par. 140.)

The above quoted provisions of sec. 19 expressly prohibit the possession of alcoholic liquor in or about motor vehicles except in the original package. Sec. 2.05 of Article I of the Act, defines the term "alcoholic liquor" to mean and include the word "wine." Under sec. 2.06 of the same Article the words "original package" have been defined to mean any bottle corked, sealed and labeled by the manufacturer of alcoholic liquor to contain and to convey any alcoholic liquor.

The employees who would conduct the survey would possess wine, which is an alcoholic liquor, in and about motor vehicles. The wine would be in thermos containers and not in the original packages. It is there-

fore our opinion that, if the survey were conducted in the manner described herein, the employees would be violating the above quoted sec. 19 of Article VI and they would be subject to the penalty provisions of Sec. 1, Article X, of the Act.

MISREPRESENTATION OF AGE BY MINOR

(No. 11438—Alderman, 7th Ward—A. F. G.—October 25, 1951.)

With your letter of October 15, 1951 you sent a copy of a proposed ordinance making it unlawful for a minor to misrepresent his or her age for the purpose of purchasing or obtaining alcoholic liquor from any retail liquor licensee.

You state that you were directed by your committee to refer this draft to this department for an opinion.

All of the power municipalities possess in the matter of regulating the handling and sale of intoxicating liquors is derived from the Illinois Alcoholic Liquor Control Act. That Act does not make it an offense for a minor to purchase, or misrepresent his age for the purpose of purchasing alcoholic liquor, nor does that Act authorize municipalities to do so. While the Act penalizes licensees for the sale of liquor to minors there is no corresponding penalty on the minor for his part in the sale or attempted sale.

This policy of the State seems to be deliberate, as at the last session of the General Assembly a bill, House Bill No. 692, which would have imposed a penalty on minors for the purchasing of intoxicating liquor for their personal use, failed of passage.

The power to license, regulate or prohibit the traffic in intoxicating liquors rests in the police power of the State, and the State may delegate it to municipalities if it so desires. The only power a municipality has to regulate the sale of alcoholic beverages is that conferred upon it by the State.

Section 1 of Article IV of the Liquor Control Act, which is the section delegating power to local authorities, has two provisions with reference to minors; one authorizes local authorities to prohibit a minor, other than a licensee or the wife of a licensee from drawing, pouring or mixing any alcoholic liquor as an employee of any retail licensee; the other empowers local authorities to prohibit any minor from at any time attending any bar and from drawing, pouring or mixing any alcoholic liquor in any licensed retail premises. No express power is given to local authorities to impose a penalty on a minor for purchasing liquor or for misrepresenting his age in order to make such purchase.

It is our opinion that as the State law imposes no such penalty on minors nor has the City been given power to impose it, the proposed ordinance is beyond the power of the City to enact.

SALE OF ALCOHOLIC LIQUOR AT AIRPORT PROHIBITED

(No. 11645—Manager of Airports—C. P. H.—February 3, 1953.)

We have your letter of January 30, 1953 wherein you request our opinion as to whether or not the sale of alcoholic liquor is prohibited by law at the airports operated and maintained by the City of Chicago.

Section 11 of Article VI of the Illinois Liquor Control Law (Illinois Revised Statutes 1951, Chapter 43, Paragraph 130) provides:

> "That no alcoholic liquors shall be sold or delivered in any building belonging to or under the control of the State or any political subdivision thereof."

In an opinion addressed to the City Comptroller, under date of August 12, 1935 (Opinions of the Corporation Counsel, Volume 18, page 486), we held that under the above provisions of the act, a retail liquor dealer's license should not be issued to anyone to sell alcoholic liquor on premises within the boundaries of the Municipal Airport and if such a license had been issued it should be revoked. In another opinion addressed to the City Comptroller, under date of August 10, 1935 (Opinions of the Corporation Counsel, Volume 18, page 487), we held that the sale and delivery of alcohlic liquor is prohibited at the administration building of the Municipal Airport, as it belongs to and is under the control of the City.

In the case of *Standard Concessions, Inc.*, v. *Chicago*, Superior Court of Cook County, No. 36-S-4686, the right of the City of Chicago to deny a city retail alcoholic liquor license for premises located in the administration building of the Chicago Municipal Airport was upheld. The court there pointed out that the prohibition of the sale of alcoholic liquors in any City building applied to buildings owned by the City regardless of whether they were used for a strictly governmental or corporate purpose. (Opinions of the Corporation Counsel, Volume 18, page 487.)

In an opinion addressed to the City Comptroller, under date of August 14, 1935, (Opinions of the Corporation Counsel, Volume 18, page 487) we stated that as Rainbow Park belongs to, and is under the control of the City, a city retail liquor dealer's license should not be issued to a concessioner located within the park.

In view of the foregoing, it is our opinion that the sale of alcoholic liquor at any of the municipal airports under the jurisdiction and control of the City of Chicago is expressly prohibited by Section 11 of Article IV of the Illinois Liquor Control Law referred to above.

C. WEAPONS

TEAR GAS FOUNTAIN PENS

(No. 11139—Commissioner of Police—M. H. F.—May 4, 1949.)

Your communication of March 23, 1949 requests our opinion relative to the sale of tear gas guns in the form of fountain pens and mechanical pencils.

We understand that the devices to which you refer are in shape, size and general appearance of a large fountain pen. A powerful 38 caliber tear gas cartridge or shell is placed in the barrel of the simulated pen. To fire the cartridge the top of the pen is drawn back and as it is released a firing pin hits the shell in much the same manner as a shell is exploded in a revolver or pistol. When the trigger is pulled a cloud of powerful tear gas is projected from the device to a distance of ten to fifteen feet with a spread of five feet beyond which it continues to roll and spread more slowly. Millions of blinding and choking gas molecules are dis-

charged, which may render helpless one or more individuals at which the gun is fired. The helplessness is produced by blinding the eyes by a flow of tears accompanied with pain in the eyes, nose and throat. It is claimed, however, that while the gas will serve to rout or render easy the capture of an assailant, it will cause no permanent injury to his eyes, nose or throat. The device is advertised as a handy implement, conveniently carried in the vest pocket or a handbag, for use by bank clerks and others to rout robbers and other assailants.

Section 183-10 of the Municipal Code of Chicago is pertinent to your inquiry. It reads as follows:

> "License required. It shall be unlawful for any person to engage in the business of selling, or to sell or give away any air rifle or air gun, or any toy firearms or other toy in the nature of a firearm in which any explosive substance can be used without securing a license so to do, and no person having secured such license shall sell, or give away any such weapon to any person within the city who has not secured a permit from the commissioner of police to purchase such weapon in the manner hereinafter provided; provided, that it shall not be necessary for any person licensed to sell deadly weapons to take out an additional license for the sale of the articles mentioned herein."

Sections 183-11 to 183-18, inclusive, cover the matters of application for license, report of sales to the commissioner of police, permit to purchase, refusal of permit in certain cases, prohibition of display, and penalty for violation of the ordinance.

From the description of the device above set forth it appears that the "gun" is an article in the nature of a firearm in which an explosive substance can be used and is used. The "gun" is discharged by percussion, or firing on very much the same principle as an ordinary firearm. It should, therefore, properly be classed as a "firearm." The fact that a quantity of gas is propelled, instead of a metal projectile, does not in our opinion make the "gun" any the less a "firearm." If it cannot be said to attain the dignity of a firearm, then it should be classified as a "toy in the nature of a firearm," and under either name or description it would fall within the inhibition of the ordinance.

While we find no provision of the Municipal Code of Chicago which prohibits the sale or use of the device in question our opinion is that its sale and display within the City of Chicago is restricted and regulated under the above mentioned sections of the Municipal Code.

RECORDING SALES OF WEAPONS

(No. 11189—Commissioner of Police—C. N.—October 18, 1949.)

We have your communication of October 10, 1949 in which you embrace letter of October 7th last from McBride and McLennon, attorneys at law in re report required by Section 183-4 Municipal Code of Chicago in relation to the sale of deadly weapons.

They explain that their client, a dealer in such weapons, keeps a record of all sales "within the city," as required by section 183-5 and other records of sales made outside the city as required by state statute and federal laws.

Your inquirers point out that the last sentence of section 183-6 specifically exempts sales to be delivered outside of the city from the requirement of obtaining a permit and it is their belief that the report required under section 183-4 should be confined to sales made within the city. They state that reporting both classes of sales to the Commissioner of Police places an additional hardship upon this client and that, inasmuch as a large portion of his business consists of sales made and delivered outside the city, this requirement as to outside sales should be waived, particularly since the records of such sales appear in the daily register which is open for official inspection at all times at the client's place of business.

You ask for our opinion as to proper interpretation of the ordinance requirements.

The sections of the Code herein discussed read as follows:

> Section 183-4. Every person dealing in the aforementioned deadly weapons shall make out and deliver to the commissioner of police every day before the hour of twelve o'clock noon, a legible and correct report of every sale or gift made under authority of his license during the preceding twenty-four hours, which report shall contain the date of such sale or gift, the name of the purchaser or donee with with his or her address and age, the number, kind, description, and price of such weapon, the number of the purchaser's permit, and the purpose given by such person for the purchase of such weapon, which report shall be substantially in the following form:
>
> Number of permit.....
> Number of weapon.....
> Name of purchaser.....
> Address of purchaser.....
> Age of purchaser.....
> Kind or description of weapon .....
> For what purpose purchased.....
> Price .....
>
> Section 183-6. It shall be unlawful for any person to sell, barter, or give away to any person within the city, any deadly weapon mentioned in section 183-1, except to licensed dealers and to persons who have secured a permit for the purchase of such articles from the commissioner of police as hereinafter required. This section shall not apply to sales made of such articles which are to be delivered or furnished outside the city.

The exemption set forth in the concluding sentence of section 183-6 relates solely to the license or permit status of outside of the city purchasers, waiving the requirement that such purchasers be licensed dealers or secure permits from the commissioner of police.

The all-embracing requirement for dual reporting is shown by the text of section 183-4 which refers specifically to "every sale or gift." Had there been any intention to exempt out of city sales from such reporting, a reservation to this effect would have been included in this section or in a separate section relating to some phase of reporting sales.

These attorneys should remind their client that he is engaged in a business the nature of which requires extraordinary supervision.

After careful consideration of the text and intent of these ordinances, we are of the opinion that reporting of out of town sales as provided in section 183-4 of the Municipal Code is not waived by the exemption set forth in section 183-6.

D. GAMBLING AND LOTTERIES

"COMMISSION" BETTING ESTABLISHMENT

(No. 11262—Commissioner of Police—J. F. G.—March 7, 1950.)

Reference is made to your letter of March 2, 1950 to which is attached report from the Commanding Officer of the First District referring to the operation of a "Commission" establishment.

The report indicates that police officers investigated a cigar store owned and operated by "M." In the rear of the cigar store is a door which opens into a large room equipped with a counter, a blackboard, desks and three telephones, one listed to "B," one to "C," and one to "W & W." There is also a Western Union ticker machine and a television set in the room. The ticker machine receives and gives out results of sporting events, except racing information.

The report further indicates that "B," "C," and "W & W" are "betting commissioners." They rent the Western Union machine to enable them to furnish their patrons with the results of sporting events, such as boxing, baseball, football, hockey, basketball, etc., excepting racing information. The patrons of the place make wagers with each other on the outcome of the sporting events and the "betting commissioners" guarantee payment on the result. They accept no money on these wagers, but collect a commission from parties making wagers. The "commission" is paid for furnishing the results over the Western Union and for guaranteeing payment when a sporting event is over. This statement was made by "B," who is named as one of the "betting commissioners."

The police officers further state that they made a thorough search of the room and found no evidence that a handbook is being operated therein. They found no hard cards, no scratch sheets, no racing forms, no betting pads, or other such gambling paraphernalia and they did not find, see or hear any instrument or person dispense racing information.

Our opinion is requested as to the legality of the type of establishment described.

Section 127 of the Criminal Code (Chap. 38, Par. 325, Ill. Rev. Stat. 1949) provides:

> "325. Gaming house.) § 127. Whoever keeps a common gaming house, or in any building, booth, yard, garden, boat or float, by him or his agent used and occupied, procures or permits any persons to frequent or to come together to play for money or other valuable things, at any game, or keeps or suffers to be kept any tables or other apparatus, for the purpose of playing at any game or sport, for money or any other valuable thing, or knowingly rents any such place for such purposes, shall, upon conviction, for the first offense be fined not less than $100, and for the second offense be fined not less than $500, and be confined in the county jail not less than six months, and for the third offense shall be fined not less than $500, and be imprisoned in the penitentiary not less than two years, nor more than five years."

The Municipal Code of Chicago provides:

> "191-3. Every house, room, yard, boat, vessel, or other structure or premises kept or used for the purpose of permitting persons to

gamble for any valuable thing within the city is hereby declared to be a common nuisance.

"No person shall own, maintain, manage, or conduct, or be interested in owning, maintaining, managing, or conducting any such place.

"No person shall patronize, visit, frequent, or be connected with the management or operation, or shall act as the doorkeeper, solicitor, runner, agent, abettor, or pimp of any such house, room, yard, boat, vessel, or other structure, place, or premises."

"191-8. No person shall keep, occupy, or control any room, shed, tenement, tent, booth, building, or other structure, or any part thereof, or occupy any place anywhere within the city, with any book, instrument, or device for the purpose of taking, recording, or registering bets or wagers or of selling pools, or take, record, or register bets or wagers, or sell pools, upon the result of alleged result of any actual, supposed, alleged, or fictitious trial or test of skill, speed, or power of endurance of man or beast, or upon the result or alleged result of any actual supposed alleged, or fictitious political nomination, appointment, or election. Any person being the owner, lessee or occupant of any room, shed, tenement, tent, booth, building, or other structure, or part thereof, who shall knowingly permit the same to be used or occupied for any such purpose or shall therein keep, exhibit, or employ any device or apparatus for the purpose of taking, recording, or registering such bets or wagers, or selling such pools, or shall become the custodian or depositary for hire or reward of any money, property, or thing of value staked, wagered, or pledged upon any such result or alleged result, shall be fined not less than fifty dollars nor more than two hundred dollars for each offense.

"In prosecutions under this section, proof of the taking, recording, or registering of such bet or wager, or pool-selling, shall be *prima facie* evidence of the violation of said section, and proof shall not be required that there was any actual, supposed, alleged, or fictitious trial or test of skill, speed, or power of endurance of man or beast, or that there was any actual, supposed, alleged, or fictitious political nomination, appointment, or election to which such bet, wager, or pool-selling may appertain."

By the admission of "B," one of the so-called "betting commissioners," the room described is a common gaming house or gambling house within the meaning of the Criminal Code and the Municipal Code of Chicago above quoted, and the so-called "betting commissioners" are the keepers and procurers, or pimps of a gambling house, within the meaning of the Criminal Code and the Municipal Code of Chicago. None of the provisions from the Criminal Code or the Municipal Code quoted requires the maintenance of gambling devices or books or evidence of betting on horse races or other animal races to establish the fact that the room described is a common gaming house or gambling house.

The owner, licensee or manager of the cigar store, which has an open door leading into the gambling room, though not necessarily the keeper, by renting space notoriously used as a gambling house, or by permitting passage through the cigar store to a notorious gambling room, even if it is not rented from him, is guilty of permitting gambling in the premises in violation of the Criminal Code and the Municipal Code of Chicago. All City licenses for any business conducted in the cigar store may be revoked by Section 101-27 of the Municipal Code of Chicago if there is any connection between licensees and the so-called "commission" establishment, as herein indicated.

The owners or agents of the building in which the cigar store or gambling room are located, if they or any of them have knowledge of the

use to which the cigar store and back room are put, are also guilty of permitting gambling in the premises. Under the law the place described is a public nuisance and may be abated as such.

Persons engaged in business as agents or procurers for gambling are "pimps," within the meaning of Section 191-3 of the Municipal Code of Chicago, under any name which they may choose to glorify themselves.

LEGALITY OF SLOT MACHINE MANUFACTURE

(No. 11306—Mayor—J. J. M.—June 9, 1950.)

You have requested our opinion as to whether or not the manufacture of slot machines in the City of Chicago is illegal.

Illinois law pertaining to gambling devices, including slot machines, is contained in the Cities and Villages Act (Chapter 28, Article 23, Illinois Revised Statutes, 1949) and in the Criminal Code (Chapter 38, Illinois Revised Statutes, 1949).

Paragraph 23-57 of the Cities and Villages Act includes as one of the general powers of a municipality, the power to suppress gambling houses, lotteries, and all fraudulent devices or practices for the purpose of obtaining money or property. Pursuant to this authorization, the City of Chicago enacted Chapter 191 of the Municipal Code pertaining to gambling.

We are of the opinion that the pertinent provisions of the Municipal Code apply to devices actually used for gambling purposes and do not embrace the manufacutre or the sale of gambling paraphernalia prior to any illegal use thereof.

Under the Criminal Code, the legislature passed two acts pertaining to gambling devices. The first was the Act of 1895 (Paragraphs 341, 342 and 343, Chapter 38, Illinois Revised Statutes, 1949) making it a crime to operate, keep, own, rent, or use any clock, joker, tape or slot machine or any other device upon which money is staked or hazarded or into which money is paid or played upon chance, or upon the result of the action of which money or other valuable thing is staked, bet, hazarded, won or lost.

The second act passed by the legislature in 1919, is found in paragraphs 344 to 345 of Chapter 38, Illinois Revised Statutes, 1949. The title of this Act is "An act to protect all counties in the State of Illinois in which there are United States naval stations, and military posts of the first class from slot machines and other gambling devices."

Paragraph 344, provides:

> "That it shall be unlawful for any person, firm or corporation, as owner, agent or otherwise, to manufacture, sell, lease, or hold, or offer for sale, or lease to another any clock, joker, punchboard, tape or slot machine, or any other device upon which money is staked or hazarded * * * in any county in the State of Illinois in which there is a United States military post, or United States naval training station of the first class."

The penalities under the 1919 Act are the same as under the Act of 1895. It would be reasonable to conclude, therefore, that the legislature passed the second act in order to cure some omission in the first act; that there being no prohibition of the manufacture of slot machines in the first act, it was necessary to make such prohibition in the act of 1919 in order to protect the military installations described.

Reference to the legislative history of the Act discloses that it was introduced in the 51st General Assembly as Senate Bill No. 161, and contained a section entitled "Definition" as follows:

> "A military post, or naval station of the first class shall mean one in which there is at the time of the passing of this Act accommodation for 25,000 soldiers or apprentice seamen."

This section was deleted by the House, in which action the Senate later concurred. When the Bill was called up for passage in the Senate, as revealed by Senate Debates, 51st General Assembly, (1919, page 439), Mr. Atwood, who introduced the Bill, stated that it applied to counties where there are naval or military posts of 25,000 or more soldiers or apprentice seamen. He also stated that it did not interfere or change the gambling law, only that it prohibited the sale of gambling devices in counties where there are naval or military posts of 25,000 or more soldiers or apprentice seamen.

In the House debates (1919, page 870), Mr. Shurtleff, in calling up the Bill stated: "This is just a little measure that is to protect the Great Lakes Naval Station. It applies to only one zone around the Great Lakes Naval Station in Lake County."

We have been informed by direction of the Commandant of the Ninth Naval District Headquarters that the Office of the Judge Advocate General of the Navy has advised that the Navy Department has never defined naval stations or naval training stations by classes in the sense of "first class," "second class," etc.

The Assistant Adjutant General of the Office of the Commanding General, Headquarters Fifth Army at Chicago, has stated that "United States Military Post of the First Class" is not terminology in current usage nor is it found in any precedents on the subject. He has further stated:

> "Special Regulations 10-5-1, Department of the Army, dated 11 April 1950, uses and defines terms of classification of military installations as follows:
>
> " 'Installations are classified as Class I or Class II, depending upon command jurisdiction as follows:
>
> " 'Class I installations are under the command of the commanding general of an Army or the Military District of Washington.
>
> " 'Class II installations are under the command of the head of an Administrative or Technical Service or other Department of the Army agency. Such installations primarily perform operating functions contributing directly to the fulfillment of programs which can be effectively controlled only from one central national source and require closely coordinated national planning, programming and budgeting.'
>
> "By virtue of the above citation, Headquarters Fifth Army is classified as a Class I installation. Chicago Quartermaster Depot, being under the command jurisdiction of the Quartermaster General, is an example of a Class II installation."

It is apparent that the foregoing classification applies to military installations and not to the sub-classification of post, camp or station. It follows that there is no military designation which falls within the terms of the Act of 1919.

We are further advised that there is no military installation in Cook County having accommodations for 25,000 soldiers.

In view of the foregoing, we are of the opinion that there is no statute or ordinance making it unlawful to manufacture slot machines in the City of Chicago.

STATUS OF WIRE SERVICES

(No. 11337—Commissioner of Police—P. H. C.—September 25, 1950.)

We have your letter of July 12, 1950 in which you request our opinion on the legal status of the operation of wire services in connection with handbook operations. You specifically ask information in regard to a case in which Judge William J. Campbell participated while he was United States District Attorney.

The case which Judge Campbell instituted in the District Court of the United States for the Northern District of Illinois, Eastern Division, was *United States of America* v. *Moses L. Annenberg; Nationwide News Service, Inc.; Illinois Nationwide News Service, Inc.; James M. Ragen; Bentley Murray and Company; Charles W. Bidwill.* Indictment No. 31765. The indictment in that case sought conviction for violating Sec. 387, Title 18, U. S. C. A. and Sec. 88, Title 18, U. S. C. A. by carrying in interstate commerce, lists of prizes awarded by means of lottery schemes and conspiracy so to do. A demurrer to the indictment was sustained and the case was dismissed in the trial court. That and cases similar to it in which the results were the same are the only suits pertinent to this field of activity in which Judge Campbell was involved.

I.

AS TO THE POWER OF A PUBLIC UTILITY TO REFUSE SERVICE TO HANDBOOKS AND PUBLISHERS OF RACING INFORMATION.

There are two principal types of users of telegraph or telephone service for bookmaking purposes. One is the owner or proprietor of an unlawful establishment where bets are placed or received and the other is that type of customer who makes a business of gathering and disseminating information concerning racing and other sporting events.

Sec. 336, Chap. 38, Ill. Rev. Stats. 1949, makes bookmaking and pool selling unlawful, but our statutes contain no provision making it illegal to be in the information end of the business nor does the Criminal Code prohibit utility companies rendering service to either of these users.

However, a provision in the tariff filed March 9, 1950 by the Illinois Bell Telephone Company with the Illinois Commerce Commission provides:

> "Service furnished subject to the condition that it shall not be used for the purpose of making or accepting bets, furnishing information or for any other purpose in connection with any gambling scheme, business or device or for any similar unlawful purpose. Any subscriber whose service is to be discontinued or any applicant to whom service is to be denied under this regulation will be notified by the telephone company of his rights to a hearing by the Illinois Commerce Commission to determine whether or not such service is being used or will be used in violation of this rule."

This provision is now part of the schedule of rates applicable to customers of the telephone company.

The City Club and the American Civil Liberties Union filed petitions with the commission alleging that this provision is in violation of constitutional rights of users of the service. The commission, in an order dated August 16, 1950, found that both complainants failed to meet the burden of proving the provision unreasonable, unlawful or unconstitutional. The commission dismissed both petitions.

The Western Union Telegraph Company, by regulation contained in Illinois Commerce Commission Tariff No. 19, Schedule D-1, 1st revised, page 121, also reserves the right to discontinue service that is used contrary to federal or state laws.

Illinois courts have not determined the legal status of either of the users mentioned above; we must look to the decisions of other courts for precedents. Although the utility companies are required by statute in all of the jurisdictions (Sec. 38, Chap. 111-2/3, Smith Hurd Ill. Rev. Stats. 1949) to supply service and facilities without discrimination to all who may apply therefor, they may refuse to install or may remove equipment used for wagering and betting. *Shillitani* v. *Valentine* (1945) 58 N. Y. S. 2d 210; *Western Union Tel. Co.* v. *State* (1905) 165 Ind. 492, 76 N. W. 100; *People ex rel. Restmeyer* v. *New York Telephone Co.* (1916) 159 N. Y. S. 369; *Tracy* v. *Southern Bell* (1940) 37 F. Supp. 829; *Andrews* v. *Chesapeake & Potomac Telephone Co.* (1949) 83 F. Supp. 966.

In denying an injunction to restrain the telephone company from causing plaintiff's service to be discontinued, the court in the *Andrews* case said at page 968:

> " * * * the facilities of a public utility may not be used for criminal purposes * * * It clearly follows, therefore, that a telephone company may refuse to furnish or may discontinue service that has been furnished if the service is used for a criminal purpose, such as violation of the gambling statutes."

There is a lack of unanimity of opinion in those cases which have determined whether a telephone or telegraph company is obligated to furnish service to customers who gather and disseminate information concerning horse races. These customers are usually the owners of "scratch sheets" who claim need of the facilities of the companies in order to carry on their operations. Many recipients via telephone or telegraph apparatus of information from the publishers of these sheets are handbooks. Many cases have held that companies are required to furnish service to these distributors. *Pub.* v. *Pennsylvania Pub. U. Com.*, (1944) 349 Pa. 184, 36 Atl. 2d 777; 153 A.L.R. 470, Sec. IV (a). The legal explanation in this line of decisions is that the publishing of horse racing data is not illegal and that service cannot be refused merely because information furnished by the publishers through wire facilities may enable others receiving it to use it illegally.

In other cases, however, courts of equity have refused to enjoin the disconnection of telegraph or telephone service to agencies engaged in distributing such information. *Fogarty* v. *Southern Bell Teleph. & Teleg. Co.* (1940; D. C.) 34 F. Supp. 251; *Hamilton* v. *Western U. Teleg. Co.* (1940; D. C.) 34 F. Supp. 928; *Haggerty* v. *Southern Bell Teleph. & Teleg. Co.* (1940) 145 Fla. 51, 199 So. 570. Facilitating operations of business in violation of law, i.e., illegal betting by persons in handbooks, being against public policy or being unlawful, is the basis for these decisions. In this group of decisions there existed ample evidence that the subscribers were intricately connected with illegal bookmakers.

The court in the *Hamilton* case indicated that a utility had not only the right to terminate service rendered those publishers of racing information but that there existed a positive duty to disconnect equipment supplied those whom they knew dispensed information to handbooks. The court at page 929 said:

"The tariffs published by the defendant contained a provision preventing lessees of its wires from using its service to violate, directly or indirectly, any federal or state law. Even without such provision in the tariff the defendant would not only be authorized, it would be obligated, to discontinue service which contributed to and facilitates the operation of a business or enterprise in violation of law. Any person or company that knowingly assists in a scheme to violate the law is subject to prosecution. A court of equity will not restrain the discontinuance of service by a utility if the character of the use of the service is such as to justify an honest doubt as to its legality. The service which a person has the right to demand of a public utility is service lawful in character."

It must be noted, however, that in those cases where the utilities have been indicted for supplying service either to betting establishments directly or to those who engage in the business of selling racing information, the utilities have not been guilty either of maintaining gambling houses, of aiding or abetting crimes or of maintaining nuisances. *Dooley* v. *Coleman*, (1936) 126 Fla. 203, 170 So. 722; *Com.* v. *Western U. Tel. Co.* (1901) 112 Ky. 355, 67 S. W. 59, 57 L. R. A. 614.

From these apparent disparities in the decisions it may be concluded that a public utility may refuse to and may not be forced to supply its service to either of the two principal types of users for bookmaking purposes. If the utility has ample evidence to support its contention that a subscriber or an applicant for service is using or intends to use the service for either placing or receiving wagers or for acquiring and disseminating racing information the utility may discontinue or refuse the service.

No statutory provisions exist in this state for the prosecution of utilities which provide service to either a bookmaker or to a publisher who supplies bookmakers with racing information.

II.

AS TO THE POWER OF REGULATION AND CONTROL OF THE FACILITIES OF A PUBLIC UTILITY.

The legislature of this state has placed the supervision and regulation of public utilities and their property and equipment under the jurisdiction of the Illinois Commerce Commission, Sec. 8, Chap. 111-2/3, Ill. Rev. Stats. 1949. This section reads:

"The Commission shall have general supervision of all public utilities, except as otherwise provided in this Act, shall inquire into the management of the business thereof and shall keep itself informed as to the manner and method in which the business is conducted. It shall examine such public utilities and keep informed as to their general condition, their franchises, capitalization, rates and other charges, and the manner in which their plants, equipment and other property owned, leased, controlled or operated are managed, conducted and operated, not only with respect to the adequacy, security and accommodation afforded by their service but also with respect to their compliance with the provisions of this Act and any other law with the orders of the Commission and with the charter and franchise requirements."

While the police power of municipalities may be exercised over its streets used by public utilities and over property owned by public utilities which has no distinctive public feature or use (*City of Geneseo* v. *Ill. N. Utilities Co.*, 378 Ill. 506; *City of Chicago* v. *Alton R. R. Co.*, 355 Ill. 65), the Supreme Court of this State is committed to the rule that the General Assembly, by creation of the Public Utilities Commission and the powers given it over public utilities, delegated to the commission exclusively all regulatory power over the services and necessary instrumentalities of public utilities. *City of Chicago* v. *Chicago Western Railroad Co.*, 348 Ill. 193.

It is our opinion that the police officers of the city have no authority to seize any equipment of public utilities which is used by customers either for the placing or taking of illegal bets or for the purpose of disseminating racing information.

However, control of this problem may be exercised either on complaint by the Illinois Commerce Commission or by the city pursuant to Section 64 of the Public Utilities Act. This section authorizes complaint upon information that the public utility is violating the law or the rules and orders of the commission. The use of public utility communication facilities in connection with any gambling activity, if not expressly violative of any law, at least violates the orders of the Illinois Commerce Commission included in the tariff schedules of Illinois Bell Telephone Company and Western Union Telegraph Company.

Section 64, above referred to, requires the commission to serve the public utility complained of with a copy of the complaint accompanied either by notice requiring the complaint be satisfied and answered within time specified by the commission or by a notice fixing a time when and place where a hearing will be had upon such complaint. If the complaint is not satisfied the remedy is by legal proceedings in behalf of the commission which must be instituted by the State Attorney General to compel the public utility to comply with the order of the commission.

"NUMBERS" GAMES

(No. 11446—A. M.—November 19, 1951.)

This is in reply to your letter of August 20, 1951, requesting information regarding the experience of the City of Chicago relative to Chapter 191, Municipal Code of Chicago, which prohibits and penalizes gambling, with particular reference to Section 191-2 which prohibits and penalizes lotteries, including policy and "numbers" games.

We should like, at the outset, to correct your impression that large portions of Chapter 191 have been declared invalid as being in conflict with the Illinois constitution or statutes. On the contrary, the trend of Illinois judicial decision has been to uphold the various sections of Chapter 191 in cases in which they have been involved.

Since you express particular interest in Section 191-2, which prohibits and penalizes lotteries and policy and "numbers" games, we refer to the case of *City of Chicago* v. *Emanuel Russell,* (Abst. Dec. No. 35,982), 267 Ill. App. 598 (1932), certiorari denied by the Illinois Supreme Court (267 Ill. App. XXXI), wherein the court upheld convictions for violations of Section 4185 of the Revised Code of the City of Chicago, which was identical with present Section 191-2 of the Municipal Code of Chicago.

For a good definition of "lottery," we suggest that you read *Iris Amusement Corporation* v. *Kelly,* 366 Ill. 256, (1937), where the Illinois Supreme Court held that "Bank Night" was a form of lottery. See, also, *City of Chicago* v. *Sayer,* 330 Ill. App. 181, (1946), which held that slot machines were subject to seizure as gambling devices, even though they were not being devoted to any illegal use at the time.

Chapter 191 of our Municipal Code was enacted pursuant to an express grant of statutory authority to municipalities "To suppress gaming, gambling houses, lotteries, and all fraudulent devices or practices for the purpose of obtaining money or property." (Section 23-57 of the Revised Cities and Villages Act of Illinois; Chap. 24, par. 23-57, Ill. Rev. Stat.

1951). This statutory authority is broad and comprehensive, and clearly sufficient to support Chapter 191, and each and every provision thereof.

Nor is there any conflict between the Illinois statutes relating to gambling and Chapter 191 of our Municipal Code. Among the Illinois statutes dealing with gambling, (all citations being to the Illinois Revised Statutes, 1951), are the following:

Chap. 38, pars. 324-335, (punishing gambling and wagering, declaring gambling contracts to be void, and providing for the recovery of losses sustained by gaming).

Chap. 38, par. 336, (prohibiting book-making and pool-selling).

Chap. 38, pars. 341-343, (forbidding the operation of gambling devices, including slot or tape machines, and rendering them subject to confiscation).

Chap. 38, pars. 412-414, (prohibiting and penalizing policy-playing).

We hope that this information will prove helpful.

"MOVIE SWEEPSTAKES"

(No. 11457—Commissioner of Police—C. P. H.—December 7, 1951.)

We have your letter of November 29, 1951 transmitting a copy of the communication you received from Mr. Arthur W. Zarlengo, 511 Ernest and Crammer Building, Denver, Colorado, attorney for Theatre Games, Inc., 8000 W. Colfax Avenue, Lakewood, Colorado, producer of the game known as "Movie Sweepstakes." You request our opinion as to the legality of this game.

From the communication and the documents submitted it appears that the game is conducted in the manner hereinafter described. The theatre adopting the plan assigns an attendant to stand on the sidewalk in the vicinity of the box office for the purpose of passing out game cards to persons who purchase admission tickets and enter the theatre. The patrons may obtain the game cards from the attendant before or after they purchase admission tickets. Persons who do not purchase admission tickets may obtain game cards from the attendant. Local merchants also distribute game cards to persons in their establishments even though they do not make purchases.

Each participant, whether inside or outside the theatre, signs his or her name and address on the card which has a serial number and indicates thereon the number of the horse selected to win in each race shown in a motion picture exhibited in the theatre. A motion picture portraying horse races at famous race tracks throughout the country is shown as a special attraction in addition to the regular feature program. The participants outside of the theatre deposit the game cards in a receptacle at the entrance of the theatre. Each such participant retains an exact duplicate of the card so deposited.

Prizes in the form of cash or gifts are awarded to the winners of the game. Prizes are mailed to the winners who are not in the theatre at the time the motion picture of the races is being shown. The sole purpose of operating the game in connection with the motion picture theatre is to stimulate attendance and increase box office receipts.

Based upon the above stated facts the question for our decision is whether or not the game is a lottery or gift enterprise within the prohibition of the Illinois Lottery laws, or a chance distribution of money which licensed theatres may not conduct in connection with their performances.

The conducting of a lottery or gift enterprise is contrary to the public policy of the State of Illinois. By section 27 of Article IV of the Illinois Constitution of 1870, it is provided that the General Assembly shall have no power to authorize lotteries or gift enterprises for any purpose, and shall pass laws to prohibit the sale of lottery or gift enterprise tickets in this State.

Paragraph 406 of the Criminal Code, chapter 38, Ill. Rev. Stat. 1951, makes it a criminal offense to set up or promote any lottery for money, or by way of lottery to dispose of any property of value. Paragraph 407 makes it unlawful for the owner or occupant of every house or building who knowingly permits the setting up, managing or draw of a lottery, or knowingly suffers money or other property to be raffled for, or to be won, by any game of chance. Paragraph 409 prohibits the advertising of any lottery ticket or scheme. By paragraph 411 all sums of money or other valuable thing drawn as a prize in any lottery are forfeitable to the State, and may be recovered by information filed, or other appropriate civil action, brought by the Attorney General, or the State's Attorney in the proper county.

By section 23-57 of the Revised Cities and Villages Act, chapter 24, Ill. Rev. Stat. 1951, municipalities in Illinois are granted express power "to suppress gambling, gambling houses, lotteries, and all fraudulent devices or practices for the purpose of gaining money or property."

Exercising the power conferred upon it, the city council of the City of Chicago enacted in chapter 191 of the Municipal Code of Chicago provisions prohibiting gambling, lottery and policy games, and also in chapter 104 of the Code relating to amusements, provided in section 104-9 thereof that every amusement license shall contain a proviso that "no gaming, raffle, lottery, or chance distribution of money, gift or article of value shall be connected therewith or allowed by the person obtaining such license, or in any way permitted to be held out as an inducement to visitors."

The courts of Illinois have often passed upon lottery schemes and gift enterprises. In *Dunn* v. *People*, 40 Ill. 465 (1866) the Supreme court said that the word "lottery" has no technical meaning in the law distinct from its popular significance, which is a scheme for the distribution of prizes by chance. In *People* v. *Monroe*, 349 Ill. 270 (1932) the court accepted Webster's definition which defines a lottery as a scheme for the distribution of prizes by lot or chance. In the more recent case of *Iris Amusement Corporation* v. *Kelly*, 366 Ill. 256 (1937), the court stated that a lottery may be defined as a scheme for the distribution of prizes by lot or chance, and that a lottery consists of three essential elements,—a chance, a prize and a price. The decision in the *Iris Amusement* case is especially helpful in the matter now before us as it upheld the validity of the City's ordinance above mentioned. A prize money distribution scheme of motion picture theatres known as "Bank Night" was examined and held to constitute a lottery and to violate the City's ordinance. The amusement corporation admitted the existence of the elements of "chance" and "prize," but contended that its "Bank Night" scheme was not a lottery as the third essential element "price" was lacking since persons not attending the theatre and who never paid an admission fee had a chance to win. The court, however, held that a scheme does not cease to be a lottery because some or even many do not have to pay to participate, saying (p. 266):

> "In actual operation those who paid to get in, paid for those on the outside in so far as those on the outside had a chance to win, and the giving of free chances to those who did not come in could not alter the basic and essential character of the transaction. * * *

"In this scheme there is present every element of the evils attendant upon mass gambling. A small stake concealed within the price of admission gives its chance for a large prize, which may become large enough to arouse intense cupidity; there is the excitement of drawing a lucky number with its attendant exultation for one fortunate individual; there is depression and disappointment for a thousand losers, many of whom must think enviously of what they could do with so much money had they won it, and there is the constant temptation to continue to play in the hope of winning. We have thus created cupidity, envy, jealousy and temptation — the very things sought to be avoided by that enlightened public policy of most of the world which has outlawed lotteries."

Then in concluding its opinion the court said (p. 268):

Our public policy against lotteries expressed in two constitutions, in the Criminal Code, and in the ordinance before us, is much too firmly rooted to be evaded by any chimerical device. Our conclusion is that the operation of the scheme outlined in the amended complaint constitutes a lottery and that the plaintiffs have no standing in a court of equity for its furtherance or protection."

We have quoted these portions of the opinion in the *Iris Amusement Corporation* case as an answer to the point made by Mr. Zarlengo that it is not necessary for a winner of the game to be present in the theatre to claim a prize. In the instant case as in the "Bank Night" case, those who pay a fee for admission to the theatre pay for those on the outside, in so far as those on the outside have a chance to win; and the giving of free game cards to those who do not enter the theatre would not alter the basic essential character of the transaction. Thus it is clear that the element of price is present.

The next question presented for determination is whether or not the element of chance is to be found in the scheme.

In 17 Ruling Case Law, page 1225, section 12 of the article on Lotteries, it is stated:

" * * * from an examination of the later cases, both federal and State, it appears to have become the established American doctrine that, in order to constitute a lottery within the meaning of the various statutes, it is not necessary for the distribuion of prizes to be purely by chance, but only for such distribution to be by chance as the dominating element, even though affected to some extent by the exercise of skill or judgment."

In *People ex rel. Ellison* v. *Lavin* (1904), 179 N. Y. 164, 66 L. R. A. 601, in condemning as a lottery a scheme for the distribution of prizes to those who made the closest estimate of the number of cigars on which a tax is paid during a specified period, the court said (p. 170):

"Throwing dice is purely a game of chance, and chess is purely a game of skill. But games of cards do not cease to be games of chance because they call for the exercise of skill by players, * * *. The test of the character of the game is not whether it contains an element of chance or an element of skill, but which is the dominating element that determines the result of the game. * * *

"If we examine the plan of distribution advertised, the number and character of the persons who were invited to compete for the distribution as well as the event by which the distribution was to be determined, we think it perfectly clear that the dominating and controlling factor in the award of the prizes is chance. * * * If the contest for a prize was to be had among experts, the award of the prize, despite the many elements affecting the result which no one could foresee, might be held dependent on judgment and not on chance.

But the competition before us is not at all of that character. The scheme contemplates over thirty-five thousand competitors."

State v. *Globe-Democrat Publishing Company* (1937), 341 Mo. 862, 110 S. W. (2d) 705, involved a newspaper cartoon contest wherein contestants selected the most appropriate name from a suggested list, for a series of eighty-four cartoons. The court held the contest to be a lottery, even though skill, judgment or research entered into it to some degree. In its opinion the court said:

"Further, we are convinced the question whether the element of chance was present must be viewed from the standpoint of the nearly 70,000 persons who entered the contest in response to the advertising thereof; and that it is not to be measured by any absolute or technical standards."

The participants in the game under consideration indicate on cards by numbers the horses which they select to win the races shown in the motion picture. All game cards are in the possession of the management of the theatre before the film is shown. Whether or not they win a prize depends on mere luck, guess or chance. They do not exercise any knowledge, foresight, ingenuity, or skill in making their selections. Manifestly, the element of chance is present.

The element of prize is admittedly present. In his communication Mr. Zarlengo states that prizes in the form of cash or gifts are awarded to the winners.

Inasmuch as all three essential elements, — price, chance and prize, are present it is our opinion that the game known as "Movie Sweepstakes" is a lottery and would be in violation of the public policy and the statutory law of the State of Illinois and the ordinances of the City of Chicago and that any theatre located in the City which conducts the game in connection with its performances would thereby subject itself to the revocation of its license.

"BINGO SCORE" GAME

(No. 11682—City Collector—M. I. W.—April 15, 1953.)

We have your letter of March 25, 1953 transmitting a letter you received from Joseph E. Beck, 4350 N. Pulaski Road, with which he submitted a photograph and description of an automatic amusement device bearing the name of "Bingo Score."

You request our opinion as to the legality of the operation of the machine and its amenability to the ordinances covering the licensing and taxing of amusements.

The following is the description of the machine as forwarded by Mr. Beck:

"Bingo Score Description"

"Bingo Score is a Shuffle Board type coin-operated amusement game, having a playing surface approximately two (2) feet wide and six (6) feet long, over which a puck is slid toward a target area. There are no holes, bumpers, springs or any other objects mounted on the playboard. The target area is located on the end opposite to the player and consists of five (5) arrow levers below five (5) reels.

Each reel consists of four (4) identical sets of numbers and each set consists of five (5) different numbers, hence there are twenty (20) numbers on each reel. Each set of numbers correspond with the bingo card numbers in vertical row above. The five (5) levers rest against a rubber bumper strip. This rubber transmits the force of the throw to the lever moving it back from one (1) to five (5) positions, depending upon the force and accuracy with which the player throws the puck. Each position is a different number, therefore, the number required to complete a bingo determines the amount of speed necessary with which to throw the puck.

"The best player is the one who has most accuracy in hitting the lever and has the best co-ordination in controlling the speed of the puck.

"Above the target area is an illuminated glass score board on which appears a bingo game design, numbers which indicate the players score, instructions that indicate that a game is completed after nine (9) throws are made and that the player can receive a bonus score of 100,000 in addition to his regular score indicated by the numbers on the wheel. Regular score is obtained as follows: If 1st reel is moved and stops at number nine (9), nine thousand will the the score. If on the next throw the 2nd reel is moved and stops at six (6), six thousand will be added to the previous score of nine thousand making a total of fifteen thousand.

"Hence, the players objective to obtain the highest possible score is to:

(a) Score a bingo combination with least amount of throws.

(b) With the remaining throws hit the arrow levers as many times as possible to obtain the highest score possible."

Section 193-26 of the Municipal Code makes it "unlawful for any person to keep or use in any place of public resort within the city any tables or implements for any game of bagatelle or pigeonhole."

That section defines a bagatelle or pigeonhole as:

" * * * a game played with any number of balls or spheres upon a table or board having holes, pockets or cups into which such balls or spheres may drop or become lodged and having arches, pins and springs or any of them, to control, deflect, or impede the direction or speed of the balls or spheres put in motion by the player, and shall include the modern variety of bagatelle or pigeonhole commonly known as pin games."

The object to be thrown at the target is described as a "puck." In the case of *Coven Distributing Co.* v. *City of Chicago*, 346 Ill. App. 488 (1952), a similar object was held to be a "ball or sphere" within the meaning of the ordinance.

The device is described as having no "holes, bumpers, springs or any other objects mounted on the playboard." Leaving aside for the moment the question of whether that description is legally accurate we shall proceed to an examination of several decisions which throw some light on the attitude of the courts toward similar devices.

In the case of *Levins and Genco Inc.* v. *City of Chicago*, 296 Ill. App. 645 (1938) the Illinois Appellate Court had before it the contention that the device "Magic Roll" had "no holes, pockets or cups into which the balls may drop or become lodged;" and that neither of the two devices before it "has arches, pins or springs to control, deflect or impede the direction or speed of balls and that neither of them is a 'pin game.'" The court went on to say:

"We think this contention cannot be sustained. The Statute, sec. 44, art. 5, chap. 24, authorized City Councils to regulate or prohibit billiards, bagatelle, pigeonhole, 'or any other tables or implements kept or used for similar purposes.' We think the devices in question may properly be held to fall within the classification, 'tables or other implements used for a similar purpose.' "

In the description of a device before the same court in the *Coven* case cited above, there is no mention of any holes, pockets or cups on the playing surface and yet the court held:

"We can see no substantial difference in the structural features of the Bowler and other machines of this kind * * * In our opinion the Bowler is essentially a modern variety of bagatelle or pigeonhole commonly known as pin games and the use is therefore prohibited by the Ordinance."

Thus, we see that the court has repeatedy given the ordinance a broad interpretation which the ordinance itself invites with the language "and shall include the modern variety of bagatelle or pigeonhole commonly known as pin games."

The device about which you inquire is essentially similar in structure, purpose and method of operation as other devices consistently held illegal. Merely modifying any one or all of the features in an attempt to take the machine out of the specific requirements of the definition spelled out in the first part of the ordinance is not enough to save it from being realistically classified as a "modern variety" of the same thing.

We are, therefore, of the opinion that operation of this device in a place of public resort would be illegal and that no license should be issued for such use.

TOY DISPENSING MACHINE

(No. 11741—City Collector—C. P. H.—September 17, 1953.)

We have your letter of September 11, 1953 setting forth the contents of a communication you received from Mr. H. M. Schaef of the Victor Vending Machine Corporation, located at 5701-13 W. Grand Avenue, Chicago, Illinois.

It appears that the corporation is in the business of manufacturing a certain type of vending machine which will be placed in business establishments located in the City of Chicago. Upon the insertion of a five cent coin, the machine is designed to dispense toys and charms each of which, it is claimed, has a value of five cents. However, upon each operation a different type of toy or charm is discharged from the machine. It is contended that no additional prizes will be awarded by the machine. It is stated that the machine does not vend gum, peanuts, or any food articles.

The question presented for our determination is whether or not the machine in its operation is akin to a lottery.

Paragraph 408 of the Criminal Code, chapter 38, Ill. Rev. Stat. 1951, makes it a criminal offense to set up or promote any lottery for money, or by way of lottery to dispose of any property of value. Paragraph 407 makes it unlawful for the owner or occupant of every house or building who knowingly permits the setting up, managing or draw of a

lottery, or knowingly suffers money or other property to be raffled for, or to be won, by any game of chance. Paragraph 409 prohibits the advertising of any lottery ticket or scheme. By paragraph 411 all sums of money or other vauable thing drawn as a prize in any lottery are forfeitable to the State, and may be recovered by information filed, or other appropriate civil action, brought by the Attorney General, or the State's Attorney in the proper county.

By section 23-57 of the Revised Cities and Villages Act, chapter 24, Ill. Rev. Stat. 1951, municipalities in Illinois are granted express power "to suppress gambling, gambling houses, lotteries, and all fraudulent devices or practices for the purpose of gaining money or property."

Exercising the power conferred upon it, the city council of the City of Chicago enacted in chapter 191 of the Municipal Code of Chicago provisions prohibiting gambling, lottery and policy games and also in chapter 104 of the Code relating to amusements, provided in section 104-9 thereof that every amusement license shall contain a proviso that "no gaming, raffle, lottery, or chance distribution of money, gift or article of value shall be connected therewith or allowed by the person obtaining such license, or in any way permitted to be held out as an inducement to visitors."

The courts of Illinois have often passed upon lottery schemes and gift enterprises. In *Dunn* v. *People*, 40 Ill. 465 (1866) the Supreme Court said that the word "lottery" has no technical meaning in the law distinct from its popular significance, which is a scheme for the distribution of prizes by chance. In *People* v. *Monroe*, 349 Ill. 270 (1932) the court accepted Webster's definition which defines a lottery as a scheme for the distribution of prizes by lot or chance. In the more recent case of *Iris Amusement Corporation* v. *Kelly*, 366 Ill. 256 (1937), the court stated that a lottery may be defined as a scheme for the distribution of prizes by lot or chance, and that a lottery consists of three essential elements,—a chance, a prize and a price. The decision in the *Iris Amusement* case is especially helpful in the matter now before us as it upheld the validity of the City's ordinance above mentioned. A prize money distribution scheme of motion picture theatres known as "Bank Night" was examined and held to constitute a lottery and to violate the City's ordinance. The amusement corporation admitted the existence of the elements of "chance" and "prize," but contended that its "Bank Night" scheme was not a lottery as the third essential element "price" was lacking since persons not attending the theatre and who never paid an admission fee had a chance to win. The court, however, held that a scheme does not cease to be lottery because some or even many do not have to pay to participate, saying (p. 266):

> "In actual operation those who paid to get in, paid for those on the the outside in so far as those on the outside had a chance to win, and the giving of free chances to those who did not come in could not alter the basic and essential character of the transaction. * * *
>
> "In this scheme there is present every element of the evils attendant upon mass gambling. A small stake concealed within the price of admission gives its chance for a large prize, which may become large enough to arouse intense cupidity; there is the excitement of drawing a lucky number with its attendant exultation for one fortunate individual; there is depression and disappointment for a thousand losers, many of whom must think enviously of what they could do with so much money had they won it, and there is the constant temptation to continue to play in the hope of winning. We have thus created cupidity, envy, jealousy and temptation—the very things sought to be avoided by that enlightened public policy of most of the world which has outlawed lotteries."

Then in concluding its opinion the court said (p. 268):

"Our public policy against lotteries expressed in two constitutions, in the Criminal Code, and in the ordinance before us, is much too firmly rooted to be evaded by an chimerical device. Our conclusion is that the operation of the scheme outlined in the amended complaint constitutes a lottery and that the plaintiffs have no standing in a court of equity for its furtherance or protection."

The first question to consider is whether or not the element of price is to be bound in the operation of the device under consideration. It is conceded that the machine is placed in operation by the insertion of a five cent coin. In view of this fact it is manifest that the element of price is present.

The next question for consideration is whether or not the element of prize is present. Again it is admitted that upon each operation of the machine an article of value in the form of a toy or charm each of which is valued at five cents, is awarded the player of the device. There is, therefore, no dispute as to whether prizes are awarded. Obviously, the element of prize is present.

The final question presented is whether or not the element of chance is present. It is claimed that upon each operation of the machine a toy or charm is dispensed from the machine. It is clear that a different type of toy or charm is vended upon each operation. The player of the machine has absolutely no control over the selection of a particular type of toy or charm which he may desire upon operating the machine. The item of merchandise dispensed from the machine depends solely upon luck or chance. The player of the machine exercises no judgment or skill in selecting the merchandise that will be dispensed from the machine. This is the attraction or lure that incites the player to continue to operate the machine for the purpose of obtaining a toy or charm which is more attractive to the player than those he has already received by operating the machine. It is obviously designed to attract the patronage of children of all ages. The element of chance is, therefore, present.

Inasmuch as all of the three elements—price, chance and prizes are present, it is our opinion that the machine described in your letter is akin to a lottery and is in violation of the public policy and the statutory law of the State of Illinois and the ordinance of the City of Chicago prohibiting lotteries. Furthermore, if the machine described herein is operated on any premises licensed by the City of Chicago, the license issued for such premises would be subject to revocation.

FEDERAL GAMBLING STAMP

(No. 11766—Alderman, 47th Ward—A. F. G.—November 13, 1953.)

In your letter of October 30, 1953 you say:

"It is my understanding that several cities have recently enacted ordinances establishing as prima facie evidence of gambling the mere possession of a federal gambling stamp.

It is my impression that we could go even farther than that by making it illegal for one to purchase a federal gambling stamp. Accordingly, I would greatly appreciate your preparing an ordinance for my presentation to the next council meeting declaring the purchase or possession of a federal gambling tax stamp illegal."

We have not prepared the ordinance you suggest for the reason that in our opinion such an ordinance would be unconstitutional.

Section 3285 of subchapter A of Chapter 27A of the Revenue Act of 1951 provides for an excise tax on wagers equal to 10 per cent of the amount thereof.

Section 3290 of subchapter B provides a special tax of $50 per year shall be paid by each person who is liable for tax under subchapter A or who is engaged in receiving wagers for or on behalf of any person so liable.

The Act requires each person required to pay a special tax to register with the collector of the district—his name and place of residence, if he is liable for the 10 per cent tax, each place of business where the activity which makes him so liable is carried on, and the name and place of residence of each person who is engaged in receiving wagers for him or on his behalf. The Act requires any person liable for the special tax to place and keep conspicuously in his principal place of business the stamp denoting the payment of such special tax; another section provides that any person who does an act which makes him liable for the special tax hereunder, without having paid the tax, shall, besides being liable for the payment of the tax, be fined not less than $1,000 and not more than $5,000. A penalty also is provided for failure to post or exhibit stamp.

Another act of congress imposed a special tax of twenty-five dollars on retail dealers in liquors as therein defined, and made it the duty of one engaging in a trade or business on which a special tax is imposed by law to register with the collector of the district "his name or style, place of residence, trade or business and the place where such trade or business is to be carried on" and provided other requirements with respect to the posting of stamp denoting payment of the special tax in much the same manner as the law with respect to persons subject to the wagering tax.

The State of North Dakota on March 13, 1907 (Laws No. Dak., 1907, p. 307), enacted a law requiring the registration and publication of any receipt, stamp or license, showing the payment of the special tax levied under the laws of the United States upon the business of selling distilled, malted and fermented liquor. Briefly, the law provides as follows: A notice of the particulars contained in the receipt or license and other details respecting the place where the tax receipt or license is posted, etc., is required to be made for three weeks in official newspapers, and the fees for publication are declared to be the same "as allowed by law for the publication of othr legal notices." The holder of the receipt or license is also required to place and keep posted, at all times, with the government tax receipts or license, an affidavit of the fact of publication and the obtaining of such license, etc., together with a copy of the notices or advertisements. A duly authenticated copy of the tax receipt or license is required to be filed with a named official, to whom a ten-dollar filing fee is to be paid, and such official is required to publish, in certain official newspapers, the first week in each month, a list of all such tax receipts or licenses filed during the previous month, such notice to be published one week in each newspaper.

One Flaherty was held to answer upon a charge of neglecting to register and publish a government receipt for the payment of an internal revenue tax on the business of a retail dealer in malt liquors. He applied for a writ of habeas corpus to a judge of a state District Court which was denied. Afterwards a similar application was made to the Supreme Court of the State and the writ was granted by that court, but, upon hearing, the writ was quashed (*Flaherty* v. *Hanson* 16 No. Dak. 347). The court held that the law was not repugnant to the Constitution of the United States, and to be but a lawful exercise of the police power of the State to regulate the traffic in liquor within the State. A writ of error was prosecuted in the Supreme Court of the United States. The errors assigned insist that the statute, as thus construed, is repugnant to the Constitution of the United States: First, because under the guise of the exertion of the police power of the State, the law really imposes a burden directly

upon the exertion by the Government of the United States of its lawful power of taxation, and because, even if this be not the case, the conditions and requirements of the statute are so in conflict with the act of Congress concerning the payment of the tax and the issuance of the receipt as to amount to a direct burden upon the constitutional power of Congress to tax.

In *Flaherty* v. *Hansen* 215 U. S. 515, (1909) in deciding that the state law was repugnant to the Constitution of the United States, the court said:

> "The propositions, which are in substance one and the same, we think are well founded. Under the construction placed upon the statute by the court below we see no escape from the conclusion that it immediately and directly places a burden upon the lawful taxing power of the United States, or, what is equivalent thereto, places the burden upon the person who pays the United States tax, solely because of the payment of such tax and wholly without reference to the doing by the person of any act within the State which is subject to the regulating authority of the State. That the attempted exertion of such a power is repugnant to the Constitution of the United States is so elementary as to require nothing but statement. We place in the margin, however, a few of the numerous cases in which the principle has been announced or recognized. (Citing cases). But if the mere form in which the burdens imposed by the statute be disregarded and their essence be considered, nevertheless we are of the opinion that the statute must be held to be repugnant to the Constitution of the United States. This follows, because it is clear that in principle a State may not so exert its police power as to directly hamper or destroy a lawful authority of the Government of the United States. Here, again, the doctrine is elementary, and finds clear and consistent expression in the cases previously cited. Its potentiality, however, as applied to the case in hand, is so pointedly illustrated by the case of *United States* v. *Snyder*, 149 U. S. 210, that we briefly refer to that decision. In that case, a Circuit Court of the United States had refused to enforce, in favor of the United States, a lien upon real estate for taxes under the internal revenue laws, on the ground that the lien, or easement for the tax, had not been recorded in the mortgage records for the parish of Orleans, where the real estate in question was situated, as required by the laws of Louisiana, and that the proceeding to enforce the lien had not been brought within the period fixed by the state law. The Circuit Court, therefore, in effect, had held that it was in the power of the State to burden, control or regulate the right of the United States to assess and collect taxes under its constitutional power of taxation. In deciding that this view was unsound it was said (p. 214):
>
> 'The power of taxation has always been regarded as a necessary and indispensable incident of sovereignty. A government that cannot by self-administered methods, collect from its subjects the means necessary to support and maintain itself in the execution of its functions is a government merely in name. If the United States, proceeding in one of their own courts, in the collection of a tax admitted to be legitimate, can be thwarted by the plan of a state statute prescribing that such a tax must be assessed and recorded under state regulation, and limiting the time within which such tax shall be a lien, it would follow that the potential existence of the government of the United States is at the mercy of state legislation.
>
> Moreover, it scarcely seems necessary to look beyond the Constitution itself for a decisive reply to the question we are now considering. The 8th section of the 1st article declares that "the Congress shall have power to lay and collect taxes, duties, imposts and excises, . . . but all duties, imposts and excises shall be uniform throughout the United States." The power to impose and collect the

public burthens is here given in terms as absolute as the language affords. The provision exacting uniformity throughout the United States itself imports a system of assessment and collection under the exclusive control of the general government. And both the grant of the power and its limitation are wholly inconsistent with the proposition that the States can by legislation interfere with the assessment of Federal taxes, or set up a limitation of time within which they must be collected.' "

In view of this decision it is our opinion, therefore, that your proposed ordinance making it illegal to purchase or possess a federal gambling stamp would directly place a burden upon the lawful taxing power of the United States, or what is equivalent thereto places a burden upon the person who pays the United States tax, solely because of the payment of such tax and wholly without reference to the doing by the person of any act within the State which is subject to the regulating authority of the State.

E. OTHER HEALTH AND WELFARE REGULATIONS

CIGARETTE MACHINES

(No. 11149—Mayor—M. H. F.—May 31, 1949.)

Complying with the request contained in your memorandum of May 21, 1949, relative to the prohibition of the use of cigarette vending machines in the city, the following information is submitted.

For many years Chicago has had an ordinance licensing the sale of cigarettes. It may be found as sections 178-9 to 178-21, inclusive, of the Municipal Code of Chicago. Semi-annual licenses are issued for which a period license fee of $60.00 is charged.

Considerable revenue is derived from the ordinance. During the first period of 1948 12,341 licenses were issued and $740,460.00 in license fees paid. During the second period 13,011 licenses were issued and $780,660.00 paid in fees. Total for the year was $1,521,120.00.

While the city has express power, conferred by section 23-64 of the Revised Cities and Villages Act, "to provide for and regulate the inspection of all food for human consumption and tobacco," no express power has been granted it to regulate or license the sale of cigarettes or tobacco.

The source of power to enact the ordinance is found in the city's general police and health powers. Primarily the ordinance is an exercise of the health power. If or when it ceases to be such, it has been thought that attacks against it would be invited, which possibly might be successful in either destroying the ordinance as a whole or in substantially reducing the amount of the license fee on the ground that it was excessive and unduly disproportionate to the cost of regulation.

Section 178-19 makes it unlawful for any person to sell or give away any cigarettes to any individual under the age of twenty-one years.

Section 178-20 provides as follows:

"No person with or without a retail tobacco dealer's license, shall locate, install, keep, maintain, or use, or permit the location, installation, keeping, maintenance or use upon his premises of any vending machine, automatic vending machine, coin-controlled or coin-operating machine or other mechanical device used or intended to be used for the sale or distribution of cigarettes."

The validity of the ordinance as it existed prior to the incorporation of section 178-20, was upheld as a health measure designed to protect young persons of weak and immature minds from the deleterious and injurious effects of tobacco in the form of cigarettes, by the Supreme Court of Illinois in the year 1898, in the case of *Gundling* v. *City of Chicago,* 176 Ill. 340. The provision prohibiting the sale to minors was the crucial one upon which the court relied in upholding the constitutionality and validity of the ordinance.

The *Gundling* case was taken to and reviewed by the Supreme Court of the United States and the judgment of the Supreme Court of Illinois affirmed in the case of *Gundling* v. *Chicago* (1900), 177 U. S. 183.

See also *Kappes* v. *City of Chicago* (1905), 119 Ill. App. 436, wherein the Appellate Court of Illinois upheld the validity of an amendment to the ordinance made to effectuate its main purpose.

When automatic cigarette vending machines were invented and placed upon the market it immediately became apparent that if not prohibited their use would destroy the effect of the all important section which prohibits sales to minors, as the machines are inanimate and respond equally efficiently to coins placed therein by a child as to coins inserted by an adult.

The enactment of what is now section 178-20, which prohibits the use of automatic vending machines, precipitated litigation in both the state and federal courts. In this litigation the city was successful in upholding the validity of the section against attacks of manufacturing and cigarette service concerns. The litigation was concluded by the decision of the United States Circuit Court of Appeals for the Seventh Circuit rendered April 29, 1937, in the consolidated cases entitled *Illinois Cigarette Service Company* v. *City of Chicago, et al.,* and *Rowe Manufacturing Company* v. *City of Chicago, et al.,* 89 F. (2d) 610. This decision firmly establishes the validity of the section. In concluding its opinion the court said (page 613):

"Though such machines may not be inherently dangerous in themselves, when devoted to the indiscriminate use for automatic sales of cigarettes which are deemed injurious to minors, they work an evil within the city's control, the limitations of which are bounded only by the limitations of the police power."

On several occasions since the year 1937 strong efforts have been made by manufacturers and cigarette service concerns to bring about the repeal of section 178-20 and thus open Chicago to the unrestricted use of the automatic machines. These efforts were joined in by certain members of the city council until it was explained to them that the repeal of 178-20 would render innocuous section 178-19 and leave the ordinance devoid of the fundamental ground for its existence, namely, protection of the young against the unrestricted purchase and use of cigarettes.

True, cigarette vending machines are found in use in many cities in the United States and abroad. Their convenience to many storekeepers and members of the public is apparent. However, many cities exact only a very small amount of money in the form of license fees, whereas Chicago, as has been shown, receives annually over a million and a half dollars. This aggregate is the highest aggregate of fees derived by Chicago from any single business subject to license.

It is easy for those interested in promoting vending machines to point out their convenience, to call attention to the fact that they are permitted in other cities, and also to say that minors are procuring cigarettes notwithstanding the ordinance. In advising against the repeal of section 178-20 we have been revenue-minded. If the repeal of section 178-20 is now contemplated, it is believed the matters herein set forth should be first carefully weighed.

RED AUTOMOBILES

(No. 11150—Fire Commissioner—L. L. K.—June 1, 1949.)

This will acknowledge receipt of your request for an opinion concerning the proposed use by an automobile manufacturer of red paint on automobiles for sale in the City of Chicago.

Section 27-74 of the Municipal Code of Chicago provides as follows:

> "No vehicle painted a bright or fire red, excepting fire apparatus and any fire patrol vehicle maintained by an insurance company or board of underwriters, and no vehicle equipped with a gong or siren, excepting fire apparatus, fire patrol vehicles, ambulances, street cars and emergency vehicles of any governmental agency or of public utilities, shall be operated upon the streets."

In *Hansen* v. *Raleigh*, 391 Ill. 536 (1945), the Supreme Court pointed out (p. 545):

> "Fire protection is a matter of public welfare in which the general public has a vital interest."

This statement follows from the grant of powers contained in Section 23-105 of the Cities and Villages Act (Ill. Rev. Stat. 1947, ch. 24, par. 23-105) which provides that cities have power:

> "To pass and enforce all necessary police ordinances."

Section 23-10 of the same statute grants power:

> "To regulate the use of the streets and other municipal property."

Section 23-27 empowers the city:

> "To regulate traffic and sales upon the streets, sidewalks, public places, and municipal property."

The powers enumerated herein seem to afford ample justification for the ordinance. The purpose of the ordinance is to confine the use of bright or fire red paint to fire department equipment so that all vehicles on the street can readily recognize such equipment and yield the right-of-way when such squipment is on the way to a fire.

The ordinance prohibits the use of the colors "bright or fire red". Webster's New International Dictionary, Second Edition, opposite page 528, contains a color chart from which it appears that the color "English vermilion is almost identical with the one presently used by the fire department.

It is our opinion that the use of this color on any vehicle other than those provided for in the ordinance would constitute a violation of said ordinance.

DEFINITION OF PLUMBING FIXTURES

(No. 11225—A. F. G.—December 19, 1949.)

We have your letter of December 5, 1949 in which you state that you are gathering statistics concerning plumbing codes from various cities in the United States and request an answer to the following questions:

"1. Does the controlling statute or ordinance in your municipality define water heaters as plumbing fixtures?

"2. Does the above statute or ordinance define water softeners as plumbing fixtures?

"3. Does the above statute or ordinance define hot water heating boilers as plumbing fixtures or hot water coils in heating furnaces as plumbing fixtures?

"4. If the plumbing code or state statute which controls does not expressly prescribe the above as plumbing fixtures, have they been construed by the municipal authorities

(a) as electric or gas appliances, or

(b) as plumbing fixtures?"

Our answer to the first three questions is "no".

Neither the statute nor the city ordinance defines the fixtures referred to in these questions, but both statute and ordinance define the general terms "plumbing" and "plumbing work" to mean and include: all piping, fixtures, appurtenances and appliances for a supply of water *for all personal or domestic purposes* and for a sanitary drainage, etc. and all work upon or connection with such piping, etc. Both the statute and ordinance prohibit any person from engaging in the plumbing business unless he is licensed either as a Master plumber, Journeyman plumber or plumbers' apprentice.

The rule established here for determining whether any piping, fixtures or appliances are "plumbing" and whether work thereon must be performed only by a licensed plumber is the use to which such facilities can be put. We have advised our permit issuing department, that if the piping, fixtures, etc., are not for "personal or domestic purposes" it is not warranted in withholding its approval merely because the work is not to be done by a licensed plumber.

From the foregoing it can be seen that some of the fixtures referred to in the first three questions may or may not be deemed plumbing fixtures depending on the use to which such fixture is or may be put. Generally water heaters are considered plumbing fixtures as the hot water is usually for personal or domestic purposes, but if the water heater is used to heat water for some industrial process is may be considered not a plumbing fixture. Water softeners are generally not considered plumbing fixtures as they are usually employed in commercial laundries and kindred places for non-domestic purposes. Hot water heating boilers are not plumbing fixtures but hot water coils in heating furnaces may or may not be plumbing fixtures depending on the use to which the water heated therein is put.

The piping of water for sprinkler systems is not construed as plumbing nor is the installation of air conditioning systems.

SUPPRESSION OF QUESTIONABLE LITERATURE

(No. 11231—Commissioner of Police—L. L. K.—January 3, 1950.)

This will acknowledge receipt of your letter of November 12, 1949, with correspondence attached thereto, in which you request our opinion concerning what action you should take, if any, toward the suppression of a novel entitled "The Amboy Dukes" written by Irving Shulman, published by Avon Publishing Co., Inc.; and your letter of November 28, 1949, asking for an opinion concerning the book entitled "Love Without Fear" by Eustace Chesser, M. D., published by the New American Library of World Literature, Inc. We shall deal with both publications in this opinion inasmuch as the same law is applicable.

On the cover of "The Amboy Dukes" appear the statements that it is "a novel of wayward youth in Brooklyn" and that the book was made into the thrilling Universal-International picture "City Across the River". The book deals with a gang of tough youths in Brooklyn's slums, their criminal and sex adventures, their street gang activities and the ultimate death of the principal character through murder by one of his gang associates. On the inside of the back cover appears an endorsement by Edwin J. Lukas, described as Executive Director of the Society for the Prevention of Crime in New York. In many of its passages the book is coarse and vulgar. The tale of juvenile delinquency unfolds in an atmosphere of crime, poverty and ignorance and ends with the principal character's death at a time when he has concluded that his association with criminal companions can lead only to a bad end.

"Love Without Fear" states on the frontispiece that its purpose is to tell "how to achieve sex happiness in marriage". In the book the author sets forth in simple language the marital conflicts which arise as a result of ignorance concerning sexual relations and of the unhappiness which results from the failure to understand the proper manner of obtaining pleasure through sexual intercourse. The book is well written and the discussion is objective and on a high plane throughout. It does not advocate birth control.

These books offer a striking contrast in that "The Amboy Dukes" seem to be literary trash of a coarse and vulgar nature, while "Love Without Fear" is written in a fluid, lucid style which indicates intelligence and literary ability on the part of the author.

However, as we had occasion to point out in an opinion rendered to your office on the display and sale of nude photographs (Opinions of the Corporation Counsel, Volume XX, page 139) in 1939, it is not the function of the Department of Law to express an opinion which would, in effect, constitute the exercise of a role of censorship which does not properly belong to it, but merely to point out the applicable law.

Section 192-9 of the Municipal Code of Chicago provides as follows:

> "192-9. It shall be unlawful for any person to exhibit, sell, offer to sell, circulate, or distribute any indecent or lewd book, picture, or other thing of an immoral or scandalous nature, or exhibit in any place where the same can be seen from the public way, or in a public place frequented by children, any picture representing a person in a nude state which is not connected with any art or educational exhibition, or exhibit or perform any indecent, immoral, or lewd play or other representation. Any person violating any provisions of this section shall be fined not less than twenty dollars nor more than one hundred dollars for each offense."

The bulk of the law affecting lewd and obscene publications appears in federal decisions involving mailing and importation. One of the lead-

ing cases is *United States* v. *Kennerly*, 209 Fed. 119 (1913) which was a prosecution for sending through the mails an obscene book entitled "Hagar Revelly". The book is described in the opinion as a novel of manners presenting the life of a young woman in New York compelled to earn her living. She is represented as impulsive, sensuous, fond of pleasure, and restive under the monotony and squalor of her surroundings. Her virtue is unsuccessfully assailed by a man she does not love and later successfully by one whom she does. After her seduction she has several amorous misadventures and ends with a loveless marriage and the prospect of a dreary future. In order to give complete portrayal to the girl's emotional character, some of the scenes are depicted with a frankness and detail which gave rise to the prosecution. In the opinion written by Judge Hand, the court said (p. 120):

> "Whatever be the rule in England, in this country the jury must determine under instructions whether the book is obscene. The court's only power is to decide whether the book is so clearly innocent that the jury should not pass upon it at all. *U. S.* v. *Clarke* (D. C.) 38 Fed. 500; *U. S.* v. *Smith* (D. C.) 45 Fed. 478."

He refers to the rule laid down as a test in *Reg.* v. *Hicklin*, L. R. 3 Q. B. 36, in these words:

> "Whether the tendency of the matter charged as obscenity is to deprave and corrupt, those whose minds are open to such immoral influences and into whose hands a publication of this sort may fall."

and in *U. S.* v. *Bennett*, 16 Blatch. 338; *U. S.* v. *Clarke* (D. C.) 38 Fed. 500; *U. S.* v. *Harmon* (D. C.) 45 Fed. 414; *U. S.* v. *Smith* (D. C.) 45 Fed. 478; as indicating that under the rule there laid down certain portions of the book might be found obscene "because they certainly might tend to corrupt the morals of those into whose hands it might come and whose minds were open to such immoral influences." But he points out that "however consonant it may be with mid-Victorian morals (the rule as laid down) does not seem to me to answer to the understanding and morality of the present time, as conveyed by the words, "obscene, lewd, or lascivious" and he concludes with the following statement:

> "Indeed, it seems hardly likely that we are even to-day so lukewarm in our interest in letters or serious discussions as to be content to reduce our treatment of sex to the standard of a child's library in the supposed interest of a salacious few, or that shame will for long prevent us from adequate portrayal of some of the most serious and beautiful sides of human nature. That such latitude gives opportunity for its abuse is true enough; there will be, as there are, plenty who will misuse the privilege as a cover for lewdness and a stalking horse from which to strike at purity, but that is true today and only involves us in the same question of fact which we hope that we have the power to answer."

One of the landmark cases on the subject is *U. S.* v. *One Book Entitled Ulysses, by James Joyce*, 72 F. (2d) 705 (1934) decided in the Circuit Court of Appeals, Second Circuit. That was a proceeding for the forfeiture of the book on the ground that it was an obscene book and that importation into this country should be barred. In a lengthy decision written by Judge Augustus N. Hand, he discusses the literary qualities of the book, points out that in not a few spots it is course, blasphemous and obscene, and concludes that if these are to make the book subject to confiscation, many of the classics would be equally barred. He refers to earlier cases based on *Reg.* v. *Hicklin*, hereinabove mentioned, as no longer containing the applicable rule, and says (p. 707):

> "It is settled, at least so far as this court is concerned, that works of physiology, medicine, science, and sex instruction are not

within the statute, though to some extent and among some persons they may tend to promote lustful thoughts. *United States* v. *Dannett*, 39 F. (2d) 564, 76 A. L. R. 1092. We think the same immunity should apply to literature as to science, where the presentation, when viewed objectively, is sincere, and the erotic matter is not introduced to promote lust and does not furnish the dominant note of the publication. The question in each case is whether a publication taken as a whole has a libidinous effect. The book before us has such portentous length, is writen with such evident truthfulness in its depiction of certain types of humanity, and is so little erotic in its result, that it does not fall within the forbidden class.

* * *

The main difference between many standard works and Ulysses is its far more abundant use of coarse and colloquial words and presentation of dirty scenes, rather than in any excess of prurient suggestion. We do not think that Ulysses, taken as a whole, tends to promote lust, and its criticized passages do this no more than scores of standard books that are constantly bought and sold. Indeed a book of physiology in the hands of adolescents may be more objectionable on this ground than almost anything else."

FIREWORKS

(No. 11313—Commissioner of Police—A. M.—June 22, 1950.)

We are in receipt of your letter of May 25, 1950, transmitting a report dated May 24, 1950 from Captain Joseph Goldberg, Commanding Officer, 37th District, reporting the shipment of a quantity of fireworks into the City of Chicago from Toledo, Ohio, through the Railway Express Agency and found in the possession of the consignee, a fifteen year old boy who had sold and distributed a portion of the shipment to a boy twelve years of age who, in turn, had resold some of the firecrackers to several other boys thirteen years of age. Our opinion is requested as to whether the Railway Express Agency is in violation of the Municipal Code of Chicago in handling and transporting shipments of fireworks into the City of Chicago from outside the State of Illinois to persons, including juveniles, who have neither applied for nor received, and would not be entitled or qualified to receive, any permit for the public or private display of fireworks as provided by law.

We are also in receipt of your letter of June 8, 1950, transmitting a comic book entitled "Fritzie Ritz," being an issue of United Comics, published by United Feature Syndicate, Inc., 220 E. 42nd Street, New York 17, N. Y. and distributed by the American News Co. Inc., 131 Varick Street, New York 13, N. Y. This comic book issue contains on the inside cover thereof a full page advertisement for the sale of fireworks by Rich Bros. Fireworks Co., Department 30, Box 514, Sioux Falls, South Dakota. This comic book is distributed and sold within the City of Chicago, as well as in practically every other state, and you request our opinion as to whether advertising the sale of fireworks in such manner is in violation of the city ordinances.

Sections 125-27 to 125-33, Municipal Code of Chicago, entitled "Fireworks," which forms a part of Chapter 125 entitled "Explosives and Fireworks," represents the City's attempt to deal with the problem of fireworks within the city limits. The sale, transportation and use of fireworks is pro-

hibited, but the division marshal in charge of the bureau of fire prevention may issue permits to qualified adults, upon application therefor and the payment of a permit fee, for the public or private display of fireworks (Sections 125-28 to 125-31). The advertising of fireworks for sale within the city except to permittees is also prohibited (Section 125-28.1).

Section 125-32 provides that none of the provisions of Chapter 125 dealing with fireworks shall be construed as applying to the transportation of any article or thing shipped in conformity with the regulations prescribed by the Interstate Commerce Commission.

I. *Does the Interstate Transportation of Fireworks into Chicago by the Railway Express Agency Constitute a Violation of the Municipal Code.*

The prohibition against the sale, transportation and use of fireworks, although stated broadly, is necessarily limited to their sale, transportation or use *within the city*, and does not extend to interstate sales, or to shipments of fireworks into Chicago from outside the state pursuant to such sales. Moreover, Section 125-32 specifically excludes application of any of the provisions of Chapter 125 to the transportation of articles shipped in conformity with regulations prescribed by the Interstate Commerce Commission.

It is our opinion, therefore, that the transportation of fireworks into the city from outside the state by the Railway Express Agency does not subject said Agency to prosecution for any violation of the Municipal Code. A recent case supporting this conclusion is *Bruskas et al.* v. *Railway Express Agency, Inc.*, (C. C. A. 10) 172 Fed. (2d.) 915 (1949).

II. *Does the Advertising of Fireworks For Interstate Sale to Chicago Consignees Constitute a Violation of the City Ordinances?*

The prohibition of the ordinance against fireworks advertisements is expressly limited to such as are intended to induce sales within the city. It does not extend nor purport to extend to advertisements which seek to attract interstate business. The fireworks advertisement in the comic book under consideration here contemplates the sale and shipment of fireworks from an out-of-state source, so that any sales and shipments eventuating from such advertisement will be interstate in character and, therefore, beyond the purview of the ordinance.

In addition, it is important to bear in mind that a general advertisement listing various lots of goods for sale at specified prices is not an offer of sale, but a mere invitation to receive offers which the advertiser reserves the right to accept or reject. (Williston, Contracts, Rev. Ed. 1936, Vol. 1, Sec. 27, pp. 54-58; Vol. 13, Corpus Juris, Contracts, p. 289; *Montgomery Ward & Co.* v. *Johnson*, 209 Mass. 89, 95 N. E. 290 (1911).

It is our opinion, therefore, on the facts submitted that the fireworks advertisement contained in the comic book in question does not represent a violation of the city ordinances.

FENCE-VIEWERS

(No. 11335—Alderman, 47th Ward—C. N.—September 7, 1950.)

We have your letter of August 31, 1950, in which you state that a constituent has applied to you, under Chapter 54, Ill. Rev. Stat. 1949, for the appointment of Fence Viewers to settle her dispute with a neighbor to

the north of her property at 4426 N. Damen Avenue, Chicago, regarding the ownership of a fence separating their properties. You ask us to take all action necessary under the chapter cited and also request information as to the law regarding the responsibility of property owners for the fencing of property where it adjoins another lot in subdivided sections of Chicago.

As we frequently pointed out in communications on this subject matter over a long period of years, it is evident from the language of the statute cited that it relates to rural communities and not to cities. Its provision that the apportionment of fences and the enforcement of the statute generally shall be in the hands of certain "Fence Viewers" has no force and effect in this city, inasmuch as these officers are non-existent in the City of Chicago.

City ordinances have nothing to say on the aspects of the subject to which you call our attention. The city's only interest in fences is in their relation to streets and alleys, or the presence of fences so constructed that they obstruct light and air. The few restrictions imposed by ordinances relate chiefly to height and materials used.

There is no actual law governing the responsibility for the local erection of a division fence. Because property owners are and for many years have been at liberty to make mutually satisfactory arrangements, regarding such fences, builders have evolved a "gentlemen's agreement" by virtue of which each owner of a lot other than corner lots assumes responsibility for the erection of only one fence, the one to his right as he stands in front of his property and faces it. However, no legal duty is imposed upon a property owner to adhere to this rule, its almost universal acceptance being due to the savings involved for the owners who abide by the rule, as in most instances, it does away with the necessity for building two division fences on a single piece of property.

For the reasons hereinabove fully discussed, we can neither take nor suggest any action for the solution of the problem confronting your constituent, other than the suggestion that she consult private counsel for determination of her rights.

IMPOUNDING DOGS

(No. 11345—Acting Police Commissioner—E. R. H.—November 20, 1950.)

We acknowledge the letter of Honorable John C. Prendergast, former Commissioner of Police, dated November 13, 1950, asking our opinion as to the interpretation of Section 98-38 of the Municipal Code of the City of Chicago.

Dr. Young of the Anti-Cruelty Society is quoted in the letter suggesting an amendment to this section of the Code. That is a matter which should be presented to the City Council.

We are asked to answer the following questions:

1. Does compliance with the Municipal Code require impounding of biting dogs for 15 days without regard to the date of biting?

2. If the answer to question No. 1 is "No," would the impounding of the dog under observation for a period of 15 days from the date of

biting regardless of the date on which the impounding of the dog begins, be regarded as complying with the Code?

Section 98-38 of the Code provides:

"Any dangerous, fierce, or vicious dog running at large in the public ways or public places of the city or upon private premises of any person other than the owner or keeper, and any dog which may in any manner disturb the quiet of any person or neighborhood, or which shall bite a person or so injure a person as to cause an abrasion of the skin, is hereby declared to be a nuisance, and such dog shall be immediately placed in a duly licensed veterinary hospital or taken up and impounded in the manner provided by this chapter.

It shall be unlawful for the owner or keeper of any dog, when notified that such dog has bitten any person or has so injured any person as to cause an abrasion of the skin, to sell or give away such dog or to permit or allow such dog to be taken beyond the limits of the city, but it shall be the duty of such owner or keeper, upon receiving notice of the character aforesaid, to immediately place such dog in a duly licensed veterinary hospital where such dog shall be confined for a period of at least fifteen days, or to deliver such dog to any policeman. In case such dog is delivered to a veterinary hospital notice of the name and location of such hospital shall be immediately furnished the department of police by the owner or keeper of such dog. Any policeman receiving such dog shall forthwith convey such dog to the municipal animal shelter, where such dog shall be securely chained or confined for a period of at least fifteen days, but if any dangerous, fierce, or vicious dog cannot safely be taken up and impounded, such dog may be slain by any policeman. In all cases where any dog which has bitten a person or caused an abrasion of the skin is slain by any policeman whether by order of court or otherwise, and a period of less than fifteen days has elapsed since the day on which such dog bit any person or caused an abrasion of the skin of any person, it shall be the duty of the policeman slaying such dog to forthwith deliver the carcass and the brain of such dog to the board of health.

It is hereby made the duty of any person receiving a dog from any veterinary hospital or place where it has been impounded by the department of police, to securely muzzle and chain such dog for a period of at least fifteen days from the date of receiving the dog from such place."

In our opinion the answer to question No. 1 is "yes."

With reference to both questions asked:

This section of the Code imposes a duty upon the owner or keeper of such a dog having notice of a biting, causing an abrasion of the skin, *"to immediately place such a dog in a duly licensed veterinary hospital where such dog shall be confined for a period of at least fifteen days, or to deliver such dog to any policeman. In case such dog is delivered to a veterinary hospital notice of the name and location of such hospital shall be immediately furnished the department of police by the owner or keeper of such dog. Any policeman receiving such dog shall forthwith convey such dog to the municipal animal shelter where such dog shall be securely chained or confined for a period of at least fifteen days."*

It is vital for human safety that there be a proper period of observation in such cases. Former Commissioner Prendergast stated in his letter "that a period of observation of about a week to fifteen days is standard practice. Scientific evidence supports such a stand." The City Council has ordained a period of fifteen days' observation. Presumably proper records in such cases are kept by licensed veterinary hospitals and the municipal animal shelter so that the date of impounding can be readily ascertained.

It is our opinion that the fifteen day period of observation required by the Code should be computed from the date of impoundment as shown by the proper records of the licensed veterinary hospital to which the dog is taken or, if the dog is delivered to a policeman, the date of the impounding at the municipal animal shelter.

PACKAGED COMMODITY ORDINANCE

(No. 11361—City Sealer—A. M.—January 31, 1951.)

We are in receipt of your memorandum dated January 12, 1951, addressed to this Department, wherein you request our opinion whether Section 100-13.1 of the Municipal Code of Chicago making it unlawful to sell packaged commodities "unless the net quantity of the contents is plainly and conspicuously marked on the outside of the package, in terms of weight, measure, or numerical count," may be enforced as against the sale and shipment of wiping rags, packaged in bales, which are shipped from outside the State into the City of Chicago. Since such sales and shipments clearly constitute interstate commerce, the question is whether the net weight provisions of the aforementioned city ordinance may be invoked against such sales and shipments without violating the commerce clause of the Federal Constitution.

It is to be noted, first, that Section 100-13.1 of the Municipal Code of Chicago is not a prohibition against selling by gross weight, or a requirement that sales of packaged commodities must only be made by net weight, but rather a "marking" or "labeling" requirement. The said section provides in pertinent part as follows:

> "100-13.1. It shall be unlawful to keep for the purpose of sale, or to offer or to expose for sale, or sell, any commodity in package form unless the net quantity of the contents is plainly and conspicuously marked on the outside of the package, in terms of weight, measure, or numerical count; * * *."

By the same section, the words "in package form" are defined "to include a commodity in a package, carton, case, can, box, barrel, bottle, phial or other receptacle, or in coverings or wrappings of any kind, * * * making one complete package of the commodity."

It is quite plain from the words used that they do not constitute a prohibition against the sale of a packaged commodity by gross weight, if the net weight of the contents is clearly marked on the package. However, it appears from the facts contained in your memorandum that local dealers in wiping rags will be disadvantaged if the net weight marking provision is enforced against them and not against out-of-state sellers who ship baled wiping rags into the City of Chicago from states which do not have a similar net weight marking requirement.

It seems pertinent at the very outset to inquire into the statutory authority of the City to have enacted this net weight marking provision. A careful examination of Section 23 of the Revised Cities and Villages Act (Chapter 24, Article 23, Ill. Rev. Stat. 1949, Vol. 1, pp. 500-508 reveals no express grant to municipalities of the power to enact a net weight marking provision with respect to the sale of baled or packaged wiping rags. Section 23-63 delegates to cities the power to regulate the sale of beverages and food for human consumption, to locate and regulate the places where and the manner in which any beverage or food for human consumption is sold,

and to describe the loaf-weight and quantity of bread. Section 23-65 gives the power to regulate the inspection, weighing, and measuring of brick, lumber, firewood, coal, hay, and any article of merchandise of the same kind. Section 23-66 gives authority to provide for the inspection and sealing of weights and measures. Section 23-67 grants authority to cities to require the keeping and use of proper weights and measures by vendors. Section 23-68 empowers cities and villages to require the sale, by standard avoirdupois weight or by numerical count, of all grain, flour, meal, hay, feed, seeds, fruits, nuts, vegetables and non-liquid vegetable products, meats and non-liquid animal products, fish, butter, cheese and other similar dairy products, dry groceries and all other similar articles of merchandise, "or any particular class or classes of the specified merchandise," in the absence of a contract or agreement in writing to the contrary. (Chapter 24, Sections 23-63, 23-65, 23-66, 23-67 and 23-68 of the Ill. Rev. Stat. 1949, Vol 1, p. 505.)

It is evident from the above enumeration that the Revised Cities and Villages Act grants no authorization to the City of Chicago for the enactment of Section 100-13.1 of the Municipal Code of Chicago hereinabove referred to. However, an express delegation of authority in this respect is contained in an act entitled "An Act in relation to weights and measures," approved June 30, 1921, as amended. (Chapter 147, Ill. Rev. Stat. 1949, Vol. 2, pp. 1470-1480).

Section 12 of said Act provides that each city of 25,000 or more inhabitants may appoint an "inspector of weights and measures," and that the city council may pass such ordinances relative to his duties as shall not be in conflict with the provisions of the Act. (Chap. 147, par. 12, Ill. Rev. Stat. 1949, Vol. 1, p. 1472).

Section 14 of the Act provides that each such "city inspector of weights and measures" shall have the powers and perform the duties within his city as are granted to and imposed upon the Director of Agriculture by sections 7, 8, 9 and 10 of the Act. (Chap. 147, par. 14, Ill. Rev. Stat. 1949, Vol. 1, p. 1472).

Section 7 of the Act specifically provides, in part, as follows:

> "Whenever the Director of Agriculture finds a violation of the statutes relative to weights and measures, he shall cause the violator to be prosecuted." (Chap. 147, par. 7, Ill. Rev. Stat. 1947, Vol. 1, p. 1471).

Thus there is an express delegation to the city inspector of weights and measures (here the City Sealer) to enforce the provisions of the Act.

Section 100-13.1 of the Municipal Code of Chicago is identical in language to Section 21 of the Act. (Chap. 147, par. 21, Ill. Rev. Stat. 1949, Vol. 1, p. 1473). Hence the enforcement by the City Sealer of the net weight marking provision with respect to the sale of packaged commodities (which includes the sale of wiping rags in bales) may be supported both as an enforcement of Section 21 of the Act and as an enforcement of Section 100-13.1 of the Municipal Code of Chicago.

Some classes of commodities are required by the city ordinances to be sold only by "avoirdupois net weight." (Section 100-8, solid fuel; Section 100-10, crushed stone, sand, or gravel; Section 100-12; vegetables, meats, dairy products; Section 100-13, fresh berries, cherries, currants, and other small fruits). Some of the aforementioned items may also be sold by numerical count or in uniform size receptacles of one quart or one pint standard dry measure or multiples thereof. However, there is no general "sale by net weight" requirement in the city ordinances that can be applied to the sale of baled wiping rags. For authority to enforce sales by net weight, reference must be had to Section 28 of the Act in relation to Weights and Measures, which provides as follows:

"Whenever any commodity is sold on the basis of weight, it shall be unlawful to employ any other weight in such sale than the net weight of the commodity; and all contracts concerning goods sold on a basis of weight shall be understood and construed accordingly. Whenever the weight of a commodity is mentioned in this Act, it shall be understood and construed to mean the net weight of the commodity." (Chap. 147, par. 28, Ill. Rev. Stat. 1949, Vol. 1, p. 1475).

This requirement of sale by "net weight" applies to "any commodity sold on the basis of weight," and is not limited to commodities of particular kinds, nor depends on whether they are sold in package form or in bulk. The power of the municipality to enforce this provision of the statute through its city inspector of weights and measures is within the scope of the delegation, but until an ordinance is enacted in conformity with Section 28, the enforcement of this requirement of sale by net weight must necessarily be under the statute alone.

We now come to the basic question whether these net weight sale and marking provisions may be enforced against interstate shipments into the City of Chicago without offending against the paramount Federal power over interstate commerce. The problem is whether a local police regulation (which is essentially what these net weight provisions are) is powerless to prevent the importation from outside the State of commodities sold and marked in violation of such local police measures. On this question, the decisions of the United States Supreme Court are, of course, controlling.

In *Armour and Co.* v. *State of North Dakota*, 240 U. S. 510 (1916), a statute of North Dakota required that every article of food or beverage shall be sold by weight, measure, or numerical count, and shall be labeled in accordance with the provisions of the food and beverage laws of the State. By another section of the statute it was provided that lard, when not sold in bulk, shall be put up in pails or other containers holding one, three, or five pounds net weight, or some whole multiple of these numbers, and not any fractions thereof. Armour and Co., a New Jersey corporation, had a branch office in the City of Fargo, North Dakota, to which it shipped its products in carload lots for resale within the State. The question was whether this statute could constitutionally be applied to retail sales, within the State of North Dakota, of lard shipped into the State by Armour and Co., which was put up in pails of three, five and ten pounds gross weight. At first, the net weight was not shown on each pail, but subsequently, in obedience to State law, it was indicated by labels. The three pound pail gross weight was shown by its label to contain two pounds and six ounces net weight.

The Supreme Court pointed out, first, that the statute was a police power regulation of the State for the purpose of securing to its inhabitants honest weights. The language of the Supreme Court in pointing out the public purpose of the regulation is worthy of quotation here because it is so pertinent to the present inquiry. The Supreme Court said (p. 515-516):

"The testimony of the company was directed at great length to show the advantages of selling in containers over selling in bulk, and the expense to the company of the former and the additional expense which the law would require. And meeting the objection that the company fixed the price of the lard by the gross weight of the package, in other words, as though there were three pounds instead of two pounds six ounces, it was replied that by so doing there was no profit to the company and only a reimbursement of the cost of the tin container and extra cost of putting the lard in that style of package.

But this does not justify the practice of the company nor establish the invalidity of the law of the State. The advantages are in a sense made a snare and the testimony means no more than that the packer has built up a trade on a system of gross weight which enables it to

practice a kind of deception on the purchaser that he is getting three pounds of lard when he is only getting two pounds six ounces, and enables the packer to pay for the container. The evil of the transaction is not in the latter but in the former, that is, in the deception. The correction of the statute is that the lard and the container shall be unequivocally distinguished and the purchaser have the direct assurance of the quantity of lard he is receiving, knowledge of its price and the cost of the container to him, a means of estimating his purchase free from disguises or the necessity of an arithmetical estimate of what he is getting or paying for upon the market fluctuations of lard and tin. This may involve a change of packing by the company and the cost of that change, but this is a sacrifice the law can require to protect from the deception of the old method. The law is allied in principle, as the Supreme Court of the State observed, to regulations in the interest of honest weights and measures. It involves no giving up of what the company has a right to retain and the cost of the container as well after change as now can be cast upon the purchaser, he, however, being able to determine if it is worth the price he has to pay for it.

GAS DISTRIBUTION SAFETY REGULATIONS

(No. 11403—J. F. G.—July 19, 1951.)

1. There are no provisions in our Code for gas shut-off valves or other safety regulations applicable to the gas distribution system in our city, nor are there provisions for inspection specially applicable to gas appliances, furnaces and hot water heaters.

In our opinion regulation of all appliances and equipment of a gas distribution system is within exclusive jurisdiction of Illinois Commerce Commission which regulates all public utilities.

2. Persons installing gas appliances are not licensed under our City ordinances.

The gas distribution system in Chicago is maintained and operated by one company, Peoples Gas Light & Coke Company, which was granted a charter by the State of Illinois for the manufacture and sale of gas in the city of Chicago in 1855 (Laws of Illinois 1855, p. 614). The gas company was authorized to lay pipes in the streets of the city with the consent of the city council, which consent was granted on August 30, 1858, without any time limit. By its charter the company was authorized to manufacture and sell only illuminating gas, but by an act of the State Legislature passed in 1897 all gas companies authorized to manufacture and distribute illuminating gas were granted the additional power to manufacture and distribute gas for fuel purposes and to distribute natural gas (Laws of Illinois 1897, p. 177). Since the enactment of the Illinois Public Utilities Act in 1913 the gas company obtained a certificate of convenience and necessity to operate as a public utility as required by that act.

We trust this information will satisfy your request for a copy of the gas franchise.

NARCOTICS PROSECUTION

(No. 11407—Mayor—A. M.—July 31, 1951.)

We are in receipt of your communication of April 18, 1951, transmitting a letter dated April 6, 1951, addressed to you by the Honorable Charles S. Dougherty, Judge of the Municipal Court of Chicago, suggesting that Section 193-1 of the Municipal Code of Chicago be amended by including "narcotic addicts" among the classes of persons subject to arrest and prosecution for disorderly conduct. This suggestion has been carried out, and said Section 193-1 has been so amended by the City Council on May 24, 1951 (C. J. 5/24/51, p. 312).

With the words added by the amendment underlined, said Section 193-1, in pertinent part, now reads as follows:

> "* * * all persons who are known to be *narcotic addicts*, thieves, burglars, pickpockets, robbers or confidence men, either by their own confession or otherwise, or by having been convicted of larceny, burglary, or other crime against the laws of the state, who are found lounging in, prowling, or loitering around any steamboat landing, railroad depot, banking institution, place of public amusement, auction room, hotel, store, shop, public way, public conveyance, public gathering, public assembly, court room, public building, private dwelling house, house of ill-fame, gambling house, or any public place, and who are unable to give a reasonable excuse for being so found, shall be deemed guilty of disorderly conduct, and upon conviction thereof, shall be severally fined not less than one dollar nor more than two hundred dollars for each offense."

The question presented is whether the amendment accomplishes its purpose, namely, whether arrests and prosecutions of narcotic addicts under the disorderly conduct ordinance are legally sustainable.

It will be noted, first, that the phrase "narcotic addicts" is inserted as an added class to the heretofore enumerated criminal classes of persons known to be "thieves, burglars, pickpockets, robbers or confidence men." Addiction to narcotics is not made a crime either by statute or ordinance, and the question is whether it was proper to place narcotic addicts in the same category as the other criminal persons specified in the section. It might be contended that since narcotic addiction is not a crime, it cannot be made the subject of arrest, prosecution, and punishment. In our opinion, a complete answer to such a contention is that the ordinance does not penalize narcotic addiction *per se*, but only if the narcotic addict is found under circumstances (such as loitering in public places, etc.) as would render his conduct disorderly because tending to a breach of the peace, or otherwise dangerous to public safety or offensive to public morals.

The fact that narcotic addiction is not made a crime is thus no bar to the prosecution of its public display, just as *public drunkenness* is punishable although *private intoxication* is not. The analogy between public drunkenness and the public display of narcotic addiction goes even further, since the power of the municipality to penalize both types of conduct is sustainable as an exercise of the police power.

There is an express statutory grant to Illinois municipalities of the power to enact ordinances "To prevent intoxication, * * * and all other disorderly conduct." (Chap. 24, Sec. 23-59, Revised Cities and Villages Act). Pursuant to this grant of power, the City Council has enacted an ordinance declaring "common drunkards" to be "vagabonds," and imposing a fine of not to exceed one hundred dollars for each offense. (Sec. 193-3, Municipal Code of Chicago). The validity of such a provision as a proper exercise of the City's police power is unquestioned.

In McQuillin, on Municipal Corporations, 3d ed., Vol. 6, Sec. 24.183 at pp. 755-56, it is stated:

> "Indeed, public drunkenness is a good example of an offense that affects especially the morals of the local community and hence frequently is prohibited by ordinance as well as by statute.
>
> "The competency of a municipality to prohibit public intoxication is a phase of municipal police power. Thus, a general welfare clause is usually viewed as sufficient to authorize an ordinance prescribing a penalty on conviction of being found drunk, noisy or disorderly within the corporate limits, or found in a state of intoxication on the public streets, ways and places."

Narcotic addiction is at least as dangerous to public safety and as offensive to public morals as intoxication; indeed, it is a more vicious and demoralizing form of intoxication than that caused by liquor. It is common knowledge that narcotic addicts have little or no control over their emotions, impulses or passions and constitute a disproportionate percentage of the criminal element of the population. The Federal Publice Health and Welfare Act, 42 U. S. C. A., Sec. 201 (k), defines an "addict" as "* * * any person who habitually uses any habit-forming narcotic drugs so as to endanger the public morals, health, safety, or welfare or who is or has been so far addicted to the use of such habit-forming narcotic drugs as to have lost the power of self-control with reference to his addiction." Narcotic addicts thus create a sufficient public danger upon which to sustain the validity of the recent amendment to Section 193-1 of the Municipal Code as a legitimate exercise of the police power.

A question which will undoubtedly arise in prosecutions under the "narcotic addicts" amendment of Section 193-1 of the Municipal Code is whether it is sufficient to charge the defendant with being a "narcotic addict" without specifying the particular narcotic drug or drugs to which the defendant is alleged to be addicted. It would seem that the particular drug should be specified and that it must be of a type coming within the definition of "narcotic drugs" contained in the Uniform Narcotic Drug Act of Illinois. Said Act, by section 1, subdivision (16) thereof, defines "narcotic drugs" as follows:

> " 'Narcotic drugs' means coca leaves, opium, isonipecaine, cannabis, methadon, and every substance neither chemically nor physically distinguishable from them." (Chap. 38, par. 192.1 (16), Ill. Rev. Stat. 1949, Vol. 1, p. 1330).

The drugs enumerated in the above definition are each further defined in other subdivisions of the same section.

In *People* v. *Lee Foon*, 294 N. Y. S. 872 (1937), the defendant was charged with the crime of possessing a "narcotic drug." The trial court granted defendant's motion in arrest of judgment, and the State appealed. The New York statute, like the Illinois Statute, defined "narcotic drugs" as meaning "coca leaves, opium, cannabis, and other substances neither chemically nor physically distinguishable from them." Also, by other subdivisions of the New York statute, "coca leaves," "opium," and "cannabis," were themselves more specifically defined. The point raised by the defendant was that the allegation of the possession of a "narcotic drug" was insufficient to charge a crime, because a chemical analysis of the particular narcotic drug found in his possession might show that it was not one of the narcotic drugs specified in the statute. It was further argued that lack of such specification might preclude a plea of former jeopardy upon a subsequent charge of the same act of possession. The court held that the information which charged merely the possession by defendant of "a certain narcotic drug," without specifiying the particular narcotic drug, was fatally defective, and the order granting defendant's motion in arrest of judgment was affirmed.

The aforementioned decision strongly suggests the necessity of specifying, in all complaints for disorderly conduct filed under Section 193-1 of the Municipal Code of Chicago, the particular narcotic drug to which the defendant is charged with being addicted, and further suggests that it must be a narcotic drug within the definition of the Illinois statute. While it might be argued with great force that a "narcotic addict" is just as dangerous to the public safety and morals, whether his addiction is to a narcotic drug within or without the statutory definition, the rule of strict construction of penal ordinances might well limit the "narcotic addicts" phrase of the ordinance to the "narcotic drugs" defined in the statute.

This question is further complicated by the fact that the Municipal Code specifies its own list of habit-forming drugs, ("morphine, cocaine, alpha or beta eucaine, chloral hydrate, or any salt, compound, or derivative of any of the foregoing substances, or any substance, preparation, or compound containing any of the foregoing substances, or any of their salts, compounds, or derivatives"), the selling or giving away of which is prohibited except upon the written prescription of a duly registered physician, and the same list of drugs is prohibited from being sold or given away even by a duly registered physician to any person "addicted" to the use of any of the drugs enumerated (Sections 97-4 and 97-5, Municipal Code of Chicago). To the extent that the definition in the ordinance varies from that contained in the statute, the statutory definition would, in our opinion, control, especially since the ordinance does not refer to the drugs which it enumerates as "narcotic drugs," whereas the statute does so in express terms. Consequently, the phrase "narcotic addicts" in Section 193-1 of the Municipal Code must be construed in the light of the statutory definition of "narcotic drugs" rather than in accordance with the list of drugs specified in the ordinance to which the designation "narcotic" is not applied at all.

In conclusion, it is our opinion that the arrest and prosecution of "narcotic addicts" under Section 193-1, as amended, of the Municipal Code of Chicago, under a complaint specifically setting forth, among other things, the type of narcotic drug (within the statutory definition of that term) to which the defendant is charged with being addicted, is within the police power of the city and legally sustainable.

USE OF RED OSCILLATING LIGHTS

(No. 11439—Fire Commissioner—A. F. G.—November 1, 1951.)

In your letter of October 29, 1951 you state that fire, police and fire insurance patrol apparatus in Chicago are equipped with an oscillating red light device, the principal purpose of which is to visually acquaint the public of the respone of the apparatus to emergencies.

You express the belief that the general use of the oscillating red light upon automotive equipment other than the above would lessen the effectiveness of the device.

You state that one of the local utilities has made verbal inquiry as to the use of oscillating red lights on their equipment and ask our opinion as to the legality of the use of such a device on automotive equipment, other than emergency equipment in use by the fire, police and fire insurance patrol.

The term "Authorized emergency vehicle" is defined in section 27-1 of the Traffic Regulations as follows:

"Any vehicle of the Chicago fire insurance patrol, the fire department or police department of any governmental agency, or any ambulance, or any repair or service vehicle of a governmental agency or public service corporation, authorized by the public vehicle license commissioner."

The term is similarly defined in section 2 of the Uniform Act Regulating Traffic on Highways.

Section 113 of the U A R T is as follows:

"Special restriction on lamps. (a) No person shall drive or move any vehicle or equipment upon any highway with any lamp or device thereon displaying a red light visible from directly in front thereof. (b) Flashing lights are prohibited on motor vehicles, except as a means for indicating a right or left turn or stop.

The provisions of Paragraphs (a) and (b) of this section shall not apply to authorized emergency vehicles or to vehicles of the second division designed for towing or hoisting disabled vehicles while actually being used for such purposes."

By this section flashing lights are permitted on authorized emergency vehicles but are not required.

Section 27-20 of the City's Traffic Regulations provides:

"Authorized emergency vehicles.

(a) The driver of an authorized emergency vehicle, when responding to an emergency call or when in the pursuit of an actual or suspected violator of the law or when responding to but not upon returning from a fire alarm, may exercise the privileges set forth in this section, but subject to the conditions herein stated.

(b) The driver of an authorized emergency vehicle may:

1. Park or stand, irrespective of the provisions of this chapter.

2. Proceed past a red or stop signal or stop sign, but only after slowing down as may be necessary for safe operation;

3. Exceed the prima facie speed limits so long as he does not endanger life or property;

4. Disregard regulations governing direction of movement or turning in specified directions.

(c) The exemption herein granted to an authorized emergency vehicle shall apply only when the driver of any said vehicle while in motion sounds audible signal by bell, siren or exhaust whistle as may be reasonably necessary, and when the vehicle is equipped with at least one lighted lamp displaying an oscillating, rotating or flashing red beam visible under normal atmospheric conditions from a distance of 500 feet to the front of such vehicle, except that an authorized emergency vehicle operated as a police vehicle need not be equipped with or display a red light visible from in front of the vehicle."

By the foregoing section authorized emergency vehicles, if they are to exercise the privileges granted to them by this section, must be equipped with the type of oscillating red light described therein.

It is our opinion, therefore, that every vehicle authorized as an emergency vehicle must be equipped as provided in the foregoing section.

EMERGENCY VEHICLE WARNING EQUIPMENT

(No. 11441—Commissioner of Police—A. F. G.—November 5, 1951.)

In your letter of October 31, 1951 you quote in full a letter from the Metropolitan Ambulance Operators Association, by Mr. Charles P. Leach, Secretary, which is as follows:

> "Please advise us whether or not we are now considered to be in a period when the provisions of Sec. 193-6.1, Municipal Code, are applicable.
>
> Sec. 193-6.1 provides; 'For the duration of any war in which the United States is engaged no person, including without limiting the generality of the word "person" all persons upon an authorized emergency vehicle, shall sound a siren for any purpose.'
>
> Our reason for requesting this information is that certain insurance underwriters who cover ambulances in Chicago operated by members of our organization for public liability and property damage insurance have questioned the right of the operators of such vehicles to sound a siren when responding to an emergency call in the period through which we are presently passing, due to the provisions in the Code cited."

You request our opinion on this question.

Without deciding whether the war with Germany and Japan is over, we are of the opinion that section 193-6.1 of the Municipal Code of Chicago is not applicable to authorized emergency vehicles for the following reasons:

The section is in conflict with section 53 of the Uniform Act Regulating Traffic on Highways which is as follows:

> "The prima facie speed limitations set forth in this article shall not apply to authorized emergency vehicles when responding to emergency calls and the drivers thereof sound audible signal by bell, siren or exhaust whistle. This provision shall not relieve the driver of an authorized emergency vehicle from the duty to drive with due regard for the safety of all persons using the street, nor shall it protect the driver of any such vehicle from the consequence of a reckless disregard of the safety of others."

This section requires the driver of an authorized emergency vehicle when exceeding the prima facie speed limits to sound audible signal by bell, siren or exhaust whistle. The code provision referred to in the letter prohibits the use of a siren. When a city ordinance is in conflict with a State law the ordinance must give way.

Section 193-6.1 is also in conflict with section 27-20 of Traffic Regulations of the Municipal Code which reads as follows:

> "Authorized emergency vehicles.)
>
> (a) The driver of an authorized emergency vehicle, when responding to an emergency call or when in the pursuit of an actual or suspected violator of the law or when responding to but not upon returning from a fire alarm, may exercise the privileges set forth in this section, but subject to the conditions herein stated.
>
> (b) The driver of an authorized emergency vehicle may:
>
> 1. Park or stand, irrespective of the provisions of this chapter.

2. Proceed past a red or stop signal or stop sign, but only after slowing down as may be necessary for safe operation;

3. Exceed the prima facie speed limits so long as he does not endanger life or property;

4. Disregard regulations governing direction of movement or turning in specified directions.

(c) The exemption herein granted to an authorized emergency vehicle shall apply only when the driver of any said vehicle while in motion sounds audible signal by bell, siren or exhaust whistle as may be reasonably necessary, and when the vehicle is equipped with at least one lighted lamp displaying an oscillating, rotating or flashing red beam visible under normal atmospheric conditions from a distance of 500 feet to the front of such vehicle, except that an authorized emergency vehicle operated as a police vehicle need not be equipped with or display a red light visible from in front of the vehicle."

By this section authorized emergency vehicles, if they are to exercise the privileges granted to them by this section, are permitted to sound a siren; by section 193-6.1 they are prohibited from so doing.

When two sections of a statute or an ordinance are in conflict and cannot be reconciled the one last enacted is controlling.

Section 193-6.1 was enacted in February 1942. Section 27-20, which is part of the Traffic Regulations of the code, was enacted December 22, 1950, Council Proceedings p. 7587, and is therefore controlling.

It is our opinion therefore that section 193-6.1, which is in conflict with the State law and with another provision of the city code enacted subsequently, is no longer in effect regardless of whether the war emergency is in effect or not.

STEEL DRUMS AS REFUSE CONTAINERS

(No. 11523—Commissioner of Streets and Electricity—A. F. G.—April 25, 1952.)

In your letter of April 17, 1952 you state that about 200,000 fifty gallon steel drums are used as refuse containers in the city of Chicago.

Section 99-15(a) of the Municipal Code of Chicago defines the term "Sanitary Refuse Container" as "a receptacle of not less than twenty or more than thirty-two gallons capacity, of impervious material and sturdy construction with a tight fitting cover, equipped with at least two handles properly placed to facilitate handling, and shall be subject to the approval of the commissioner of streets and electricity."

A fifty gallon drum would not comply with the capacity requirement of a Sanitary Refuse Container as defined in Section 99-15 as that section limits the capacity to thirty-two gallons. Your letter indicates also that these drums do not have covers as required by the section and probably do not have handles as required.

If these drums have practical value for the purpose used and the fact that 200,000 are in use indicates they must have, why not amend the above section so that these drums could qualify as legal containers?

You state your department has been giving thought to buying galvanized steel covers to fit these drums and reselling them to individuals and groups. We do not believe you have any right or authority to thus engage in business. No provision in the Revised Cities and Villages Act expressly grants power to municipalities to engage in this business. In the absence of express legislative sanction, a municipality has no authority to engage in any independent business enterprise or occupation such as is usually pursued by private individuals. McQuillin Municipal Corporations, Second Edition Vol. 1, Section 375.

The use of a non-conforming garbage container is in violation of Chapter 99 and subjects the violator to the penalty provided in that chapter. We do not believe, however, that such illegal use constitutes such a nuisance as to call for the summary abatement provided in Section 99-2.

The City has the power to abate nuisances, but it does not follow that the City may, as the easiest way to abate the nuisance, destroy private property susceptible of use for lawful purposes. (*City of Chicago* v. *Chicago Stock Yards Co.*, 164 Ill. 236.)

WATER FLUORIDATION

(No. 11532—Alderman, 36th Ward—J. C. M.—May 15, 1952.)

In your letter of May 9, 1952, with which you transmitted a copy of a resolution you introduced in the City Council on October 31, 1951 relating to the use of fluoride in the water supply of the City of Chicago, you stated in part:

> "One of the objections raised at this last meeting was that my proposal was unconstitutional in being a violation of one's civil rights. I do not believe that there is any merit to this contention, but in order to be absolutely thorough and fair in this matter, I believe we ought to look into it. Accordingly, will you please look into this question and advise me as to whether or not my proposal is constitutional so that I may incorporate your written opinion as part of our committee report?"

You also furnished us with the report of July 1951 by the American Dental Association on Fluoridation; a statement of the Executive Committee of the Health Division, Welfare Council of Metropolitan Chicago, dated March 14, 1952, approving the proposed fluoridation of Chicago water supplies as a health measure; the release of the American Dental Association dated March 19, 1952, relating to expert testimony given to your committee; a bulletin issued by the Illinois Department of Public Health, Division of Dental Health; a bulletin issued by the Federal Security Agency, Public Health Service, Division of Dental Public Health; a release on "Fluoridation of Public Water Supplies" issued February 1, 1952 by the secretary of the Inter-Association Committee on Health; and a Report of the AD HOC Committee on "Fluoridation of Water Supplies", dated November 29, 1951, all of which we considered with interest. We also considered articles appearing in the Journal of American Water Works Association relating to the present standard methods for handling fluoride.

It is our opinion that the use of fluoride in the water supply of Chicago as a health measure under scientific control would not violate any constitutional or other legal rights of any water users. According to the

data submitted it appears that the mechanics of feeding fluorides are no more involved than those used for adding chlorine to the water system. Chlorine is a gas and so is fluoride. (*Washington State Apple Advertising Commission* v. *Federal Security Administrator,* (1946), 156 F. (2) 589).

In *Oakes Mf'g. Co.* v. *City of New York,* (1909), 120 N. Y. S. 796, it was held that where a city supplies water which is not absolutely pure, no action can be brought against it by a citizen to compel it to furnish pure water; he having no grievance other than that borne by the rest of the community. In this case a manufacturer of logwood extracts sued to compel the City to furnish a "pure supply of water." The City was using chlorine in its water. The chlorine made it difficult to manufacture the product. In dismissing the suit, the court said:

> "It is plain in the execution of a scheme of water supply there is ample room at every step for choice and selection which within certain limits cannot be controlled by the courts."

The fluoridation program, if adopted, should be by ordinance as a project of the Board of Health, with the Water Department being the agent of that Board in applying the fluoride. This appears feasible for the reasons:—(1) the subject matter is kept in the realm of health control, that is a governmental function, and (2) frequent laboratory tests of the water appear to be necessary to proper control, as there "is a safe margin between trace quantities in drinking water which are required for optimal dental health and that amount which produces undesirable physiological effects." (Report of AD HOC Committee on Fluoridation of Water Supplies, Nov. 29, 1951, p. 6.) In all the articles on the subject we find that "proper safeguards" make the use harmless.

Consideration must be given to the authority vested in the Department of Public Health of the State of Illinois and its prior approval of the use of fluoride should be obtained.

Under Chap. 127, Section 55.03 Illinois Revised Statutes, that Department is authorized to act "in supervisory capacity relative to the sanitary quality and adequacy of proposed or existing water supplies, water treatment and purification works, * * * to determine standards of purity of drinking water."

While it appears from the data submitted that that Department has informally approved fluoridation of water, a more formal and specific approval of any plan you may adopt should be had. Any rules or regulations prepared by that Department bearing on the subject matter should be recognized and followed.

We return the articles on the subject above enumerated for your files.

WEED ORDINANCE

(No. 11538—Commissioner of Streets and Electricity—A. F. G.—May 19, 1952.)

On May 19, 1952 you sent to this office a letter dated May 15, 1952 from Albert F. Keeney, Realtor, 5612 North Avenue, which is as follows:

> "We have your special notice of May 9th regarding the new city weed ordinance. We would like to know if, under the new City of

Chicago Weed Ordinance, the "person in control of said plot of ground" will be construed to be the Real Estate Broker having an ordinary open listing with his regular "for sale" sign erected thereon.

Last year this office experienced considerable difficulty with this matter and we would like to hear from you in order to avoid a similar situation in 1952."

I think you can assure the writer of this letter and any other realtor who makes similar inquiry that it was not the intention of this office in drafting the new weed ordinance to make a mere agent for the sale of the premises responsible for the eradication of the weeds growing thereon.

When this ordinance was considered by the city council several aldermen raised the question of whether a realtor whose agency is limited to finding a purchaser, would be considered as a "person in control of said plot of ground," we assured the inquiring aldermen that such was not the intention. With that understanding the ordinance was passed.

However, if a realtor's contract of agency gives him complete management and control of the premises, it is our opinion he would be responsible under the ordinance.

SMOKE ABATEMENT

(No. 11600—Alderman, 48th Ward—A. F. G.—October 20, 1952.)

Your letter of October 9, 1952 reads as follows:

"Mr. Lloyd Whitney, owner of the Whitney Company, 1002 Wilson Avenue, Chicago 40, Illinois, has written me a letter suggesting that an ordinance be drawn which would permit the Court to issue an Order making mandatory an installation which would abate smoke nuisance where such a nuisance has been proved before the court. Mr. Whitney, in his letter, points out that there are many violations of the present smoke abatement ordinance and feels that it is almost impossible to attack the problem unless the Courts would require the abatement of the nuisance.

He feels that the only way this could be done would be by some type of installation which filters the smoke. I have no idea whether such an ordinance could be constitutionally drawn. I would appreciate your opinion on this matter."

A municipality can only exercise such powers as the legislature expressly grants to it or such powers as may be implied from powers expressly granted.

We find no provision in the Cities and Villages Act granting power to the corporate authorities of municipalities to confer jurisdiction on or to regulate the practice in courts of record.

Article 6 of the constitution covers the whole judicial power of the people of the State and is the source of all legislative powers respecting courts. (*People* v. *Smith*, 327 Ill. 11; *People* v. *Olson*, 245 Ill. 288.)

Section 1 of Article 6 of the constitution declares that the judicial powers, except as otherwise provided in the article shall be vested in one Supreme Court, circuit courts, county courts, justices of the peace, police magistrates, and in such courts as may be created by law for cities and

incorporated towns. The jurisdiction of the several courts is either definitely prescribed or committed to the legislature for determination. Section 29 provides that all laws relating to courts shall be general and of uniform operation and the organization, jurisdiction, powers, proceedings and practice of all courts, of the same class or grade, so far as regulated by law, shall be uniform. (*The People* v. *Fisher*, 340 Ill. 250.)

Prosecutions for violation of city ordinances are commenced in the Municipal Court of Chicago. If that court has power to issue the mandatory order suggested by Mr. Whitney no ordinance is necessary to direct the court to exercise it. If the court is without power to issue such an order, a city ordinance authorizing the exercise of such power would be a nullity.

The city ordinance on the subject of the abatement of the smoke nuisance seems ample to accomplish that end. Section 99-65 of the Municipal Code makes it unlawful for any person to use any new or reconstructed plant for the production and generation of heat and power until he has first secured a certificate from the smoke abatement engineer. Such certificate shall state that the plant is so constructed that it will do the work required, and that it can be so managed that no dense smoke shall be emitted in violation of the code for the chimney connected with the furnace or firebox.

Section 99-66 provides for the annual inspection of plants for which certificates have been issued as provided in section 99-65. It further provides that if at the annual inspection or at any inspection subsequent to the issuance of such certificate allowing use of the plant, it is found that the fuel burning equipment is in such condition that it cannot do the work required or cannot be managed that no dense smoke, solids, fumes or noxious gases will be emitted, in violation of the code, from the chimney connected to the furnace or firebox, the smoke abatement engineer shall give notice in writing to the person owning, operating or in charge of such equipment of the defects found and an order to correct, repair or replace the defective equipment. If within ten days from the date of said notice, said order has not been complied with, the smoke abatement engineer may revoke the certificate allowing use of the plant.

If this power which appears drastic enough is not adequate to abate such nuisances, the city has available the remedy of Injunction.

Municipal corporations in the exercise of power granted to them by the State to abate nuisances, may, under proper circumstances, call upon a court of equity for assistance. (*Metropolitan City Railway Co.* v. *City of Chicago*, 96 Ill. 620.)

While the court might properly decline to exercise its equitable jurisdiction where public officials are discharging their duties in the enforcement of the laws and the ordinary methods are effective in compelling obedience to statutes forbidding the creation and maintenances of nuisances, but if ordinary methods are ineffective or officials disregard their duties and refuse to perform them, the court ought to apply the strong and efficient hand of equity and uproot the evil. The remedy should be confined within legitimate bounds. (*Stead* v. *Fortner*, 255 Ill. 468.)

From the foregoing we are of the opinion the suggested ordinance should not be enacted.

REGULATING OIL TANKERS ON RIVER

(No. 11634—Division Fire Marshal in Charge of Fire Prevention—A. F. G.—January 13, 1953.)

In your letter of January 5, 1953 you say:

"The Harbor Master of the City of Chicago phoned the Bureau of Fire Prevention and requested our opinion regarding the provisions of the Municipal Code of Chicago governing the transfer of flammable liquids from an oil tanker to one or more barges in the main branch of the Chicago River immediately west of the outer drive bridge.

The owner of the oil tanker wishes to dock the tanker at the above mentioned location long enough to transfer the flammable liquids to the barge or barges which will proceed down the Chicago river and other waterways to some point outside of Chicago."

After calling attention to the danger from fire attendant upon such operation you ask our opinion relative to the jurisdiction of the Bureau of Fire Prevention concerning such shipments and the transfer of flammable liquids within the city of Chicago.

In 1925 your department advised this office that an oil barge 142 feet long by 37 feet wide, with a total capacity of 114,000 gallons in 9 compartments was towed up the Chicago River three times a week, that the barge had a steel hull with a flat deck and had no power. It was hauled into the city from Lockport, Illinois by a coal burning tug and was used to transfer gasoline to a station at Archer Avenue on the south branch of the river and also to a private oil yard at 1654 Kingsbury street.

You stated that the boat created a fire hazard and requested us to advise you as to the powers you have in order to forbid the entrance of the barge into the city.

In an opinion re the above case dated April 13, 1925, and appearing in Volume 13, Opinions of the Corporation Counsel at page 749 we said:

"The Supreme Court of the United States has frequently held that although Congress has authority to regulate the use of all navigable waters within the United States, nevertheless, this authority is also vested in the states, and may be exercised by states concurrently with Congress, unless Congress has indicated and intention to exclude the jurisdiction of the States, or unless regulations of the State conflict with those of Congress *(Cummings* v. *City of Chicago*, 188 U. S. 410; *Dupont* v. *Miller*, 310 Ill. 140). Although the City of Chicago has been delegated quite general police power over the navigable waters lying within its jurisdiction, our ordinances contain no regulations relative to fire prevention in such waters. The ordinances of the City of Chicago creating the harbor master and giving him general police power over the harbor do not contain fire regulations. The reason for the lack of such municipal regulations probably is due to the fact that the Federal statutes contain minute regulations over navigable waters, and in particular contain such regulations with respect to fire prevention. Thus, Section 7441, of Barnes' Federal Code of 1919 contains regulations as to the mode of packing dangerous articles, including gasoline, and Section 7733 provides that when gasoline and similar commodities are carried, they shall be packed in accordance with the provisions prescribed by the Board of Supervising Inspectors and approved by the Secretary of Commerce and Labor. Sections 7436 to 7449, inclusive, contain minute regulations relative to fire hazards.

We therefore advise you that you notify the federal authorities of this fire hazard and request them to take such action as the law provides."

We furnished your department two other opinions re this subject matter, one in 1933, the other in 1935, both appearing in Volume 18 of the Opinions of the Corporation Counsel at pages 6 and 687, respectively. In both opinions we held as we did in the opinion of 1925.

In the opinion of 1935 we concluded with the following statement:

"We are of the opinion that since commerce over all navigable waters is under the jurisdiction of the United States and since the federal statutes contain specific regulations relative to fire hazards an ordinance passed by the City of Chicago to regulate the transportation and handling of inflammable liquids on the Chicago river and on the waters of Lake Michigan adjoining the City of Chicago might be held invalid. We therefore advise you that you notify the federal authorities of this fire hazard and request them to take such action as the law provides."

We see no reason now to change the views expressed in the foregoing opinions.

REGULATING T. V. CRIME SHOWS

(No. 11638—City Council—A. F. G.—January 21, 1953.)

In your letter of January 8, 1953 you state that your subcommittee has been authorized to give consideration to the matter of a resolution, (copy enclosed) with reference to crime expositions by television stations in Chicago.

You ask our opinion as to the extent of the power of the city council in passing resolutions, orders and ordinances in this matter.

The resolution referred to points out in the preamble that more than 2500 crimes of violence including more than 980 murders were shown during the last year over Chicago's four television stations and refers to the shocking increase in teen-age crime in Chicago during that period, and that a connection exists between the showing of these films and the startling increase in teen-age crime in Chicago. It is then Resolved that the Committee on Judiciary and State Legislation proceed with an immediate study of the problem and take all necessary steps for its correction.

Communications by radio or television is "commerce" and hence under the exclusive regulation of Congress. Neither the State nor any municipality created by the State has any power of regulation over this species of commerce.

In 1948 Mayor Kennelly referred to this office a letter urging regulation by the City of television programs disgusting in character which were then being presented on television screens in this city. In answering this communication we said:

"Being in accord with you as to the need of regulation we have given the matter study and regret to say that so far we are unable to reach a determination that the City possesses authority by ordinance to exercise supervision or surveillance over the programs, this because of the close linking of television with radio and the holdings of the courts to the effect that municipal regulation would be an unlawful interference with interstate commerce. The Radio Act of 1927 empowered the Federal Radio Commission and its successor the Federal Communications Commission to regulate 'all forms of interstate and foreign radio transmissions and communications within the United

States.' Section 31 defines the term 'radio communication' to mean 'any intelligence, message, signal, power, pictures or communication of any nature transferred by electrical energy * * *.'

Furthermore the Communications Act of 1934 is still more explicit with reference to the Commission's jurisdiction over television. Section 3 (b) defines 'radio communication' as the transmission by radio of 'writing, signs, signals, pictures and sounds of all kinds.'

Our investigation shows that it has been held in the case of *Station WBT* v. *Poulnot*, 46 F. (2d) 671, that radio broadcasting stations are engaged in interstate commerce and that state laws imposing license taxes on radio receiving sets are unconstitutional as imposing a burden on interstate commerce. The court in his opinion stated that such a license tax could not be sustained as a matter of local regulation, for the subject is national, and admits only of one uniform system or plan of regulation, and that it could not be sustained as a police regulation with an incidental tax to pay the expense of the regulation, as it has no elements of police." (Opinions Corporation Counsel Vol. 22, p. 245.)

In the state of Pennsylvania a statute required all motion picture films intended to be broadcast by television in that state to be submitted to the Board for censorship purposes. The Communications Act of 1934 prohibits the Federal Communications Commission, the body created to administer the Act, from exercising censorship over radio communications (47 U.S.C.A. section 326).

In *Allen B. Dumont Laboratories, Inc.* v. *Edna R. Carroll* (184 Fed. Rep. 2nd 153) the validity of the Pennsylvania statute was raised before the United States Court of Appeals, Third Circuit. The State Censorship Board contended that as the field of censorship was left open by the Communications Act, that the State Board could exercise censorship under its police power. In denying this contention the Court said:

"We cannot agree with the contention of the Board of Censors that censorship by the States is permitted under the Act. While Section 326, 47 U.S.C.A. Sec. 326, declares it to be a national policy that nothing in the Act shall be understood to give the Federal Commission 'power of censorship' over radio communications and that no regulation or condition shall be promulgated or fixed by the Commission which shall interfere 'with the right of free speech by means of radio communication,' this does not mean that the States may exercise a censorship specifically denied to the Federal agency. Censorship may be defined as the forbidding of publication, i.e., prohibition of publication in advance of publication. The Act itself demonstrates that Congress was vitally concerned with the nature of the programs broadcast as affecting the public good. It, therefore, dealt directly with the subject matter of the broadcasts which Pennsylvania seeks to regulate here. Congress thus set up a species of 'program control' far broader and more effective than the antique method of censorship which Pennsylvania endeavors to effectuate in the instant case.

Five provisions of the Communications Act must be noted in this connection. Section 308(b), 47 U.S.C.A. Sec. 308(b) provides for a careful check by the Commission as to the character and responsibility of any person seeking to obtain a license to operate a broadcasting station. Section 307(d), 47 U.S.C.A. Sec. 307 (d) deals with applications for renewals of licenses. Sections 309(b) (2) and 310 (b), 47 U.S.C.A. Secs. 309(b) (2) and 310 (b) prohibit the assignment or transfer of a license without the written consent of the Commission after it has secured full information respecting the responsibility of the assignee or transferee. Section 303 (m) (4), 47 U.S.C.A. Sec. 303 (m) (D), authorizes the Commission to suspend

the license of any operator upon proof that the licensee '* * * has transmitted * * * communications containing profane or obscene words, language, or meaning * * *'. Finally, Section 326, now embodied in substance in Section 1464, Title 18 U.S.C.A. provides for the fining and imprisonment of any person who utters any indecent, obscene or profane language by means of radio communication."

From these citations we think that as Congress has occupied fully the field of television regulation that the field is no longer open to the States and that the city council is without authority to legislate in this field.

However, we are of the opinion that the city council or its committees may investigate and study the effect that the promiscuous broadcasting of crime films have on the morals and welfare of the youth of the city, that you may conduct public hearings on this subject, to which you may invite organizations such as the Parent Teachers Association, Child Welfare organizations and organizations for the prevention of juvenile delinquency, or similar groups.

If you find after investigation and study that these films, as pointed out in the resolution, are contributing to the spread of teen-age crime, it is your right and duty to memorialize the Federal Communications Commission to exercise its powers with the view of eliminating or minimizing these evils.

CIGARETTE VENDING MACHINES

(No. 11650—City Collector—C. P. H.—February 10, 1953.)

We have your letter of February 6, 1953, wherein you request our opinion relative to the enforcement of Section 178-20 of the Municipal Code of Chicago, prohibiting the use of automatic vending machines for the sale and distribution of cigarettes, which provides as follows:

"No person with or without a retail tobacco dealer's license, shall locate, install, keep, maintain, or use, or permit the location, installation, keeping, maintenance, or use upon his premises of any vending machine, automatic vending machine, coin-controlled or coin-operated machine or other mechanical device used or intended to be used for the sale or distribution of cigarettes."

In the case of *Illinois Cigarette Service Co.*, v. *City of Chicago*, 89 Fed. (2) 610 (1937), the above provisions of the Code, prohibiting the use of automatic vending machines for the sale of cigarettes in order to prevent sales to minors, was held within powers conferred on the City of Chicago by statute, and not unconstitutional as depriving manufacturers and lessors of such machines of their property without due process of law, or as unreasonably and arbitrarily discriminating between persons in business of the same general class and character.

Your first question reads as follows:

"What form of action should be taken, and by whom, against one found selling cigarettes by means of an automatic coin operated vending machine?"

Section 101-28 provides that the City Collector and all license investigators and employees of his office who may be designated by the City Collector shall have full police powers to enforce the license provisions of this Code and shall have the right to arrest or cause to be arrested any

person who violates any of the license provisions of this Code, and shall have the right of entry, at any time, to any place of business for which a license is required by this Code for the purpose of ascertaining whether or not the said license provisions have been complied with.

Section 178-20 quoted above, prohibiting the use of automatic vending machines for the sale of cigarettes, is part of Chapter 178 of the Code which chapter contains the ordinance licensing and regulating tobacco dealers in the City of Chicago. Under the provisions of Section 101-28 referred to above, it is made the express duty of the City Collector and all license investigators and employees who are vested with power to make arrests, to enforce all the license provisions of this Code. It is, therefore, our opinion that it is the duty of the City Collector and all license investigators and employees who have power to make arrests to enforce the above provisions of Section 178-20, prohibiting the use of automatic vending machines for the sale of cigarettes.

With respect to what form of action should be taken against persons who sell cigarettes by means of an automatic coin operated vending machine, it is our further opinion that proceedings may properly be instituted in the Municipal Court of Chicago against any person who makes such sales for violation of Section 178-20, which prohibits the use of automatic vending machines for the sale and distribution of cigarettes. In addition, the Mayor may revoke any license issued to any person who violates these provisions of the Code under the provisions of Section 101-27, which provides that the Mayor shall have power to revoke any license issued under the provisions of this Code for good and sufficient cause.

Your second question reads as follows:

> "Are these vending machines by which cigarettes are sold, legally confiscable? If so, upon what official is imposed the duty of making such confiscation?"

We have examined Chapter 178 of the Code which sets forth the ordinance licensing and regulating tobacco dealers and find that it does not contain any expressed or implied provisions which authorize the confiscation of automatic vending machines used for the sale of cigarettes. In the absence of any such provision, no one has authority to confiscate such machines. If the City Council intended that such machines should be confiscated it would have so provided as it did in the case of gambling devices by providing in Section 191-6, that it shall be the duty of every member of the Department of Police to seize and destroy all wheels, instruments and other such devices used for gambling. It is, therefore, our opinion that there is no authority for the confiscation of automatic vending machines used for the sale of cigarettes.

LIABILITY OF OWNERS OF PRIVATE BOMB SHELTERS

(No. 11660—Coordinator, Civil Defense Corps—P. W. D.—March 12, 1953.)

On March 2, 1953, you submitted to us a FCDA Advisory Bulletin on Tort Liability assumed by property owners who permit the use of their premises as public air raid shelters, and requested that we make a resume of this bulletin showing its application under Illinois law.

Each person gratuitously providing air raid shelters must consider his responsibility to three general classes of people: 1) the general public, 2) those persons on the premises for business purposes, and 3) tenants and their guests.

The general public using an air raid shelter provided without compensation are no more that gratuitous licensees. The law in Illinois, as in the majority of states, holds that a property owner owes no duty to a gratuitous licensee to maintain his premises in a safe condition. All that is necessary, is that such a property owner warn licensees of any concealed dangers of which he has knowledge (*De La Vergne Refrigerating Company* v. *McLeroth*, 60 Ill. App. 529). Of course a property owner must always refrain from willful and wanton conduct toward all licensees. (*Ellguth* v. *Blackstone Hotel*, 408 Ill. 343).

All persons who are on the premises for a purpose beneficial to the owner or occupier is a business invitee. To such persons, the Illinois law requires that the property owner maintain the premises in a reasonably safe condition (*Hart* v. *Washington Park Club*, 157 Ill. 9). Therefore, if a property owner permits his business premises to be used as an air raid shelter, he must continue to maintain them in a safe condition as to all business invitees. A business invitee retains his status during the permitted use of any service or convenience provided by the property owners. If a property owner provides an air raid shelter in an area not devoted to the business transacted, his duty of care will be extended to such an area so far as all persons upon his premises for business purposes are concerned.

A property owner has no duty to maintain portions of his premises which have been leased. However, he must maintain in a safe condition all common corridors, stairways, elevators and the like used by his tenants and his tenants' lawful guests. If a landlord allows his tenants or their lawful guests to use the common places of the premises, or even those portions not otherwise open to them as an air raid shelter, he assumes responsibility to keep such area in a reasonably safe condition.

In a summary, we may say that the Illinois law, with the majority throughout the country, would impose an additional burden on property owners who devote a portion of their premises to air raid shelters only in so far as business invitees, tenants and their guests are permitted to use an area otherwise not open to them. Since this is the only instance in which the duty of the property owner is extended, and since in this instance a consideration of one form or another usually exists between the property owner and his business invitees, or tenants and their guests, it does not seem advisable to adopt any legislation changing the existing law.

ELEVATOR FEES—MUSEUM OF SCIENCE AND INDUSTRY

(No. 11664—City Comptroller—L. L. K.—March 19, 1953.)

You have orally requested an opinion concerning the right of the city to collect elevator inspection fees from the Museum of Science and Industry in Jackson Park as evidenced by warrants for collection attached hereto, No. A10531-10532.

In an opinion which we have heretofore rendered on August 8, 1953, we have indicated that the Chicago Park District authority over the parks does not exclude park areas from the jurisdiction of the city in the enforcement of its ordinances and that the city has the right to inspect weighing machines used by the public in the parks (vol. 18, p. 39, Opinions of the Corporation Counsel). However, in the Municipal Court of Chicago, in a suit to compel Hatfield Electric Company, Inc. to obtain a permit for the installation of electrical equipment at this Museum, the Municipal Court in case No. 3986625, on October 14, 1938, held against the city. No

appeal was taken by the city from this judgment and the case stands as *res adjudicata* against any attempt which we might make to compel the Museum to obtain permits as therein litigated.

Investigation discloses that the Museum is a charitable corporation organized not for profit and the park commissioners are members of its board of trustees. Section 46-7 of the Municipal Code specifically waives building inspection fees from charitable, religious and educational institutions which do not operate for gain or profit, upon application for exemption duly made. It is our opinion that the judgment hereinabove referred to, as well as the ordinance provision, afford a sound basis for making no further attempt to collect these warrants.

LICENSING MASSAGE PARLORS

(No. 11673—Commissioner of Police—A. F. G.—March 26, 1953.)

On January 6, 1953 we sent you a draft of a proposed ordinance amending several sections of Chapter 152 of the Municipal Code of Chicago which provides for the licensing of massage parlors. The amendatory ordinance makes bath houses subject to the same regulations as massage parlors.

On January 22, 1953 you sent this draft to the city clerk for introduction in the city council. The city clerk presented the draft at the meeting of January 26, 1953 (C. J. p. 3942), which was referred to the Committee on License. The Committee had not reported the ordinance up to March 11, which was the last meeting of the city council.

In your letter of March 19, 1953 you make a report of conditions found in the New Congress Baths, 505 S. Wabash avenue, which are comparable to those found in the Lincoln Bath House, 1812-16 N. Clark street, which prompted you to ask for the amendment.

You ask to be advised as to the proper procdure to be used to eliminate bath houses such as this one, where they have no regard for decency and morals.

In our opinion, prosecution for the offenses committed in the New Congress Baths could be successfully carried on by charging the offenders with violating paragraph 162 of Chapter 38 (Ill. Rev. Stats. 1951). We attach hereto copy of a decision of the Illinois Appellate Court, 348 Ill. App. 542, sustaining the conviction of a person charged with a similar offense under that paragraph of the Criminal Code.

GOING OUT OF BUSINESS SALES

(No. 11675—City Clerk—M. I. W.—April 7, 1953.)

We have your letter of March 21, in which you refer to Chapter 121½, Sections 149 to 156 of the Illinois Revised Statutes, sometimes referred to us as the Fraudulent Sales Act, which makes it unlawful for any person to advertise or hold out that any sale of merchandise is an insurance, salvage, closing out, fire sale, or a going out of business, unless he shall first obtain a license from the City Clerk.

You recite several requirements of the statute which we shall discuss below and you describe an application which has been made to you pursuant to this Act by a person who claims he just bought the entire stock of a firm in Chicago, for the sole purpose of disposing of the stock by advertising a "Closing Out Sale."

You state that up to the present time you have rejected this application on the grounds that the new owner procured his merchandise within sixty days from the date of his sale and you request our opinion as to whether you as City Clerk have the right to refuse a license to any person who acquires his merchandise for the sole purpose of conducting a "going out of business sale."

Section 150 of the Act requires the person seeking a license to conduct such a sale to set out in his application under oath among other matters:

> "* * * an inventory of the goods, wares or merchandise to be sold, why such goods, wares or merchandise are to be sold under such name, why, and in what manner, such name is truthfully descriptive of such sale, * * * from whom the goods, wares or merchandise to be sold were procured by the applicant, the date of so procuring them, and of the delivery thereof to the applicant * * * whoereupon such clerk shall issue a license to the person so applying therefore * * *"

Section 153 of the Act reads in part as follows:

> "* * * No person in contemplation of conducting any such liquidation, creditors' removal, closing out, or going out of business sale, * * * shall order any goods, wares or merchandise for the purpose of selling them at such sale, and any unusual purchase, or additions to the stock of such goods, wares or merchandise within sixty days before the filing of such application for a license to conduct such a sale, shall be presumptive evidence that such purchases or additions were made in contemplation of such sale and for the purpose of selling them at such sale."

While this section may have been intended to deal primarily with the problem of sellers who acquire additional wares to add to existing stocks thereby abusing the privilege and misleading the public, and may not have been intended to cover a situation where a purchase is made of a full stock and the entire business venture is planned as a "one shot" going out of business sale, there is nothing in the language of the Act which permits construction of this distinction. The language used is broadly phrased and in the absence of judicial construction must be read in accordance with its plain meaning.

We are therefore of the opinion that a person who acquires his merchandise for the sole purpose of conducting a "going out of business" sale has made such purchase "in contemplation" of such sale and would be in violation of the above section.

The next question presented is whether the City Clerk may refuse to issue a license where the applicant has acquired his merchandise for the sole purpose of conducting such a sale.

An Act "to prevent the fraudulent sale and to regulate the sale and advertising for sale of goods, wares and merchandise, and to provide penalties" which had been approved by the state legislature July 7, 1931, was subsequently held invalid by our Supreme Court because it delegated legislative power to the City Clerk to whom wide discretionary power was given. *People* v. *Yonker*, 351 Ill. 139 (1933).

The present statute was apparently designed to meet the court's objections to the earlier act. Section 150 quoted above prescribes the steps

to be taken by the applicant and enumerates the information he must include and then in setting out the duty of the clerk reads," * * * whereupon such clerk shall issue a license * * *."

This language when viewed in the light of the history of the act would appear to spell out a mandatory duty which the clerk must follow once the form has been filled out as prescribed by law.

However, whether a statute is mandatory or directory does not depend upon its form but upon the intention of the legislature, to be ascertained from a consideration of the entire act, its nature, its object, and the consequence that would result from construing it one way or the other. In re McQuistons Adoption, 238 Pa. 304, 86 Atl. 205 (1913).

If the very application form presented to the Clerk contains information showing that the nature of the contemplated sale is such that is prohibited and declared punishable by a subsequent section of the same act, violence would be done to the "entire act, its nature, its object," to permit such a license to issue and the sale to be held. The purpose of the Act is to protect the public. This can be done most effectively at the point of issuing the license and the legislature may be regarded as having so intended by the very fact of its establishment of a licensing requirement.

It is our opinion that you, as City Clerk, may refuse a license to this applicant and to any person who acquires his merchandise for the sole purpose of conducting a "going out of business sale."

CIGARETTE VENDING MACHINES

(No. 11747—Commissioner on Licenses—J. F. G.—September 23, 1953.)

On September 18, 1953, you addressed this office requesting an opinion "as to whether the City Council would be endangering the City's collection of cigarette license fees by permitting and licensing the operation of cigarette vending machines in restricted or supervised locations where the machines would not be accessible for use by children."

We have examined into the history of the ordinances of the City of Chicago requiring licenses for the sale of cigarettes. In the year 1898 the Supreme Court of Illinois had occasion to consider the validity of such an ordinance. It provided for a license fee of $100 per year. The amount of the license fee was not involved in that case, but the right to license the sale of cigarettes was sustained on the ground that it was a proper exercise of the police power delegated to the City to provide for and regulate the inspection of tobacco in any form "to subserve the public welfare and protect the public health." In that case it was contended "that the City Council has no right to single out a particular form of manufactured tobacco and provide for its regulation, and require a license for its sale, without making the requirement apply to all the forms in which tobacco may be used." The court sustained the power of the City Council to single out the sale of tobacco in the form of cigarettes for regulation and license on the basis that "young persons of weak and immature minds are more liable to use tobacco in the form of cigarettes than in any other form." *(Gundling* v. *City of Chicago,* 176 Ill. 340, 347-348).

The *Gundling* case was taken to the Supreme Court of the United States and that court upheld the ordinance on the fundamental constitu-

tional principle that the decision of the Supreme Court of Illinois as to the power of the City Council to license any kind of business is conclusive (*Gundling* v. *City of Chicago*, 177 U. S. 183; 44 L. ed. 725).

The city ordinance licensing the sale of cigarettes was again the subject of litigation in the year 1904. The objection to the ordinance at that time was that the ordinance prohibited retail cigar and tobacco dealers who were not licensed to sell cigarettes from giving away cigarette papers without a license as provided in the ordinance regulating and licensing the sale of cigarettes or cigarette papers. It was claimed that there was nothing harmful to the public health or otherwise unlawful or injurious in giving away cigarette papers. At that time the license fee was still $100 per year. The case was decided by our Appellate Court (*Kappes* v. *The City of Chicago*, 119 Ill. App. 436, 442), which stated the question thus:

> "* * * has a city council which had power to pass an ordinance plainly intended to restrict and discourage as well as to regulate the sale of a given article—an ordinance forbidding its sale altogether in certain places and to certain persons—power also to add by amendment to that ordinance a simple provision preventing its evasion and practical abrogation?"

The court sustained the power of the City Council to prohibit the sale or giving away of cigarette paper without a cigarette dealer's license, saying:

> "* * * The purpose of the original ordinance was to regulate and restrict and partially prohibit the use of tobacco in the form of cigarettes. It was upheld as a police regulation on the ground that weak and immature persons injured their health by such use. It would be a halting jurisprudence which could find that such an ordinance was legal and valid, but that the body enacting it had no power to prevent retail dealers of tobacco who had and needed no license for their business, from selling freely to minors as well as to all others the tobacco prepared for cigarettes and then giving away to the purchasers the prepared cigarette papers in which to envelope it."

The prohibition against the installation and maintenance of automatic vending machines for dispensing cigarettes was included in the ordinance regulating and licensing the sale of cigarettes by amendment passed December 2, 1936. Sec. 3792a, Revised Chicago Code 1931, C. J., p. 2669. That amendment was attacked in 1937 in the United States courts on constitutional grounds and the United States Circuit Court of Appeals had occasion to review the case. It held valid the amendment forbidding the sale of cigarettes in automatic vending machines. *Illinois Cigarette Ser. Co.* v. *Chicago* 89 F. (2d) 610; 111 A. L. R. 749. After reviewing the cases in Illinois and in the United States Supreme Court involving the city cigarette licensing ordinance, the Court of Appeals held:

> "The evil sought to be reached by forbidding the sale of cigarettes in automatic vending machines was the purchase of cigarettes by immature minors. Automatic vending machines, in order to achieve their purpose, namely, dispensing with salesmen and making facile the purchase of goods without the intervention of human service, are placed in localities easily accessible to the public, are inanimate and automatic, and respond equally efficiently to coins placed therein by a boy or girl as to coins inserted by an adult.* * *"

> "Clearly, within the authorities cited, the city has the right to enact such legislation as will prevent sale of cigarettes to minors and to take all reasonable steps necessary to prevent such action."

From the cases cited we conclude that (1) the City has power to regulate and license the sale of any form of tobacco; (2) the city is justified in singling out the sale of cigarettes and cigarette paper for regulation

and license because "young persons of weak and immature minds are more liable to use tobacco in the form of cigarettes than in any other form;" (3) the nature and extent of restriction of the sale of cigarettes to subserve the public welfare and protect the public health is within the sound discretion of the city council; (4) the sale of cigarettes in automatic vending machines may be forbidden or restricted, at the council may determine, to achieve the purpose of limiting accessibility of cigarettes for use by children; (5) permission by license to locate, install and maintain automatic vending machines for the sale of cigarettes in restricted or supervised locations, as indicated in your request for an opinion, will not affect the license fee required under the present ordinance.

The license fee now required, at the rate of $120 per annum, does not seem to us to be excessive when it is considered that an annual license fee of $100 in the year 1898 was not deemed oppressive, without the additional burden of policing the location and operation of vending machines.

NO LIEN FOR RAGWEED REMOVAL

(No. 11746—Commissioner of Streets and Sanitation—A. F. G.—September 23, 1953.)

In your letter of September 11, 1953 you call attention to Senate Bill 383 which adds "ragweed" to the list of noxious weeds defined in section 1a of "An Act concerning noxious weeds" approved March 15, 1872, as amended. You are correct in your understanding that this bill passed and has been approved. You also state that it is your understanding that Chapter 85, Section 3 of the Illinois Revised Statutes provides "Any expense incurred in such destruction shall be paid by the owner or owners of such lands, and the townships, road district, city or village, or county, of which such Commissioner is an officer, as the case may be, shall have a lien against such lands for such expense which lien shall be enforced in the manner now provided for the enforcement of mechanic's liens."

This language is not in Chapter 85 of the Illinois Revised Statutes, but is part of Chapter 18 (Canada Thistle Act). Section 1 of that act, permits, but does not require, boards of town auditors, county commissioners, city councils in cities and the president and trustees of any town or village to appoint some competent person to be "Commissioner of Noxious Weeds" for a term of two years, his compensation not to exceed six dollars a day for each full day necessarily spent in the performance of his duty, to be verified by affidavit.

The City of Chicago has not elected to provide for the eradication of noxious weeds under that Act. This city has provided by section 99-9 of the Municipal Code of Chicago for the destruction of weeds injurious to public health. The power to enact this ordinance is found in section 23-93 of the "Revised Cities and Villages Act," which reads as follows:

> "To provide for the destruction of weeds at the expense of the owners of the premises on which the weeds are growing."

It will be noted that this grant of power does not give the City a lien for its expenses for the destruction of weeds, but does provide that such destruction shall be at the expense of the owners. The last paragraph of section 99-9 of the Chicago Code is as follows:

> "When the owner or person in control of any plot of ground fails to destroy or spray weeds grown thereon, as provided herein, the city

official charged with the enforcement of this section shall destroy the said weeds, and any expenses incurred by the city in so doing shall be a charge against the owner so failing, which may be recovered in an appropriate action in law instituted by the corporation counsel."

In *Village of Palmyra* v. *Warren*, 114 Ill. App. 562, (1904) the plaintiff village declared a mill pond on private property a nuisance and gave notice to the owner to abate same. The notice was ignored and the village authorities proceeded to abate the nuisance by filling the pond and in so doing incurred an expense of more than 600 dollars. The village filed a bill praying a lien upon the property for the amount expended and for an order for the sale of the property to satisfy the lien.

The court after citing the powers of municipalities in the abatement of nuisances, said:

"The foregoing constitutes the only powers conferred by statute upon municipalities, relating to the subject of nuisances. It will be observed that no power is therein conferred upon municipalities by either ordinance, resolution or regulation, to impose on any person or property, real or personal, the cost of abating a nuisance existing thereon or arising therefrom. It follows that there was no legal obligation upon appellees to pay the expense of abating the nuisance in question, and therefore no promise to pay the same could be implied. For this, and the further reason that the property sought to be charged therewith was real estate, we are of the opinion that no lien at law existed or could exist upon the property described in the bill."

In an opinion of this office dated December 17, 1907 we said:

"In answer to your inquiry as to the right of the City of Chicago to abate a nuisance and assess the cost of abatement as a lien upon the property upon which such nuisance is maintained or produced, I beg to say:

In the exercise of the police power possessed by the State it may, by statute, provide that the cost of abating a nuisance shall be assessed against or made a lien upon the property upon which such nuisance is maintained or produced. Such statutes have been passed and have been held constitutional in California, Massachusetts and Nebraska, and, perhaps, in other States." (Citing cases) * * *

"But, I believe, from a careful examination of the authorities, that such assessments can be made and such liens exist only by virtue of special statutes authorizing them. There is no such statute in Illinois, and I am therefore of the opinion that the City of Chicago has no right to assess the cost of abating a nuisance as a lien against the property upon which it is maintained or produced.

It may be well to add, however, that in a proper case you may secure a judgment for the cost of abating a nuisance, and that such judgment is either a lien against all the real property of the defendant or can be made such by filing a transcript in the Circuit Court in accordance with the statute." (Opinions of Corporation Counsel, Vol. 4, p. 221).

Since this opinion was written the Legislature has given the City a lien in certain cases for expenses incurred in abating certain nuisances. Section 23-109 of the "Revised Cities and Villages Act" grants to municipalities a lien for expenses incurred in the extermination of rats on private property. And at the last session of the General Assembly section 23-70.2 was added to the said Act and grants a lien to municipalities for expenses incurred in the repair or demolition of dangerous and unsafe buildings.

In view of the foregoing it is our opinion that the City does not have a lien for expenses incurred in the destruction of weeds on private property, but such expense is chargeable against the owner of such property, which may be recovered in an action at law. Any judgment thus recovered is a lien not only on the property on which the expenditure was made but upon any other real property owned by the person against whom the judgment was obtained.

MANUFACTURING LIQUID GAS

(No. 11749—Building Commissioner—E. W. P.—September 25, 1953.)

We have your letter of September 23, requesting our opinion as to whether or not the erection of buildings for the manufacture of liquid and gaseous oxygen, liquid and gaseous nitrogen, argon gas and hydrogen is a permitted use in a manufacturing district.

The proposed use is not a permitted use under Section 12 of the Chicago Zoning Ordinance which relates to manufacturing districts, but is a use permitted only in an industrial district.

Under Section 22 of the Ordinance relating to variations, the City Council, by ordinance, may determine and vary the application of the provisions of this ordinance in harmony with their general purpose and intent and in accordance with the rules adopted by the ordinance in cases where there are practical difficulties or particular hardship in the way of carrying out the strict letter of any of the provisions of this ordinance relating to the construction or alteration of buildings or structures or the use of land. However, no such variation shall be made by the City Council, except in a specific case and after a public hearing before the Board of Appeals.

The National Cylinder Gas Company may present their application for a variation before the Board of Appeals-Zoning for consideration.

SOLICITING PERSONAL INJURY SUITS

(No. 11755—Police Commissioner—M. I. W.—October 19, 1953.)

We have your letter of October 9, with which you fowarded a report from the commanding officer of the 26th District requesting an opinion on the arrest of individuals soliciting injured persons for the purpose of instituting law suits.

The situation described in the report exists around the office of a physician who operates an emergency medical center at which are treated persons who are injured at their work and who are sent for first aid by the companies. The report states that several individuals have been stopping patients as they leave the doctor's office after treatment and soliciting them on behalf of certain attorneys who, it is explained, will be helpful in effecting financial remuneration for injuries sustained. An introductory card to the attorney is given and the solicitor is paid by the attorney for each account which the attorney signs to a contract.

You request our opinion as to the section of the state statutes or municipal ordinances under which prosecution of these solicitors can best be effected and call our particular attention to sections 65 and 66 of the Criminal Code covering "barratry and maintenance."

These sections read as follows:

> "65 Barratry.) If any person shall wickedly and willfully excite and stir up any suits or quarrels between the people of this state, either at law or otherwise, with a view to promote strife and contention, he shall be deemed guilty of common barratry, and shall be fined not exceeding $100; and if he be an attorney or counselor at law he shall be suspended from practice of his profession, for any time not exceeding six months.
>
> "Section 66. Maintenance.) If any person should officiously intermeddle in any suit at common law or in chancery, that in nowise concerns such person, by maintaining or assisting either party with money or otherwise, to prosecute or defend such suit, with a view to promote litigation, he shall be deemed guilty of maintenance and upon conviction thereof, shall be fined and punished as in cases of common barratry * * *." (Ill. Rev. Stat. 1953, Chap. 38.)

Section 65 seems more pertinent than 66, since the latter requires assistance in financial or other form to maintain the injured party during pending recovery. This is an element that does not appear in the facts you describe.

Barratry is an old common-law offense. 9 C.J.S., Barratry, sec. 1, p. 1546; 10 Amer. Jur, Champerty and Maintenance, par 3, p. 551.

Blackstone defined this offense as:

> "* * * frequently exciting and stirring up suits and quarrels between his majesty's subjects, either at law or otherwise." 4th Blackstone, p. 134.

It will thus, be seen that the Illinois statute on this subject has enacted the common law definition and thus precedents under the common-law constitute authority for the interpretation of our statute.

In the case of *State* v. *Batson*, 17 S. E. 2nd 511 (1941) the North Carolina Supreme Court affirmed a conviction for an attempt to commit barratry on an indictment which charged that the defendant did:

> "* * * willfully, unlawfully, and with a mean and selfish intent stir up divers quarrels, strifes, suits, and controversies, among the honest and quiet citizens of this State; that the said (defendant) was and yet is a common barrator, stirring up, moving and procuring strifes, quarrels, suits and controversies among the people, to the common nuisance of all the people, all contrary to the common law and against the peace and dignity of the State * * *."

Barratry is not a statutory offense in North Carolina and the indictment charged the common law offense in language similar to that in the Illinois statute. Evidence under which the conviction was sustained showed that the defendant "went, unsolicited, to see each of the five persons named * * * in the indictment and urged each of them to institute separate suits, and offered to assist such persons in the conduct of such suits and to receive his compensation from the collection made therein."

Testimony was also introduced as to a statement made by the defendant to an attorney who appeared as a witness, as follows:

> "Well, you lawyers know that it is not 'nice' for lawyers to solicit business. When I hear of an accident I go to the injured parties and get their stories * * * and talk to them about recovering some dam-

ages * * *. Generally, these folks do not know a lawyer and they ask me to recommend a good lawyer. Of course, I work along with the lawyers who work along with me and naturally I suggest to them the name of some lawyer that will cooperate with me. I then go to see the lawyer and get a contract of employment and the people sign it and then (go) in to see the lawyer. My contract is made with the lawyer and my fee is contingent upon recovery in the case."

The facts in the above case, with only minor variations in the method of operation, are basically similar to the situation you describe. We are therefore of the opinion that person engaged in such conduct may be arrested and charged with violation of section 65 of the Criminal Code.

It should be noted, however, that the offense is not in being simply a barrator but a *common barrator* and there can be no conviction for a single offense. *Vorhees* v. *Dorr*, 51 Barb. (N. Y.) 580. It is not clear whether two acts are sufficient or whether three must be shown as was held in the case of *State* v. *Noell*, 295 S. W. 529. Better practice would be to charge three acts to avoid a challenge on this score.

We further call your attention to Canon 20 of the Canons of Professional Ethics of the Chicago Bar Association, which reads in part as follows:

"It is disreputable * * * to breed litigation by seeking out those with claims for personal injuries or those having any other grounds of action in order to secure them as clients, or to employ agents or runners for like purposes, or to pay or reward, directly or indirectly, those who bring or influence the bringing of such cases to his office. * * *"

It would be appropriate for you to bring information of any activities of any attorney falling within the prohibition of this canon to the attention of the Chicago Bar Association which under Supreme Court rule 259.59; Chapter 110, Ill. Rev. Stat. (1953) are designed as Commissioners of the Illinois Supreme Court in maintaining the standards of the legal profession.

CIGARETTE TAX AT HOUSE OF CORRECTION

(No. 11760—Board of Trustees, House of Correction Employees' Pension Fund—G. F. M. Jr.—November 2, 1953.)

In response to your request for an opinion concerning the questions which you asked in connection with the cigarette tax, the following is submitted:

Your letter requests the answers to the following questions:

1. Must the commissary pay the one cent tax as cigarettes are sold only in the House of Correction?

2. Could the tax stamps be delivered in blocks instead of being attached to the packs of cigarettes so the tax could bt recovered by this Fund from the city?

3. Can the cigarettes be delivered by the wholesaler to the commissary tax exempt?

4. Can the cigarettes be delivered (sold) to the inmates (prisoners) without the tax stamp attached.

The City Council of the City of Chicago on the sixth day of August 1953, passed an ordinance amending the Municipal Code of Chicago by adding a new chapter thereto, which new chapter is known as Chapter 178.1.

Chapter 178.1 and the following subdivisions have to do with the imposing of an occupation tax upon all retail tobacco dealers at the rate of one cent per package of twenty cigarettes sold. It further provides for the wholesale tobacco dealer to affix stamps representing the tax before delivering cigarettes to any reail dealer. There is no provision contained in said ordinance which would permit the sale of cigarettes by a retailer without payment of the occupation tax.

It therefore follows that the answers to the four questions set out hereinabove in this opinion must be as follows:

1. The commissary, acting as a retailer, must pay the tax. (178.1-2)

2. The stamps must be attached to the package of cigarettes. (178.1-4)

3. The cigarettes cannot be delivered to the commissary tax exempt. (178.1-4-5)

4. The cigarettes when delivered to the inmates must bear the tax stamp. (178.1-11)

In order that the commissary may not take the loss of approximately $150 per month by reason of payment of this tax, it is respectively, suggested that the amount of the tax be added to the packages sold to the inmates.

CIGARETTE TAX

(No. 11764—City Collector—M. I. W.—November 10, 1953.)

In your letter of October 9, you request our opinion on the claim of the Federal Reserve Bank of Chicago that they are exempt from the operation of the Chicago cigarette tax ordinance.

Under the terms of that ordinance an occupation tax is imposed upon all persons engaged in the business of selling cigarettes in the city to a purchaser for use or consumption. The rate of tax is set at one cent per twenty cigarettes sold, offered, displayed or kept for sale and the tax is paid by purchase of tax stamps from the city collector which are to be affixed to cigarette packages. Section 178.1-2, Mun. Code, Chicago.

The Federal Reserve Bank operates a canteen which it is claimed is for the sole use and convenience of employees of the Bank.

The Bank claims exemption from the ordinance as an agent and instrumentality of the federal government exercising governmental functions and that the purpose of the sale of cigarettes to employees is to promote morale, decrease the employee's time away from work, and increase his efficiency which the Bank contends in its letter to you, is not a departure from the performance of governmental functions.

As further authority and precedent for its view the Bank cites several points each of which we shall consider.

1. An opinion of this office dated May 29, 1953 directed to the city clerk holds that the Bank was exempt from payment of the city vehicle tax license for its vehicles.

In answer to this contention it need merely be noted that that opinion dealt with an ordinance which expressly exempted from the vehicle tax "all vehicles owned or operated by the United States government." (Section 29-15.) The opinion referred to was concerned solely with the question of whether the Federal Reserve Bank was, insofar as that ordinance was concerned, synonomous with "the United States government." Concluding in our opinion that it was brought into automatic operation the express exemption contained in the ordinance itself for vehicles so owned.

No such exemption is expressed in either the cigarette tax ordinance (Chapter 178.1, Mun. Code of Chicago) or in the statute authorizing the city to enact such an ordinance. Chapter 24, paragraph 23-53.1, Ill. Rev. Stat. (1953).

2. Rule 40 of the Illinois Department of Revenue, Retailers' Occupation Tax Division, exempts governmental bodies from the payment of that tax and the Bank under that exemption it not paying this tax on food sold in the cafeteria it operates or upon candy, cigars and other items sold in the canteen. It is urged by the Bank in view of this exemption that "it would necessarily follow that we (the Bank) should also be exempted from the Chicago cigarette tax ordinance * * * as that too imposes an occupation tax upon retailers and if the State authorities are not authorized to subject sales by an agency or instrumentality of the Government to a retailer's occupation tax, it would seem that a subordinate taxing unit deriving its power from the State of Illinois, such as the City of Chicago, also would be without this authority."

This contention likewise falls short. Although the two taxes are somewhat similar in nature, the line of legislative authority under which they are activated bear no relationship to each other. While it is true that the City of Chicago is a subordinate unit to and derives its power from the State of Illinois, the Chicago cigarette tax ordinance was not adopted pursuant to the Retailers' Occupation Tax Act, and the City of Chicago in the enforcement and administration of the ordinance is not subordinate to, bound by, or in any way related to the Illinois Department of Revenue, Retailers' Occupation Tax Division. The exemption from the state "sales" tax is granted by a rule promulgated by that agency. The grant of power to Chicago to exact a tax from retail cigarette dealers is a direct grant from the legislature to the city, and is limited only by the terms of the grant of power to it and such constitutional prohibitions as may be applicable and not by administrative decisions adopted in regard to an unrelated tax by an unrelated agency.

3. Section 7 of the Federal Reserve Act reads as follows:

> "Federal reserve banks, including the capital stock and surplus therein, and the income derived therefrom shall be exempt from Federal, State and local taxation, except taxes upon real estate." U.S.C. Title 12, Paragraph 531.

This section presents the most substantial argument urged by the Bank toward granting the exemption. It is clear that this tax falls technically upon the Bank and therefore within the apparent prohibition of the statute.

This section of the Federal Reserve Act enacts into statute a well settled principle of constitutional law to the effect that a state may not impose a license or a privilege tax on the activities of the federal government or on the business of any of its agencies or instrumentalities. *Graves* v. *Texas Co.*, 298 U. S. 393, 56 S. Ct. 818, 80 L. Ed. 1236; *Panhandle Oil Co.* v. *State of Mississippi ex rel, Knox*, 277 U. S. 218, 48 S. Ct. 451, 72 L. Ed. 857, 56 A. L. R. 583; see also 53 C. J. S. page 470, notes 36 and 37.

This rule has it roots in Chief Justice Marshall's historic and oft quoted warning that "an unlimited power to tax involved necessarily a power to destroy. *McCulloch* v. *Maryland,* (1819) 4 Wheat. U. S. 316, 327, 4 L. Ed. 57. But since its universal and unquestioned application was challenged by Justice Holmes' pertinent observation that "The power to tax is not the power to destroy while this court sits," in the dissenting opinion of the Panhandle case (cited above) the Supreme Court has swung towards the view that the burden on the government taxed must be proved in order for an immunity to be allowed. 26 Minn. L. Rev. 414 and cases cited therein.

The limitation of immunity to its appropriate applications is important to the successful working of our governmental system. *Willicuts* v. *Bunn,* 282 U. S. 216—234, 75 L. Ed. 304 (1930).

> "The application of the principle which denies validity to such a tax has required the observing of close distinctions in order to maintain *the essential freedom of government in performing its functions, without unduly limiting the taxing power* which is equally essential to both nation and state under our dual system." (Emphasis added.) *James* v. *Dravo Contracting Co.,* 302 U. S. 134, 150 82 L. Ed. 155, 167 (1937).

Before considering the effect of section 7 of the Federal Reserve Act granting an exemption from taxation, we shall examine the operation of the general rule of implied immunity as interpreted by the courts.

In the case of *Neah Bay Fish Co.* v. *Krummel,* 101 P. 2d 600, (1940) the Supreme Court of Washington had before it a company conducting business on an Indian reservation under authority and license granted by the United States Commissioner of Indian Affairs. The State of Washington sought to collect an occupation tax for sales made by the company to non-Indians, and the company argued that as an instrumentality of the federal government it was exempt from such taxation. The court in upholding the right of the state to exact the tax said:

> "Even if it be assumed that the appellants are instrumentalities of the federal government in so far as they transact business with the Indians, we are unable to see *how their duties or obligations to the government are in any way interfered with* by the exaction of the challenged taxes." (Emphasis added.)

In *State* v. *Whitney National Bank of New Orleans,* 179 So. 84, 189 La. 211 (1938) the Supreme Court of Louisiana had before it a situation in which a national bank leased to private parties, office space which formed a large part of a building wherein their banking business was conducted and which was unnecessary for their existing banking business. The bank sought an exemption from a state license tax imposed for the operation of office buildings, measured by gross rents. The court held the bank liable for the tax on the theory that the business of operating office buildings was itself an occupation or business separate from and not necessary to the banking business.

In the case of *Standard Oil Co.* v. *Lee,* 199 So. 325 (1940) the Supreme Court of Florida described the test of the validity of the tax in cases of this nature to be:

> "* * * not whether it is laid directly on the United States or one of its governmental agencies but whether or not in the way laid, it retards, impedes, or burdens the United States in the exercise of its constitutional powers."

It is conceded that in the cases cited there was no controlling federal statute that expressly granted immunity from taxation of a character as broad as that prescribed in section 7 of the Federal Reserve Act and that these cases represent limitations of the *implied* immunity existing by virtue of the constitution.

Viewing the facts before us in the light of the above cases it is our opinion that the tax does not interfere in any way with the bank's duties and obligations to the federal government. The sale of cigarettes to employees is entirely separable from the governmental activity of the bank. Said sales could be dispensed with and in no way effect the operations of the Federal Reserve Bank. It is common knowledge that cigarettes are sold at hundreds of locations within the vicinity of the Federal Reserve Bank easily available to employees with no greater "hardship" or "inconvenience" incurred than that which tens of thousands of employees in the loop area meet each day.

It is also common knowledge that other retailer's of cigarettes have adopted the practice of adding the full amount of this new tax to the purchase price charged consumers. The Bank is free to adopt this same method of reimbursement and thus in effect *free itself from any cost whatsoever.*

It is difficult to see how in the face of decisions holding that even if the actual financial burden is eventually passed on to and borne by the government, the fact that the onus of the tax falls technically upon an independent contractor with a cost plus contract the tax will be upheld (see cases cited in 53 C. J. S. page 470, note 39) it can be argued that a tax is invalid in a situation where no burden whatsoever need fall upon the government other than the technical "stigma" of being the taxpayer and where the operation taxed is unrelated to governmental function. To hold in this fashion is to be bound by rules witout reference to their history, meaning, purpose and usage and would serve no constitutional function.

Considering now the broad language of section 7 of the Federal Reserve Act, it is apparent that the obvious intent of Congress was to immunize Federal Reserve Banks from burdens imposed by state taxation upon the carrying out of the functions assigned to the Bank by the Act. The purpose of the statute coincides with the reason for the rule of implied immunity.

We have expressed our view that under the limitations of the doctrine of implied immunity this tax is valid. Does then the language of the exemption expressly granted broaden the immunity?

The question as to whether Congress may create an exemption from local taxation broader than that afforded by the doctrine of implied immunity has never been authoritatively decided. (Anno: 140 A.L.R. 635). It has been suggested in a footnote to an opinion that such power exists. *Helvering* v. *Gerhardt,* 304 U. S. 405, 82 L. Ed. 1427, 58 S. Ct. 969 (1938)

To ascertain the limits of this congressional power, the basis upon which it has been sustained must be observed. The source of this power follows from the express grant to Congress "to make all laws which shall be necessary and proper for carrying into execution all powers vested by the Constitution in the Government of the United States. Const. Art. I, sec. 8, par. 18." *Federal Land Bank* v. *Bismarck Lumber Co.,* 314 U. S. 95, 86 L. Ed. 71 (1941). The process of ascertaining the limits of the power is to note the most extensive congressional grants of immunity upheld by the Court. 26 Minn, L. Rev. 414.

The Bank has urged the Bismark Lumber Co. case cited above, as authority for its view. Although the Court uses extremely broad language the facts before it related to whether congress could grant immunity from taxation in relation to the landing functions of the Federal Land Bank.

The tax levied in that case was upon an act closely related to lending functions which had previously been held to be governmental and which the bank was specifically authorized by Congress to perform.

In the situation before us the powers granted the Federal Reserve Bank by Congress include the power:

"To exercise by its boards of directors, or duly authorized officers or agents, all powers specifically granted by the provisions of this chapter, and such incidental powers as shall be *necessary to carry on the business of banking* within the limitations prescribed by this chapter." U.S.C.A. Title 12, sec. 341, paragraph Seventh.

Conceding for the purposes of this opinion that Congress could grant immunity for operations of the bank authorized by it, we find no express grant of authority to sell cigarettes to employees and are unable to accept the view that such an activity is "necessary to carry on the business of banking."

It is, therefore, our opinion that the Federal Reserve Bank is not entitled to an exemption from the operation of the Chicago Cigarette tax ordinance for sales made in its canteen.

CIGARETTE TAX REVENUE

(No. 11765—Budget Director—R. J. N.—November 12, 1953.)

Your letter of October 15, 1953, requests advice as to the manner of handling the revenue which may accrue to the City in 1953 and 1954 from the cigarette tax.

You had previously been informed that one of the Judges of the Circuit Court in the case of *Zolla Bros.-Silvian Inc. et al.*, v. *City of Chicago*, Circuit Court Case No. 53-C-13148, has directed that the tax monies which might otherwise have been paid by the plaintiffs therein to the City should be deposited in a special account to be turned over to the City in the event that tax is held valid in the Supreme Court or returned to the plaintiffs if the tax is invalid. Recent experiences would indicate that only about 20% of all the anticipated revenue from the cigarette tax will be governed by this ruling.

The City Council has by ordinance directed that the City Treasurer hold all cigarette tax receipts apart from other funds for the purpose of refunding the tax to taxpayers generally upon their presentation of tax stamps which have been affixed to packages of cigarettes. Past experience would indicate that only one-half of the persons entitled thereto will claim this type of refund. Accordingly, if the cigarette tax should be held invalid, about 60% of that tax will be refunded to tax-payers but 40% will be collected by the City and not refunded and therefore must be estimated as anticipated revenue in the 1954 budget.

Our Supreme Court has held in the case of *People* v. *Mercil & Sons Co.*, 378 Ill. 142, that the total receipts from an asset that is of doubtful validity need not be anticipated as income but that it is proper where an item is contested to set up a reserve in the event that the item should become uncollectible.

We are therefore of the opinion that you should consider as assets available for appropriation in the year 1954 no more than 40% of the anticipated revenue from cigarette tax collections. A proper way to do this would be to set up the total anticipated receipts and to establish a reserve "for uncollectible items" of 60% of this amount.

We are of the opinion that the courts would not sustain a tax objection based on failure of the City to anticipate the entire collections.

BOTTLED GAS FOR HEATING PURPOSES

(No. 11752—M. I. W.—November 13, 1953.)

We have your letter of October 8, addressed to Mr. Melaniphy requesting our opinion as to whether it is permissable to use bottled gas for home heating purposes within the City of Chicago.

Section 43-18 of the Municipal Code of Chicago provides as follows:

> "Any person desiring to install a tank for the storage of any flammable liquids as provided in chapter 60 of this code, shall first obtain a permit from the commissioner of buildings; provided, however, that no permit shall be required for an aggregate capacity of tanks of one hundred twenty gallons or less for class I and class II liquids . . ."

The type of gas probably used in the tank you describe is classified as "Liquified Petroleum Gas" and is categorized in section 60-2 as a class I liquid. A permit is, therefore, required for the installation of a tank of this sort if the capacity of the tank is over one hundred and twenty gallons.

There are other provisions of the Municipal Code which apply to flammable liquids. Section 60-10 sets a minimum required safety clearance for flammable liquid storage tanks above ground in reference to any building or lot line according to capacity. This provision is applicable regardless of capacity.

Requirements for construction of flammable liquid tanks for above ground use are found in section 60-52. Section 60-52 provides for additional protective devices for such tanks of over 100 gallon capacity.

It has come to our attention that the Fire Department has been opposed to the use of such tanks and is proposing an ordinance that would prohibit the use of liquefied petroleum gas for home heating purposes. We are of course unable to say what eventual disposition of this proposal may be made by the City Council.

CHAPTER VI—LICENSES AND PERMITS

A. LIQUOR

LICENSE TO TRUSTEE

(No. 11099—M. H. F.—May 7, 1945.)

The department is in receipt of your letter of May 4, 1945, enclosing a factual and legal memorandum upon the matter of issuing a city retail liquor dealer's license to the Chicago Title and Trust Company, as trustee under the Shoreland Hotel Liquidation Trust No. 30872, for liquor dispensing premises in the Shoreland Hotel.

The Illinois Liquor Control Law, with certain exceptions not applicable to the matter under consideration, makes it unlawful for any person to sell, deliver, furnish or possess any alcoholic liquor for beverage purposes, except as specifically provided in the Act. (Article II.) This law is paramount and controlling upon the Mayor, as Local Liquor Control Commissioner. It specifies the kinds of licenses which may be issued. (Section 1, Article V.) It provides that a license shall be purely a personal privilege, and shall not constitute property. It is not subject to attachment, garnishment or execution, and is not alienable or transferable, voluntarily or involuntarily, or subject to being encumbered or hypothecated. It does not descend by the laws of testate or intestate devolution, but ceases upon the death of the licensee. The executors or administrators of the estate of a deceased licensee, and the trustee of an insolvent or bankrupt licensee, when the estate consists in part of alcoholic liquor, may continue the business of the sale of alcoholic liquor under order of the appropriate court, and may exercise the privileges of the deceased or insolvent or bankrupt licensee after the death of such decedent, or such insolvency or bankruptcy until the expiration of an existing license but not longer than six months after the death, insolvency or bankruptcy of such licensee. All renewal privileges are limited to qualified licensees. (Section 1, Article VI.) While trustees appointed by trust agreements are not mentioned in the Act, the fact that a license is expressly made purely a personal privilege negatives the thought that it can be conferred upon or enjoyed by a representative or trustee.

A corporation may receive a license for its own use and benefit, under certain restrictive conditions. Section 2 of Article VI provides that no license of any kind shall be issued to a corporation, if any officer, manager or director thereof, or any stockholder or stockholders owning in the aggregate more than five percent of the stock of such corporation, would not be eligible to receive a license for any reason other than citizenship and residence. A copartnership is not permitted to receive a license unless all of the members are qualified to obtain a license. If the legislature had intended that trustees should receive licenses it is fair to assume that it would have mentioned them and have provided for control in respect to the beneficiaries of the trust, as in the case of the officers, directors and stockholders of corporations.

The business of dispensing intoxicating liquors has always been a hazardous one. Inherent in liquor control is the necessity for close and exacting surveillance over licensees who are definitely known and held personally responsible for the conduct of the business. To grant a license to a liquidation trust would offend against not only the letter of the statute, but would render uncertain that personal responsibility which has always been regarded essential.

When acting as trustee the Chicago Title and Trust Company doubtless disclaims all personal responsibility. To issue a license to an impersonal entity such as Trust No. 30872 would not get clearance from even the first section of the first article of the Act, which requires that the Act shall be liberally construed to the end that the health, safety and welfare of the People of the State shall be protected and temperance in the consumption of alcoholic liquors be fostered and promoted by sound and careful control and regulation of the sale and distribution of alcoholic liquors.

We are unable to follow your argument that the word "person" includes such an entity as a liquidation trust. It seems manifest to us that the word is restricted in meaning to individuals, partnerships and stock corporations, which are specifically mentioned.

We find no persuasiveness in your argument relative to the proviso contained in Article IV of the Act. When a liquidation trust is refused a liquor license it is because such an entity is not a person authorized by the State Law to receive a license. The entity is not denied a license because of some regulation or restriction of local authorities.

Neither is your argument persuasive on the point that if the trustee of Trust No. 30872 were denied a license the Shoreland Hotel Liquidation Trust would be unlawfully deprived of a valuable property right. The law is clear upon the proposition that there is no vested property right in a license to sell intoxicating liquors or in cocktail lounge fixtures. Section 1, Article VI, Liquor Control Act; *The People* v. *McBride*, 234 Ill. 146; *People* v. *Kaelber*, 253 Ill. 552.

While the Liquor Control Act does not in terms expressly prohibit the issuance of a license to a liquidation trust, the dominant purpose and intent of the legislature expressed throughout the entire Act is that of restricting the privilege granted by a license to a personal privilege, personal to the licensee in his or its own right, whether such licensee be an actual person or a corporation. All implications in the Act support this conclusion. That the conclusion is sound appears obvious; if it were not then the specific prohibitions in the Act could with impunity be defeated and regulation thwarted by obtaining a license in the name of a trustee for a beneficiary or beneficiaries, who was or were not qualified to receive a license. Certainly it was not the intention of the legislature to enact a Liquor Control Law, the salutary regulations of which might be defeated or rendered innocuous by evasion.

We are therefore constrained to adhere to the advice given municipal enforcing departments that the issuance of city retail liquor dealers licenses to trustees is not authorized.

CASE BEER SALES BY BREWERY

(No. 11210—City Collector—A. F. G.—November 21, 1949.)

We have your letter of November 9, 1949, in which you quote in full a letter from the Best Brewing Co. of Chicago, making inquiry as to the necessity of securing from the City of Chicago a retail liquor dealers license for the purpose of selling beer in packages of full cases direct from the brewery to private homes for home consumption. Under the proposed

plan the consumer shall have the privilege of picking up the beer in not less than full cases for home consumption.

Sections 2.17 and 2.18 of Article I of the Liquor Control Act, reads as follows:

> "Sec. 2.17 'Retailer' means a person who sells or offers for sale, alcoholic liquor for use or consumption and not for resale in any form.
>
> "Sec. 2.18. 'Sell at retail' and 'Sale at retail' refer to and mean sales for use or consumption and not for resale in any form."

The sale contemplated by the brewery, "direct from the brewery to the consumer" is a "Sale at retail" and the person so selling is a "Retailer" within the meaning of the definitions quoted above.

Section 1 of Article V of the Liquor Control Act enumerates the kinds of licenses issued by the Illinois Liquor Commission and the rights conferred on holders of each type of license. Class 3 covers Brewers and reads as follows:

> "Class 3. A Brewer may make sales and deliveries of beer to importing distributors, distributors, retailers and to non-licensees, in accordance with the provisions of this act."

Sub paragraph (d) of that section reads:

> "A retailer's license shall allow the licensee to sell and offer for sale in the premises specified in such license alcoholic liquor for use or consumption, but not for resale in any form: Provided that any retail license issued to a manufacturer shall only permit such manufacturer to sell beer at retail on the premises actually occupied by such manufacturer."

Sub paragraph (e) of section 3 of Article VI of the said act, which section is entitled, Retail sales by distillers, manufacturers, etc. reads in part as follows:

> "(e) Any person having been licensed as a manufacturer shall be permitted to receive one retailer's license for the premises in which he actually conducts such business, permitting the sale of beer only on such premises, but no such person shall be entitled to more than one retailer's license in any event, and other than a manufacturer of beer as stated above, no manufacturer or distributor or importing distributor, * * * shall be issued a retailer's license, * * * *provided* that nothing in this act contained shall prohibit any natural person, * * * from purchasing beer in not less quantity than by the keg or case directly from the manufacturer, importing distributor or distributor at his home, for use or consumption at such home and under no circumstances for sale or resale, subject to the reasonable regulations of the State Commission and of the local liquor control Commissioner."

The type of sale referred to in the sub paragraph above quoted is clearly a "sale at retail" within the definition of section 2.18 of Article I above quoted, but by the proviso an importing distributor of a distributor, who are prohibited from having a retailer license are permitted to make such sales. It appears to have been the legislative intent to permit certain licensees, some of whom are not entitled to a retailers license to make such retail sales.

We are, therefore, of the opinion that a person licensed as a brewer, who may, but is not required to have one retailers license, may make sales of beer of the quantity permitted in the proviso, without first having been licensed as a retailer, provided, such sale is made at the home of the purchaser for use and consumption at such home.

SAMPLE DRINKS AT TRADE FAIR

(No. 11285—City Collector—A. F. G.—April 6, 1950.)

With your letter of March 20, 1950 you transmitted a letter from Swiren & Heineman, attorneys on behalf of First United States International Trade Fair, Inc., a not for profit corporation, which is to conduct an international trade fair in Chicago from August 7 through August 20, 1950. They request a ruling as to whether under the operations described in their letter, a city retail liquor license would be required. You ask our opinion on the question involved.

In their letter the attorneys state: "The Fair will have a very large number of foreign exhibitors including some foreign exhibitors of liquor. The fair is primarily a commercial fair at which wholesale buyers will attend. The fair is not designed for the public, which is excluded except during certain periods."

"During times when the fair is open only to wholesale buyers, foreign exhibitors of liquor will:

1. exhibit their bottled wares;
2. take orders for their products, to be delivered through ordinary licensed commercial channels after the close of the fair;
3. distribute sample bottles to prospective commercial customers; and
4. give sample drinks to prospective commercial customers. No distribution of any kind will be made during hours when the public is admitted to the fair.

There will be no payment of any kind for any of the samples distributed."

Section 1 of Article IV of the Liquor Control Act grants to the city council in cities power by general ordinance or resolution to determine the number, kind and classification of licenses for sale at retail of alcoholic liquor, not inconsistent with that act. Pursuant to that power the city council of Chicago has adopted Chapter 147 of the Municipal Code of Chicago regulating the sale at retail of alcoholic liquors.

Section 147-1 of that Chapter provides that all words and phrases which are defined in the Liquor Control Act shall have the meaning accorded to such words and phrases in said act. Section 147-2 of the said Chapter reads: "No person shall sell at retail any alcoholic liquor without first having obtained a city retailer's license for each location, place, or premise where the retailer is located to sell the same."

In Section 2 of Article 1 of the Liquor Control Act the following words and phrases are defined as follows:

"'Retailer' means a person who sells, or offers for sale, alcoholic liquor for use or consumption and not for resale in any form.

'Sell at retail' and 'sale at retail' refer to and mean sales for use or consumption and not for resale in any form.

'To sell' includes to keep or expose for sale and keep with intent to sell."

We have studied the four operations to be carried on at the fair and the notation that no payment shall be made for any samples distributed, and have reached the conclusion that none of these would bring the fair

within the provisions of the city code regulating retail liquor dealers. That code prohibits the sale at retail of alcoholic liquors without first obtaining a retailer's license for the place where the sale takes place. None of these operations can be construed as a sale at retail or a sale of any kind. The taking of orders for future delivery through licensed channels would not constitute a sale at the fair. It is a general rule that a sale is made where the order is accepted and the goods shipped. (*Hump Hairpin Manufacturing Co.* v. *Emmerson,* 293 Ill. 387, (1920). Here, the mere taking of an order would not constitute a sale. Until the order is transmitted to an importing distributor or a distributor, accepted by him, and the goods shipped no sale has been consummated. When accepted and shipped the sale takes place at the place of business of such distributor and not at the fair where the order was first taken.

It is our opinion, therefore that no retailers' license would be required for the holding of this fair in the manner outlined in the attached letter.

The letter does not indicate where the fair is to be held but it might be well, if it is to be held in any publicly owned building, such as Navy Pier, to call attention to Section 11 of Article VI of the liquor act, which prohibits alcoholic liquors being "sold or delivered in any building belonging to or under control of the State or any political subdivision thereof."

LICENSE EXEMPTIONS AND PRIVILEGES

(No. 11323—Chairman, Committee on License—C. P. H.—July 31, 1950.)

We have your letter of July 21, 1950 wherein you request our opinion as to the validity of a proposed ordinance amending section 147-4 of the Municipal Code by adding thereto the following:

> "Provided, that in the case of a lodge or local chapter or corresponding unit of any fraternal order or other association of a kindred nature which is national or state-wide in organization or character, or any body, the membership of which is comprised of persons who have served in the military or naval services of the United States, and which are organized under the 'General Not for Profit Corporation Act' of the State of Illinois and which has been in active and continuous existence for at least three years prior to the date on which application for license is filed and which in good faith maintains a membership roll during said three year period and has, at the time application is filed, more than fifty members with dues paid to date, and which is the owner, licensee, or occupant of an establishment operated solely for objects of a national or state-wide social, patriotic, recreational, benevolent purpose or the like, but not for pecuniary gain or profit, and the property as well as the advantages of which belong to all the members thereof, the fee for a city retail liquor dealer's license, for the sale to members only, shall be fifty dollars for the whole or any portion of the license period for which application is made."

Under the provisions of sec. 1, Article IV, of the Illinois Liquor Control Act, the city council has the power by general ordinance or resolution to determine the number, kind and classification of licenses for sale at retail of alcoholic liquor not inconsistent with this act. (Ill. Rev. Stat. 1949, chap. 43, par. 110.) However, all such ordinances must be impartial and uniform in their operation.

While there is no statutory limitation as to the amount of the fee to be fixed for retail liquor licenses, the discretionary power of the city council in this respect is not absolute. The city council cannot arbitrarily discriminate between persons having the same right to sell alcoholic beverages at retail. Local control is limited by the Illinois Liquor Control statute. *Sager* v. *City of Silvis*, 402 Ill. 262, 266-267. The statute permits city authorities to determine the kind and classification of licenses but not to discriminate between persons to whom such licenses may be issued. In determining the kind and classification of license, the legislature had in mind such kind an classification as is "in furtherance of the public good and convenience." *Walgreen Co.* v. *Garland*, 316 Ill. App. 635.

Pursuant to the power to determine the kind and classification of licenses the city council may differentiate between establishments selling alcoholic liquor at retail in bulk or in packages and those selling such liquor for consumption on the premises; between those selling all kinds of alcoholic liquor and those selling a limited kind of alcoholic liquor such as beer or wine; between establishments selling to the general public and clubs selling to its members only or to members and their guests only; between those selling at all hours and those selling during limited hours. An ordinance based on such classification as a college fraternity or an athletic club or a social club or a club maintained by a national or state organization, or a club maintained by a veterans' organization would not bear any reasonable relation to the object of regulating the issuance of local licenses consistent with the law, which is specifically limited to the purpose of providing for the public good and convenience.

A license ordinance which exempts or gives preferential consideration to ex-service men violates both the Federal and State Constitution. *Marallis* v. *City of Chicago*, 349 Ill. 422.

We are, therefore, of the opinion that the proposed ordinance will be invalid if passed.

REDUCED FEE LICENSE

(No. 11346—City Collector—C. P. H.—November 28, 1950.)

We have your letter of October 25, 1950 wherein you state that the Tvrdy Post of the Veterans of Foreign Wars of the United States has made application for a retail liquor dealers' license to sell alcoholic liquor to its members only on premises located at 2700 S. Central Park Avenue, Chicago. The Post seeks the license under an ordinance passed by the City Council on August 4, 1950 (Council Journal, p. 6751), which authorizes the issuance of such licenses to Veterans' organizations and fraternal associations for a fee of $50.00 for each semi-annual license period under certain terms and conditions, one of which is that they have more than fifty members with dues paid to the date they file applications for such licenses.

For the purpose of ascertaining whether or not it has the fifty members required by the ordinance, you have requested the Post to file with its application two copies of a list of the names and residences of its members. The Post has refused to comply with your request. You therefore ask for our opinion as to whether or not the Post is required to file the list in compliance with section 2.24 of Article I of the Liquor Control Law of the State of Illinois, which provides as follows:

> " 'Club' means a corporation organized under the laws of this State, not for pecuniary profit, * * * owning, hiring or leasing a build-

ing or space in a building, of such extent and character as may be suitable and adequate for the reasonable and comfortable use and accommodation of its members and their guests and provided with suitable and adequate kitchen and dining room space and equipment and maintaining a sufficient number of servants and employees for cooking, preparing and serving food and meals for its members and their guests; provided, that such club files with the local liquor control commissioner at the time of its application for a license under this Act two copies of a list of names and residences of its members * * *."

From our investigation we find that the Post does not provide "adequate kitchen and dining room space" on its premises and does not maintain "a sufficient number of servants and employees for cooking, preparing and serving food and meals." It therefore necessarily follows that the Post is not a club as above defined and that it is not required, under these provisions of the Act, to file copies of its membership roll with its application. However, the information you desire may be obtained under Article IV of the Act, which provides as follows:

"Section 2. The mayor * * * of each city * * * shall be the local liquor control commissioner * * *."

"Section 4. The local liquor control commissioner shall have the right to examine, or cause to be examined, under oath, any applicant for a local license or for a renewal thereof, or any licensee upon whom notice of revocation has been served in the manner hereinafter provided, and to examine or cause to be examined, the books and records of any such applicant or licensee; to hear testimony and take proof for his information in the performance of his duties, and for such purpose to issue subpoenas which shall be effective in any part of this State. For the purpose of obtaining any of the information desired by the local liquor control commissioner under this section, he may authorize his agent to act on his behalf."

It is our opinion that if the names and addresses are necessary to determine whether or not the Post is qualified for a retail liquor dealers' license under the ordinance referred to herein, the Mayor as Local Liquor Control Commission has power under the above provisions of the Act to direct the officers of the Post to produce its books and records in your office for examination. The Mayor also has authority to authorize you to examine the books and records from which you may prepare a list of the names and addresses of the members.

REDUCED FEE LICENSE

(No. 11355—Alderman, 8th Ward—C. P. H.—January 17, 1951.)

We have your letter of January 8, 1951 wherein you state that the Swedish-American Athletic Association desires to obtain a license to sell alcoholic liquor to its members only on premises located at 852 E. 75th Street, Chicago. The Association, organized in 1914, has approximately 325 members and owns the land and building at the above address. The premises are used by the Association about once a week for meetings and social functions.

The city council passed an ordinance on August 4, 1950 (C. J., p. 6751), authorizing the issuance of licenses to fraternal and Veterans' organization for the sale of alcoholic liquor to members only upon payment of a fee of $50 for each semi-annual license period provided the

organizations are national or state-wide in organization or character and provided further that they are organized under the General Not for Profit Corporation Act of the State of Illinois. From our investigation we find that the Association was incorporated on July 17, 1914 under the General Not for Profit Corporation Act of the State of Illinois. However, we also find that it is not national or state-wide in organization or character but is purely a local organization not affiliated with any other association or organizations in any manner whatsoever. It necessarily follows that the Association does not fall within the purview of the ordinance referred to herein.

With reference to the premises, section 20 of Article VI of the Liquor Control Law of the State of Illinois provides that in premises upon which the sale of alcoholic liquor for consumption upon the premises is licensed, no screen, blind, curtain, partition, article or thing shall be permitted in the windows or upon the doors of such licensed premises, which shall prevent a clear view into the interior of such licensed premises from the street, road or sidewalk at all times. We have inspected the premises and find that they do not comply with these provisions of the Liquor Control Law for the reason that the tile glass windows in the front of the building and the partitions inside the building do not permit a clear view into the interior of the premises from the street or sidewalk at all times.

In view of the foregoing, it is our opinion that no license of any kind for the sale of alcoholic liquor for consumption upon the premises may be issued to the Association at the location referred to in your letter.

SALE OF COOKING WINE

(No. 11408—City Collector—L. V. R.—July 31, 1951.)

We hereby acknowledge receipt of your communication dated July 27, 1951 in which you ask to be advised as to whether a retail liquor license is required in the selling of cooking wines.

The Illinois Liquor Control Act, Article I, Section 2.03 provides as follows:

> " 'Wine' means any alcoholic beverage obtained by the fermentation of the natural contests of fruits or vegetables, containing sugar, including such beverages when fortified by the addition of alcohol or spirits, as above defined."

Article I, Section 2.10 pertains to non-beverage user and Article VIII, Section 1, paragraph a,—sets forth the exemptions for non-users and the Municipal Code of Chicago, Chapter 147-2 provides as follows:

> "No person shall sell at retail any alcoholic liquor without first having obtained a city retailer's license for each location, place, or premise where the retailer is located to sell the same."

As your communication sets forth that the cooking wine contains more than ½ of 1% of alcohol, the provisions of the State law and the Municipal Code apply.

We are of the opinion that a city retail liquor license is required in this matter.

A City of Chicago retail liquor license is required to sell cooking wine in the City of Chicago.

WITHIN ONE HUNDRED FEET OF CHURCH HALL AND CHAPEL

(No. 11448—Commissioner of Police—C. P. H.—November 20, 1951.)

We have your letter of November 20, 1951 transmitting application of Charles Budris for a retail liquor dealer's license for the license period ending April 30, 1952 for the premises located at 10715 S. Michigan Avenue, Chicago, and a copy of an order entered February 29, 1936 in the appeal of Alexander Gudas, applicant for a license for premises located at 10715 S. Michigan Avenue, Case No. 33 of the License Appeal Commission of the City of Chicago. You request our opinion as to whether or not the premises for which the license is sought are within 100 feet of the First Reformed Church of Roseland located at the southwest corner of 107th Street and S. Michigan Avenue, under section 8 of Article VI of the Illinois Liquor Control Act which provides that no license shall be issued for the sale at retail of any alcoholic liquor within 100 feet of any church.

The order of the License Appeal Commission contains the following findings of fact:

> "That said Alexander Gudas on December 10, 1935 filed with the City Collector of the city of Chicago an application for a city retailer's license for the sale of alcoholic liquor for the license period beginning January 1, 1936 and ending June 30, 1936 for the premises located at 10715 S. Michigan Avenue, Chicago, Illinois;
>
> "That said application was disapproved by the Liquor Control Commissioner of the city of Chicago who on December 27, 1935 refused to grant the license applied for upon the ground that the premises for which license was sought are located within 100 feet of a church and that section 8 of article VI of the Illinois Dram-Shops Act, subject to certain exceptions not material to the issues involved herein, expressly prohibits the issuance of a license for the sale at retail of any alcoholic liquor within 100 feet of any church.
>
> "That The First Reformed Church of Roseland owns the plot of land on the southwest corner of 107th Street and S. Michigan Avenue. That said land is improved with a main church building or edifice located on the north portion of said plot of land and with a one-story and basement brick building called an "assembly hall' or 'chapel' situated 23 feet distant from and south of the south building line of said main church building or edifice. That both of said buildings were built by an are now owned by and are under the exclusive control of said First Reformed Church of Roseland.
>
> "That the distance between the nearest part of said premises for which a license is sought, which are known as 10715 S. Michigan Avenue, and said main church building or edifice is 117 feet.
>
> "That the distance between the nearst part of said premises for which a license is sought and said brick building called an 'assembly hall' or 'chapel' is 96 feet.
>
> "That the ground floor of said 'assembly hall' or 'chapel' is partitioned off into an entrance hallway, a hall or auditorium, a kitchen containing a bench or serving counter and tables, a heating system room, a dressing room and a toilet room.
>
> "That the second floor of said 'assembly hall' or 'chapel' is partitioned off into a hallway, a small room adjoining the hallway, a large hall, a second hallway, two rooms in the rear of said floor each containing a table and chairs; also a toilet room.

"That the regular Sunday divine worship of the congregation of said First Reformed Church of Roseland is conducted in said main church building.

"That said 'assembly hall' or 'chapel' is at all times under the control of the consistory or governing body of said church and is used for church activities such as the meetings of the consistory of the church, Sunday school and prayer meetings, choir practice, and meetings of different women's organizations affiliated with the church; also for small funerals and weddings; large funerals are held in the Christian Endeavor Society, wedding breakfasts, dramatic presentations, rehearsals, women's missionary society meetings, etc. are also held in the 'assembly hall' or 'chapel.'

That no rental is charged for the use of said 'assembly hall' or 'chapel,' but on a few occasions a small donation has been accepted from the church organization or church member using the building.

"That said First Reformed Church of Roseland has a congregation or membership of 850.

"The Commissioner further finds that said main church building or edifice, being situated more than 100 feet distant from the premises for which a retail liquor license is sought, is not entitled to the protective provision of section 8 of article VI of the Dram-Shops act.

"That said 'assembly hall' or 'chapel,' though devoted to church activities, is not a place of public worship and not a church within the meaning of the term 'church' as used in section 8 of Article VI of said Dram-Shops act and therefore not entitled to the protective prosion thereof."

The courts of review of this state have not defined the term "church" as used in section 8 of article VI of the act. However, the courts of other states have interpreted the term "church" as used in liquor control laws. In the appeal of Manheim Township Post No. 664 of the American Legion to the Court of Quarter Sessions of Lancaster County, Pa., 51 Lancaster Law Review, 287 (1949), the court held that the holding of regular church services in the basement of a dwelling house does not make the building a "church" within the meaning of the Liquor Control Act which gives the Liquor Control Board power to refuse a license for a premises within 100 feet of a church. The court stated that the legislature used the word "church" in this connection in the sense of a building or edifice instead of a congregation. In the case of *In Re Finley*, 110 N. Y. S. 71 (1908), the first floor of a frame dwelling house located in the suburbs was used for church services and a Sunday school, while the pastor and his family lived on the second floor. The third floor was occupied by another family. The court held that under the circumstances the builing was not a church under the provisions of the liquor law. In *George, et al.* v. *Board of Excise of City of Elizabeth*, 73 N. J. Law 366, (1906), 63 Atl. 870, it was decided that a building used in part for religious purposes and in part as a dwelling did not constitute a church within the meaning of the Liquor Act prohibiting the sale of liquors within 100 feet of a church.

The License Appeal Commission found that the distance between the main church building or edifice in which regular divine worship of the congregation is conducted, is 117 feet. Manifestly, the church building is not entitled to the protective provisions of section 8 of article VI of the act. The Commission also found that the distance between the one-story "chapel" is 96 feet; and that while this building is devoted to church activities, it is not a place of worship. Since this builing is not used for regular church services, in view of the authorities cited herein, it is clear that it is not a church as that term is used in section 8 of article VI of the Illinois Liquor Control Law.

It is therefore our opinion that the application of Charles Budris for a retail liquor dealer's license for the premises at 10715 S. Michigan Avenue should be approved and that such license should be issued to him for the premises upon the payment of the proper license fees prescribed for the license. We return herewith the application and the copy of the order referred to herein.

WITHIN ONE HUNDRED FEET OF CHURCH RECTORY

(No. 11455—City Collector—C. P. H.—December 4, 1951.)

We have your letter of November 27, 1951 transmitting the communication dated November 26, 1951 you received from Armanetti's, Inc. You state that the application filed by the corporation on November 8, 1951 for a retail liquor dealer's license for premises located at 5806 Milwaukee Avenue, was referred to the police department for investigation. The police department reported that the location designated in the application is within 100 feet of St. Tarcissus Roman Catholic Church, School and Rectory located at 6020 to 6040 W. Ardmore Avenue. You thereupon notified the applicant that its application had been disapproved in compliance with section 8 of Article VI of the Illinois Liquor Control Law, which provides in part as follows:

> "No license shall be issued for the sale at retail of any alcoholic liquor within 100 feet of any church, school, hospital, home for aged or indigent persons or for veterans, their wives or children or any military or naval station; * * *."

In its communication the applicant has requested that you reconsider the application on the ground that the measurements were improperly taken.

From a survey which we had made it appears that the distance measured in a straight line from the nearest point of the building for which the license is sought to the nearest point of the rectory building is less than the 100 feet. The survey also shows that the rectory building and the land on which it is situated is completely separated from the church and school buildings and a playground adjacent thereto by an iron fence 6 feet in height. Hence, one of the questions presented for our determination is whether or not a rectory is a church within the meaning of section 8 of Article VI of the Act.

The courts of review of this State have not defined the term "church" as used in the Liquor Control Law. However, in the case of *Muldoon* v. *Board of Review*, 254 Ill. 336, (1912) the issue presented was whether or not the parish house of St. Mary's Catholic Church in the City of DeKalb was exempt from taxation under the statute which provides that all property used excusively for religious purposes shall be exempt from taxation (Ill. Rev. Stat. 1951, ch. 120, par. 500). The building was built by the voluntary contributions of the members of the congregation and the title was held in trust by the bishop for the use of the church. It contained fourteen rooms, seven on the first floor and seven on the second floor. The parish priest lived in the building. He employed a servant who also lived on the premises. A kitchen, dining room, parlor, office and chapel were located on the first floor. The rooms on the second floor were used for sleeing quarters. The court stated that the building was primarily used as a home for the parish priest and that the other uses to which it was put did not convert it into a place exclusively used for religious purposes and held that it was not exempt from taxation.

In the case of *The First Congregational Church* v. *The Board of Review*, 254 Ill. 220 (1912) it was held that the primary use of a church parsonage is a home for the pastor, and the fact that some parts of the parsonage were used for purposes in connection with the pastor's work or the work of the church does not render the pasonage exempt from taxation. Likewise, it was held in the case of *The People ex Rel Carson* v. *Muldoon*, 306 Ill. 234 (1923), that property, the primary use of which is a home for nuns who have renounced all connection with the world and the public and are maintained principally by charity is not exempt from taxation, even though two chapels existed on the premises: one located in the building for the use of the nuns and the other outside of the building for the use of the general public. In an opinion of this office addressed to the City Collector under date of December 26, 1936 it was stated that a nunnery is not included within those classes of institutions specified in the Illinois Liquor Control Law which prohibits the issuance of a retail liquor license for premises within 100 feet of any school, church or hospital. (Ops. of Corp. Coun., Vol. XIX, p. 121.)

In view of the authorities cited above, it is our opinion that the rectory under consideration here is not a "church" as that term is used in Section 8 of Article VI of the Illinois Liquor Control Law.

The next question presented for determination is whether or not the premises located at 5806 Milwaukee Avenue are within 100 feet of a school. In the case of *Smith* v. *Ballas*, 335 Ill. App. 418 (1948), the court held that an application for a retail liquor dealer's license for premises that were located within 100 feet of a playground connected with a school was properly denied. The court pointed out in this case that the children might actually be standing on the school grounds immediately at the tavern windows so as to see and hear what took place therein and that they would undoubtedly be attracted, possibly entertained, and certainly would not be morally elevated. In this case the survey clearly shows that the distance measured in a straight line from the nearest point of the building designated in the application to the nearest point of the playground adjacent to the school is 100.7 feet.

Since the rectory is not a "church" and the building for which the license is sought is more than 100 feeet from the school playground, it is our opinion that you should issue a retail liquor dealer' license to the applicant for the premises designated in the application, provided, however, that the applicant and the premises comply in all other respects to the ordinances of the City of Chicago and the statutes of the State of Illinois relating to the sale at retail of alcoholic liquor.

REDUCED FEE LICENSE

(No. 11461—City Collector—C. P. H.—December 21, 1951.)

We have your letter of December 19, 1951 transmitting the communication you received from Messrs. Seidner & Seidner, attorneys at law, 10 S. LaSalle Street, Chicago, relative to the sale at retail of alcoholic liquor by the Woodlawn Post, No. 175, of the American Legion. The records of the City Collector show that a retail liquor dealer's license has been issued to the Post for the second floor of the premises located at 7465 S. Coles Avenue, under the provisions of the ordinance adopted by the City Council August 4, 1950 (C. J., p. 6751), which authorizes the issuance of a license to a Veterans' organization to sell alcoholic liquor at retail to members only upon payment of a fee of $50 for each semi-annual license period. You request our opinion as to whether or not this license may be renewed if a church is established on the first floor of the premises.

Section 8 of Article VI of the Illinois Liquor Control Act, so far as it is pertinent here, provides that no license shall be issued for the sale at retail of any alcoholic liquor within 100 feet of any church. However, this section further provides that this prohibition shall not apply "to the renewal of a license for the sale at retail of alcoholic liquor on premises within 100 feet of any church where such church has been established within such 100 feet since the issuance of the original license."

Since the Post now has a license for the second floor premises, it is our opinion that, under the above quoted provisions of the Act, the Post may renew this license after the church is established on the first floor even though the church would then be within 100 feet of the licensed premises.

You also request our opinion as to whether or not the Post, under its license to sell alcoholic liquor on the second floor premises, may sell alcoholic liquor on a portion of the first floor premises. Section 147-7 of the Municipal Code of Chicago provides that "no liquor shall be sold, offered for sale, kept for sale, displayed, or advertised for sale at retail or delivered to any person purchasing same at retail except at a location, place, or premises described in a retail liquor dealer's license." We have repeatedly held that a separate license is required for each location, place or premises where alcoholic liquor is sold, regardless of whether the location, place or premises is under the same roof or at the same street address. (Ops. of Corp. Coun., Vol. XVIII, pp. 487, 488; Vol. XXI, p. 138.)

It is therefore our opinion that the retail liquor dealer's license which has been issued to the Woodlawn Post No. 175 of the American Legion, authorizes the sale of alcoholic liquor on the second floor only of the premises located at 7465 S. Coles Avenue and that if the Post desires to sell alcoholic liquor on a portion of the first floor of the premises, it is required to obtain an additional license for a portion of the first floor premises. Furthermore, such additional license must be obtained by the Post before the church is established on the premises; otherwise, the Post would be barred from obtaining such additional license after the church has been established.

FEDERAL WAGER STAMP

(No. 11462—Commissioner of Police—L. L. K.—December 27, 1951.)

This will acknowledge receipt of your letter of December 21, 1951, in which you state that the owner of a tavern at 4951½ W. Chicago Avenue has applied for a federal wager stamp and you request an opinion as to whether the evidence embodied in the report attached thereto is sufficient to justify revocation of the retail liquor license.

An examination of the statute and our ordinance covering liquor licenses does not disclose that the mere possession of the federal wager stamp constitutes a ground for revocation. The 1951 Federal Revenue Act (Section 3290-93, Chap. 27A, 26 USCA) imposes the $50. annual occupational tax on each person "if he is liable for tax * * *" or "if he is engaged in receiving wagers * * *." The report attached to your letter discloses that Michael Bakes, the licensee, has stated that he applied for the wager stamp in order "to get in on the ground floor when legalized."

It is our opinion that the mere possession of the stamp without any overt act indicating that gambling is actually being conducted on the premises does not constitute grounds for revocation.

FEMALE EMPLOYEES—PACKAGED GOODS STORE

(No. 11503—Commissioner of Police—C. P. H.—March 27, 1952.)

We have your letter of March 14, 1952, wherein you request our opinion relative to certain provisions of the ordinance passed by the City Council on January 30, 1952, appearing in the Journal of Proceedings of the City Council of that date at page 1891, amending section 147-15 of the Municipal Code of Chicago to read as follows:

> "It shall be unlawful for any licensee, his manager, or other person in charge of any licensed premises where alcoholic liquor is sold or offered for sale for consumption thereon to engage, employ or permit the engagement or employment of any female person other than the licensee or the mother, daughter, wife or sister of the licensee to draw, pour or mix any alcoholic liquor, nor shall any other female be permitted to remain on said premises, who shall solicit any patron or customer thereof to purchase alcoholic or non-alcoholic liquor for her, himself, or any other person therein; provided, however, that nothing herein contained shall prohibit any adult manageress or waitress who shall be regularly employed therein from accepting and serving the order of a patron or customer in the regular course of her employment as such manageress or waitress."

In the first paragraph of your communication you ask the following question:

> "If a licensee is a Corporation, do the restrictions relating to the employment of females under Section 147.15 apply to female officers, directors or stockholders of the corporation?"

The ordinance makes it unlawful for any licensee of premises where alcoholic liquor is sold for consumption thereon to employ any female person, except the licensee or the mother, daughter, wife or sister of the licensee, to draw, pour or mix any alcoholic liquor. This exception applies to an individual and not to a corporation since a corporation manifestly is not a natural person. It is well established that a corporation is a legal entity, separate, distinct and apart from its officers, directors and stockholders (*Superior Coal Co.* v. *Dept. of Finance*, 337 Ill. 282 (1941); 18 C. J. S. Section 4, Page 368). In the case of a corporation the license is issued to the corporation and not to the officers, directors or stockholders thereof.

It is, therefore, our opinion that the ordinance prohibits a corporation, engaged in the sale at retail of alcoholic liquor for consumption on the premises, from employing any female person, including its female officers, directors and stockholders to draw, pour or mix alcoholic liquor on the licensed premises.

In subparagraph (a) of paragraph 2 you ask the following question:

> "Referring to the proviso 'nothing herein contained shall prohibit any adult manageress or waitress who shall be regularly employed therein from accepting and serving the order of a patron or customer in the regular course of her employment as such manageress or waitress'—
>
> How is the phrase accepting and serving the order of a patron to be interpreted? Does not the word 'serving' include preparation such as mixing a beverage."

Under the provisions of the ordinance an adult manageress or waitress of any licensed premises where alcoholic liquor is sold for consumption thereon may accept and serve the order of a patron or customer in the

regular course of her employment. Such female employees, however, are prohibited from drawing, pouring or mixing alcoholic liquor.

It is therefore our opinion that a licensee, engaged in the business of selling alcoholic liquor at retail for consumption on the premises, is permitted to employ an adult manageress or waitress to serve alcoholic liquor to patrons on the licensed premises during the regular course of her employment; and that a licensee engaged in such business is prohibited from employing an adult manageress or waitress, other than the licensee or the mother, daughter, wife or sister of the licensee, to draw, pour or mix alcoholic liquor on the licensed premises.

In subparagraph (b) of paragraph 2 you ask the following question:

> "A waitress in the regular course of her duties quite generally asks the patron if he wishes a cocktail or beverage before ordering his meal. Is not this to be construed as 'soliciting' and therefore prohibited?"

Webster's International Dictionary defines the word "solicit" to mean "to make petition to; to entreat; importune; to emdeavor to obtain by asking or pleading; to insist upon; to plead for; to tempt; to lure on." This definition was cited with approval by the court in the case of *People* v. *Rice*, 383 Ill. 584 (1943). A waitress by asking a parton if he wishes a cocktail before ordering his meal does not thereby solicit the patron to purchase alcoholic liquor in violation of the ordinance. In effect she is merely asking the customer to give his order.

It is therefore our opinion that a licensee is not prohibited by the ordinance from permitting a waitress, during the regular course of her employment, to ask a patron on the licensed premises if he desires to order an alcoholic beverage before his meal.

In subparagraph (c) of paragraph 8 of your communication, you ask the following question:

> "How about females waiting on counter in package goods stores?"

The ordinance by its terms applies solely to a licensee engaged in the business of selling alcoholic liquor at retail for consumption the licensed premises. It does not apply to a licensee engaged in the business of selling alcoholic liquor for consumption off the licensed premises.

It is therefore our opinion that the ordinance does not apply to a licensee operating a package goods store, unless the license also sells alcoholic liquor for consumption on such premises, in which case such licensee is required to comply in all respects with the provisions of the ordinance.

APPLICANT—PRIOR PETTY LARCENY CONVICTION

(No. 11506—Commissioner of Police—C. P. H.—April 2, 1952.)

We have your letter of March 29, 1952 transmitting the application for a retail liquor dealer's license for premises located at 919 N. Pulaski Road, Chicago and the applicant's petition relating thereto.

It appears that on February 4, 1935 the applicant was found guilty of the crime of petty larceny, fined $1.00 and sentenced to the House of Correction of the City of Chicago for a period of six months. You wish to be advised as to whether this conviction is grounds upon which to deny the application for the license.

Section 2 of Article VI of the Illinois Liquor Control Act provides among other things that no liquor license of any kind shall be issued to a person who has been convicted of a felony under the laws of the State of Illinois; a person who has been convicted of being the keeper or is keeping a house of ill fame; or to a person who has been convicted of pandering or other crime or misdemeanor opposed to decency and morality.

Under the provisions of paragraphs 585 and 586 of chapter 38 of Illinois Revised Statutes, 1951 a "felony" is an offense punishable with death or by imprisonment in the penitentiary; and every other offense is a "misdemeanor." In the instant case the applicant was sentenced to the House of Correction and not to the penitentiary and hence the crime he committed was a misdemeanor and not a felony. Manifestly the misdemeanor of which the applicant was found guilty was not opposed to decency or morality. Such crimes are those involving rape, indecent exposure, operating a house of ill fame, and other similar offenses opposed to decency and morality.

In view of the foregoing it is our opinion that the application of for a retail liquor dealer's license should not be denied solely on the ground that he was convicted of the offense of petty larceny referred to above.

PRIOR REVOCATION OF AMUSEMENT LICENSE

(No. 11526—Commissioner of Police—C. P. H.—April 30, 1952.)

We have your letter of April 28, 1952, wherein you state that on August 25, 1948, the Mayor revoked the Public Place of Amusement license issued to one Ben Petrone for premises located at 1529 Grand Avenue, Chicago, Illinois. It appears that this license was revoked on the ground that seven well-known hoodlums were arrested by police officers in a pool room operated at this location. A witness later identified one of the persons arrested as being the person who burglarized the Brenmen Bakery, located at 3207 Irving Park Road, on August 8, 1948.

Ben Petrone has now filed an application for a Retail Liquor Dealer's license for premises located at 1601 Grand Avenue. You request our opinion as to whether or not the applicant is qualified for such license.

The Illinois Liquor Control Law, Article VI, provides in part as follows:

> "Sec. 2. No license of any kind issued by the State Commission or any local commission shall be issued to:
>
> (1) A person who is not a resident of the city, village or county in which the premises covered by the license are located; except in case of railroad or boat licenses;
>
> (2) A person who is not of good character and reputation in the community in which he resides;
>
> (3) A person who is not a citizen of the United States;
>
> (4) A person who has been convicted of a felony under the laws of the State of Illinois;
>
> (5) A person who has been convicted of being the keeper or is keeping a house of ill fame;

(6) A person who has been convicted of pandering or other crime or misdemeanor opposed to decency and morality;

(7) A person whose license issued under this Act has been revoked for cause;

(8) A person who at the time of application for renewal of any license issued hereunder would not be eligible for such license upon a first application;

(9) A copartnership, unless all of the members of such copartnership shall be qualified to obtain a license;

(10) A corporation, if any officer, manager or director thereof, or any stockholder or stockholders owning in the aggregate more than five per cent (5%) of the stock of such corporation, would not be eligible to receive a license hereunder for any reason other than citizenship and residence within the political subdivision;

(11) A person whose place of business is conducted by a manager or agent unless said manager or agent possesses the same qualifications required of the licensee;

(12) A person who has been convicted of a violation of any Federal or State law concerning the manufacture, possession or sale of alcoholic liquor, subsequent to the passage of this Act, or shall have forfeited his bond to appear in court to answer charges for any such violation;

(13) A person who does not own the premises for which a license is sought, or does not have a lease thereon for the full period for which the license is to be issued;

(14) Any law enforcing public official, any mayor, alderman, or member of the city council or commission, any president of the village board of trustees, any member of a village board of trustees, or any president or member of a county board; and no such official shall be interested in any way, either directly or indirectly, in the manufacture, sale or distribution of alcoholic liquor."

"Sec. 8. No license shall be issued for the sale at retail of any alcoholic liquor within 100 feet of any church, school, hospital, home for aged or indigent persons or for veterans, their wives or children or any military or naval station; * * *."

"Sec. 8a. No license shall be issued to any person for the sale at retail of any alcoholic liquor at any store or other place of business where the majority of customers are minors of school age or where the principal business transacted consists of school books, school supplies, food, lunches or drinks for such minors."

"Sec. 21. No person shall receive a local license to sell alcoholic liquor upon any premises as a restaurant nor as a club unless it has the qualifications respectively described in Sections 2.23 and 2.24 of Article I. No restaurant, licensed as such, shall sell alcoholic liquor except with meals."

Section I of Article IV of the Act eypressly provides that no person shall be denied a Retail Liquor Dealer's license except for the reasons specifically enumerated in the above quoted provisions of the Act. We have examined the said provisions and find that the revocation of a Public Place Amusement license is not one of the reasons specified for the denial of a Liquor license. We have taken into consideration the provisions of para-

graph 2 of Section 2 of the Act which provides that no license shall be issued to a person who is not of good moral character and reputation in the community in which he resides. We do not believe that the revocation of the Public Place of Amusement license issued to Ben Petrone in and of itself makes him a person not of good character and reputation. Manifestly, he did not commit a crime or misdemeanor opposed to decency or morality.

It is, therefore, our opinion that the application of Ben Petrone for a Retail Liquor Dealer's license for the premises located at 1601 Grand Avenue should not bedenied solely on the ground that the Public Place of Amusement license issued to him during the year 1948 was revoked by the Mayor.

NUMEROUS TAVERNS IN VICINITY

(No. 11533—C. P. H.—May 15, 1952.)

Your letter addressed to the Mayor under date of April 24, 1952, has been referred to this departmennt for reply. You object to the issuance of a retail liquor dealer's license for the premises located at 4700 Ingleside Avenue, on the following grounds:

1. That there are more taverns on the street now than can profitably operate.

2. That in your opinion it would be a great mistake to allow any additional taverns to operate on 47th Street, east of Cottage Grove Avenue, particularly on the south side of the street.

Under the provisions of Section 1 of Article V of the Illinois Liquor Control Act the City Council has power by ordinance to limit the number and kind of licenses for the sale at retail of alcoholic liquor. The City Council, however, has not adopted such an ordinance. Furthermore, Sections 2, 8, 8a and 21 of Article VI of the Illinois Liquor Control Act specifically enumerate the grounds upon which the Mayor as Local Liquor Control Commissioner may refuse to grant a retail liquor dealer's license. Section 1 of Article IV of the Act provides that no person shall be denied a liquor license except for the reasons specifically enumerated in these sections of the Act. We have examined these provisions and find that the reasons assigned by you are not specified in the Act for the denial of a liquor license.

In view of the foregoing we regret to inform you that the Mayor does not have power to deny a retail liquor dealer's license for these premises for any of the reasons specified in your communication. However, if the legal voters of the precincts in the vicinity of these premises desire to pass upon the question of whether the sale at retail of alcoholic liquor shall be prohibited in such precincts, they may do so in the manner provided in Article IX of the Act.

REVOCATION AFTER EXPIRATION OF LICENSE

(No. 11570—Commissioner of Police—C. P. H.—July 30, 1952.)

We have your letter of May 12, 1952, requesting our opinion as to whether or not a retail liquor dealer's license may be revoked after its

expiration, for violations of the ordinances of the City of Chicago and the statutes of the State of Illinois committed on the licensed premises during the license period.

The Courts of Review of this State have not passed upon this precise question. However, the Courts of the Commonwealth of Pennsylvania have passed squarely on this issue (48 C. J. S., pages 288-289). In the leading case entitled *Seila's Liquor License* decided by the Superior Court of Pennsylvania, an intermediate Appellate Court, 124 Pa. Super. 519 (1937), 190 A. 203, a restaurant liquor license was issued to one William G. Seila for the year ending December 31, 1935. On January 3, 1936 a petition was filed for the revocation of the license on the ground that the licensee had violated certain provisions of the liquor law. After a full and complete hearing of all the facts, the Liquor Control Board, on February 11, 1936, entered an order revoking the liquor license on the grounds specified in the petition.

The Court, in upholding the action of the Board in revoking the license for violations committed within the license period, though the petition for revocation was not filed until after the expiration of the license period, stated:

> "The question involved upon this appeal, as stated by counsel for the commonwealth and not controverted by counsel for the licensee, reads: 'May a restaurant liquor license be revoked for law violations committed within the license period, where the petition for revocation is not filed until after the expiration of the license period?' "
>
> "This is the first time that exact question has reached this court." * * *
>
> "Our answer to the above-quoted question, as applied to the the facts in this case, is in the affirmative." * * *
>
> "Clearly, one of the purposes contemplated is that license holders shall faithfully observe the liquor laws of the commonwealth and the regulations of the board, under penalty of having their bonds forfeited and themselves and the premises they occupy rendered ineligible for license for specified periods, as well as under penalty of having their licenses revoked. If the only penalty for violations were the revocation of the license, there would be force in the opinion expressed by the court below in this case. To agree with the position there taken would, it seems to us, be equivalent to saying that a licensee may violate the liquor laws and the regulations of the board with impunity, provided he waits until the term of his license has so nearly expired that it would be impossible for his violations to be detected, a petition for revocation presented, due notice given, and a hearing had before the expiration of the term of his license. No matter how flagrant the violations may have been, his bond could not be forfeited, nor could his ineligibility or that of the premises be judicially established. Such results would, we think, be directly contrary to the declared legislative intent to which we have referred." * * *

Other cases of the Superior Court of the Commonwealth of Pennsylvania to the same effect are as follows:

I. B. P. O. E. Liquor License Case, 163 Pa. Super. 395, (1948), 162 A. 2d 68.

West Philadelphia Turn Und Schul Verein's Liquor License Case, 194 A. 764, (1937).

Cases wherein the same rule was followed by courts of quarter sessions of various counties of the Commonwealth of Pennsylvania are as follows:

In re Appeal of Katz, 38 *Luzerne* Legal Register Reports 193, (1945)

Rosato's Liquor License, 27 Northampton County Reports 313 (1940).

Chester Bowlers' Association License, 28 Delaware County Reports 126 (1938).

In re Revocation of License of Malusis, 32 Luzerne Legal Register Reports 431 (1938).

Feinstein's License, 25 Pa. District and County Reports 169 (1935).

In view of the authorities cited above, it is well established that a liquor license may be revoked after the expiration of the license period for violations of law committed on the licensed premises within the license period under the provisions of Section 3 of Article IV of the Illinois Liquor Control Law (Ill. Rev. Stats. 1951, ch. 43, par. 112) which provide that Local Liquor Control Commissioner shall have power to "revoke for cause all local licenses issued to persons for premises within his jurisdiction." The fact that employes of the licensee were discharged in the Municipal Court does not militate against the Mayor as Local Liquor Control Commissioner in revoking the liquor license for the premises. *People ex rel. Anderson* v. *City of Chicago,* 312 Ill. App. 187 (1941).

It is, therefore, our opinion that a retail liquor dealer's license may be revoked after the expiration of the license period for which it is issued for offenses committed on the licensed premises within the license period. If such action is taken the licensee will be forever barred from receiving a liquor license, and the premises described in the license cannot be used for the sale of alcoholic liquor for the period of one year from the date of revocation of the license. (Illinois Liquor Control Law, Article VI, Section 2, Article VII, Section 10; Ill. Rev. Stats. 1951, ch. 43, pars. 120 and 156.)

REDUCED FEE LICENSE

(No. 11619—Commissioner of Police—C. P. H.—November 25, 1952.)

We have your letter of September 18, 1952 transmitting an application of the Polish American Athletic Club for a license to sell alcoholic liquor to its members only on the second floor of the premises located at 1166 Milwaukee Avenue commonly known as the Lewis Hotel. You request our opinion as to whether or not such a license may properly be issued to the applicant for these premises.

The City Council passed an ordinance on August 4, 1950, appearing in the Journal of Proceedings of the City Council of that date at page 6751, amending Section 147-4 of the Municipal Code of Chicago by adding thereto the following:

> "Provided, that in the case of a lodge or local chapter or corresponding unit of any fraternal order or other association of a kindred nature which is national or state-wide in organization or character, or any body, the membership of which is comprised of persons who have served in the military or naval services of the United States, and which are organized under the 'General Not for Profit Corporation Act' of the State of Illinois and which has been in active and continuous existence for at least three years prior to the date on which application for license is filed and which in good faith maintains a

membership roll during said three-year period and has, at the time application is filed, more than fifty members with dues paid to date, and which is the owner, licensee, or occupant of an establishment operated solely for objects of a national or state-wide social, patriotic, recreational, benevolent purpose or the like, but not for pecuniary gain or profit, and the property as well as the advantage of which belong to all the members thereof, the fee for a city retail liquor dealer's license for the sale to members only shall be fifty dollars for the whole or any portion of the license period for which application is made."

For the purpose of showing that it comes within the purview of the above ordinance, the applicant has submitted in support of its application an affidavit dated October 31, 1952, signed by Henry Strecker as secretary of the Polish American Athletic Club, which reads in part as follows:

"That he is the duly elected secretary of the Polish American Athletic Club, an Illinois corporation organized not for profit and duly incorporated on February 14, 1946; that its principal office and its club halls are located at 1166 North Milwaukee Avenue, Chicago, Illinois.

"That it is a local chapter of the National Soccer League, Inc., a national organization organized for the administration of soccer football throughout the United States and for the purpose of promoting national and intrenational sportsmanship and good will among the states and nations and the various members thereof; that the Polish American Athletic Club by virtue of its membership in the National Soccer League and being a local chapter thereof is also automatically affiliated with the world soccer football association known as F. E. E. F. A., an international not for profit organization which is affiliated within 56 counties throughout the world.

"That the said Polish American Athletic Club since its date of incorporation and for more than three (3) years last past has at all times more than fifty (50) fully paid up members and that the membership roster of the said Polish American Athletic Club as of this date has an enrollment of fully paid up members numbering 128; that since February 14, 1946, it has been active and in continuous existence and engaged in benevolent and philanthropical activities.

"That the said Polish American Athletic Club has been organized and is operating since its date of incorporation for benevolent and charitable purposes only, and during its term of existence, it has arranged, in affiliation with the National Soccer League of which it is a chapter member, various athletic meets, proceeds of which were and are being distributed to churches, charitable organizations, veterans' associations and the like."

The above facts set forth in the affidavit disclose that the applicant is a local chapter of a national association, organized under the General Not For Profit Corporation Act of the State of Illinois for a period of three years prior to the date of filing the application, has more than fifty members with dues paid to date, and is operated solely for benevolent and charitable purposes. In view of these facts it appears that the applicant is qualified to receive the license provided for in the ordinance referred to above.

Section 20 of Article VI of the Illinois Liquor Control Law provides as follows:

"In premises upon which the sale of alcoholic liquor for consumption upon the premises is licensed (other than as a restaurant, hotel, club or any bowling alley other than one situated on the first, or ground floor) no screen, blind, curtain, partition, article or thing shall be permitted in the windows or upon the doors of such licensed premises nor inside such premises, which shall prevent a clear view into

the interior of such licensed premises from the street, road or sidewalk at all times, and no booth, screen, partition, or other obstruction nor any arrangements of lights or lighting shall be permitted in or about the interior of such licensed premises which shall prevent a full view of the entire interior of such premises from the street, road or sidewalk, and said premises must be so located that there shall be a full view of the entire interior of such premises from the street, road or sidewalk. * * *"

By virtue of the above quoted provisions of the Act, a club located above the ground floor is not required to provide a clear view into the interior of its premises when licensed to sell alcoholic liquor at retail. In the instant case the Polish American Athletic Club is located on the second floor of the hotel at 1166 Milwaukee Avenue. Section 2.24 of Article I of the Act defines a "Club" as a corporation which provides, among other things, a suitable and adequate kitchen, dining room and equipment, and maintains a sufficient number of servants and employees for cooking, preparing and serving food and meals for members and their guests. In the affidavit referred to herein it is stated:

"That the Polish American Athletic Club operates its club headquarters at the aforesaid address where it maintains a suitable and adequate kitchen, dining room and equipment and maintains a sufficient number of servants and employees for cooking, preparing and serving meals for members and their guests."

The above statements contained in the affidavit show that the applicant maintains kitchen and dining room accommodations for its members and guests which are expressly required by the Act to constitute a "Club." In addition, it is expressly stated in the application that the applicant is a "Club" as defined by the Illinois Liquor Control Law. Hence, the applicant is not required to comply with the clear view provisions of the Act.

It is therefore our opinion, based upon the information contained in the application and affidavit, that the Polish American Athletic Club is qualified under Section 147-4 of the Code, as amended, for a license to sell alcoholic liquor to its members only on the premises located at 1166 Milwaukee Avenue.

We return herewith the application referred to herein, together with the affidavit attached thereto.

REDUCED FEE LICENSE

(No. 11624—Commissioner of Police—A. F. G.—December 12, 1952.)

We have your letter of December 11, 1952 transmitting an application of the Automobile Mechanics' Society for a license to sell alcoholic liquor to its members only at its headquarters described in the application as a private room on the first floor of the premises located at 133 S. Ashland Boulevard, Chicago. You request our opinion as to whether or not such a license may properly be issued to the applicant for these premises.

The City Council passed an ordinance on August 4, 1950, appearing in the Journal of Proceedings of the City Council of that date at page 6751, amending Section 147-4 of the Municipal Code of Chicago by adding thereto the following:

"Provided, that in the case of a lodge or local chapter or corresponding unit of any fraternal order or other association of a kindred nature which is national or state-wide in organization or character, or any body, the membership of which is comprised of persons who have served in the military or naval services of the United States, and which are organized under the 'General Not for Profit Corporation Act' of the State of Illinois and which has been in active and continuous existence for at least three years prior to the date on which application for license is filed and which in good faith maintains a membership roll during said three-year period and has, at the time application is filed, more than fifty members with dues paid to date, and which is the owner, licensee, or occupant of an establishment operated solely for objects of a national or state-wide social, patriotic, recreational benevolent purpose or the like, but not for pecuniary gain or profit, and the property as well as the advantages of which belong to all the members thereof, the fee for a city retail liquor dealer's license for the sale to members only shall be fifty dollars for the whole or any portion of the license period for which application is made."

For the purpose of showing that it comes within the purview of the above ordinance, the applicant has submitted in support of its application an affidavit dated November 6, 1952, signed by Bert M. Cima, president and Walter Weldon, secretary of the Automobile Mechanics' Society, which reads in part as follows:

"The following statements are made as supplementary to and part of an application concurrently made for a City Retailer's Alcoholic Liquor license.

1. Applicant's corporate name: Automobile Mechanics' Society (As shown in application for license).

2. Location of premises: 133 South Ashland Boulevard, Chicago 7, Illinois (As shown in application for license).

3. Is applicant a lodge or local chapter or corresponding unit of a fraternal order or other association of kindred nature? Yes. If so, describe organization fully. To promote general welfare of its members, all of who are members of Automobile Mechanics Local 701, International Association of Machinists.

4. Is the organization national in character? Yes. Statewide in character? Yes.

5. Is the organization a body the membership of which is comprised of persons who have served in the military or naval services of the United States? Yes.

6. Is the body organized under the 'General Not for Pecuniary Profit Corporation Act' of the State of Illinois? Yes. If, so, answer the following:

   (A) Date so organized: May 14, 1949.

   (B) Has the incorporated organization been in active and continuing existence for at least three years prior to the date on which application for license is filed? Yes. Since what date? May 14. 1949.

   (C) Does said organization maintain a membership roll during said three-year period and have, at the time application is filed, more than fifty members with dues paid to date? Yes.

7. Is the establishment for which license is sought operated solely for objects of a national or statewide social, patriotic, recreational, benevolent purpose or the like, but not for pecuniary gain or profit? Yes.

8. Does the property of the applicant organization as well as the advantages thereof belong to all of its members? Yes."

The above facts set forth in the affidavit disclose that the applicant is a local chapter of a national association, organized under the General Not For Profit Corporation Act of the State of Illinois for a period of three years prior to the date of filing the application, has more than fifty members with dues paid to date, and is operated solely for objects of a national or statewide, social, patriotic, recreational and benevolent purposes. In view of these facts, it appears that the applicant is qualified to receive the the license provided for in the ordinance referred to above.

Section 20 of Article VI of the Illinois Liquor Control Law provides as follows:

> "In premises upon which the sale of alcoholic liquor for consumption upon the premises is licensed (other than as a restaurant, hotel, club or any bowling alley other than one situated on the first, or ground floor) no screen, blind, curtain, partition, article or thing shall be permitted in the windows or upon the doors of such licensed premises nor inside such premises, which shall prevent a clear view into the interior of such licensed premises from the street, road or sidewalk at all times, and no booth, screen, partition, or other obstruction nor any arrangements of lights or lighting shall be permitted in or about the interior of such licensed premises which shall prevent a full view of the entire interior of such premises from the street, road or sidewalk, and said premises must be so located that there shall be a full view of the entire interior of such premises from the street, road or sidewalk. * * *"

By virtue of the above quoted provisions of the Act, all premises that are licensed for the sale at retail of alcoholic liquor which are located on the first or ground floor must provide a clear view into the interior of the premises from the street, road or sidewalk. In the application, it is expressly stated that the premises for which the license is sought are so located that there is a full view of the entire interior from the street or sidewalk. Hence, the premises described in the application comply with the clear view provisions of the Act.

It is, therefore, our opinion, based upon the information contained in the application approved by the Captain commanding the 26th District, and the affidavit attached to the application, that Automobile Mechanics' Society is qualified, under Section 147-4 of the Code, as amended, for a license to sell alcoholic liquor to its members only on the premises described in the application.

We return herewith the application referred to herein, together with the affidavit attached thereto.

B. STATE VEHICLE AND DRIVER'S LICENSES

DISHONORABLE MILITARY DISCHARGE

(No. 11171—Public Vehicle License Commissioner—R. J. N.—August 26, 1949.)

Your letter of August 18, 1949, requests our interpretation of Section 28-35 of the Municipal Code of Chicago with respect to the question as to whether or not a person convicted of desertion from the United States

Army in war time who served 2½ years in the New Cumberland Disciplinary Barracks and received a dishonorable discharge from the United States Army is eligible to receive a public vehicle drivers license.

Section 28-35 prohibits the issuance of a license to any person who has been an inmate of any penitentiary or reform school because of the conviction of a felony within 8 years prior to his application for such license.

Under the provisions of the Criminal Code of the State of Illinois (Chapter 38, Section 585, Ill. Rev. Stat. 1947) a felony is defined as "an offense punishable with death or by imprisonment in the penitentiary."

An examination of the Articles of War (Section 1, Chapter 2 of the Act of June 4, 1920-1941 Statutes 787) under which the applicant for a public vehicles drivers license was convicted discloses that the maximum punishment for war time desertion is death and the court can give such lesser punishment as it may direct. (Article of War 58). This statute further provides that any punishment less than death provided for by the court trying the accused may be served in a penitentiary. (Article of War 42).

It is apparent that the applicant has been convicted of a felony within the 8 years preceding his application for a public vehicle drivers license. The only question remaining is whether the confinement of the accused in the New Cumberland Disciplinary Barracks rather than in a penal institution of a state or federal government which carries the name "penitentiary" would remove the disqualification for a license which his offense and punishment in a penitentiary would create.

Although an army disciplinary barracks can in a strict sense be distinguished from a penitentiary it is a penal institution to which are assigned those offenders who are convicted of a felony and for whom there seems little hope of rehabilitation. In this sense a disciplinary barracks is distinguished in military terminology from a disciplinary training center to which are sent those offenders which the military establishment deems potentially capable of rehabilitation.

Penitentiary has been defined by the courts as:

> * * * "a prison or place of punishment, especially one in which convicts are confined at hard labor for punishment and reformation.* * *
>
> * * * a place of punishment in which convicts sentenced to confinement and hard labor are confined by authority of the law. * * *
>
> * * * any place where felony convicts sentenced to confinement and hard labor are confined by authority of its laws. * * *"

(*Howell* v. *State* (Georgia) 138 S.| E. 206).

In *Bowers* v. *Bowers* (Ohio) 151 N. E. 750 construing a divorce statute which listed confinement in a penitentiary as one of the grounds for divorce the Supreme Court of Ohio held that confinement of a defendant in a reformatory in Ohio would be construed as confinement in a penitentiary on the ground that the defendant might have been sentenced to the penitentiary for the crime committed by him.

We are therefore of the opinion that no public vehicle drivers license should be issued to an applicant found guilty of desertion of the United States Army in war time and who served 2½ years in an army disciplinary barracks prior to receiving a dishonorable discharge from the United States Army.

VEHICLE LICENSE REQUIREMENTS

(No. 11317—Commissioner of Police—H. H. P.—July 13, 1950.)

We have your letter of July 5, 1950, together with a memorandum from Michael J. Ahern, chief of traffic, inquiring whether the Central West Motor Stages, Inc. and the Eagle Bus Lines, Inc., operating from 3451 W. Ogden Ave., Chicago, are subject to sections 29-2 of the Municipal Code of Chicago (city vehicle license required) and 27-83 (safety sticker required).

Section 29-2 provides in part as follows:

"It shall be unlawful for any person residing within the city to use, or to cause or permit any of his agents or employees to use any motor vehicles upon the public ways of the city, unless such motor vehicle is licensed as hereinafter provided."

Section 1-9 provides in part as follows:

"unless the context requires other interpretations, the following words are defined, for the purpose of this code, as follows:

(e) person—any natural individual—or corporation in his or its own capacity—."

Section 27-83 provides as follows:

"Motor vehicles shall be inspected semi-annually. Inspection shall be conducted under the direction of the public vehicle license commissioner and shall be made for the purpose of determining whether the vehicle, its parts and accessories, conform in all respects with the standard for the safe operation of motor vehicles on public highways required by the ordinances of the city and by the statute of the state."

Section 27-85 provides as follows:

"It shall be unlawful for any person to operate, cause or permit to be operated upon any public way in the city and motor vehicle owned by a resident of the city or by a corporation having its principal office or place of business in the city without having displayed on the windshield of such motor vehicle a valid certificate of inspection (safety sticker). Each day such motor vehicle is so operated shall constitute a separate offense."

Both the Central West Motor Stages, Inc., and the Eagle Bus Lines, Inc., are Illinois corporations, organized to carry freight and passengers in city, intrastate, and interstate transportation.

Central's certificate of incorporation was filed in the recorder's office of Cook County, Illinois, on September 17, 1937, as document 12055199, book 1110c, page 426. Its registered agent was William Reznick, and its registered office was 4351 W. Roosevelt Road, Chicago. Its incorporators were William, Anna and Max Reznick of Chicago.

The 1949 Certified List of Domestic and Foreign Corporations of the State of Illinois, issued by the secretary of state, shows that Central's registered office was 3451 W. Ogden Ave., Chicago; that its president was William Reznick; secretary, Richard Reznick; and registered agent, William Reznick; all of 3451 W. Ogden Ave., Chicago.

On August 12, 1949, Central filed in the recorder's office of Cook County, Illinois, document 14610392, book 1955c, page 396, a certificate of change of registered agent and registered office, from William Reznick and 3451 Ogden Ave., Chicago, to Shumway J. Bird, Room 402, Leland Office Building, Springfield, Illinois.

Eagle's certificate of incorporation was filed in the recorder's office of C. C. I. on May 23, 1945, as document 13513397, book 1537c, page 537. Its registered agent was Edward B. Casey; its registered office was 29 S. La Salle St., Chicago; and its incorporators were William Robert and Richard Reznick of Chicago.

The 1948 Certified List of Domestic and Foreign Corporations shows its registered office as Room 816, 29 S. La Salle St., Chicago; president, William Reznick; secretary, Richard Reznick; both of Chicago, and registered agent, Edward B. Casey, Room 816, 29 S. La Salle St., Chicago. Eagle is not in the 1949 Certified List of Domestic and Foreign Corporations.

On August 12, 1949, Eagle filed in the recorder's office of C. C. I., document 14610393, book 1955c, page 398, a certificate of change of registered agent and registered office, from Edward B. Casey, Room 816, 29 S. La Salle St., Chicago, to Shurway J. Bird, Room 402 Leland Office Building, Springfield, Illinois. As far as we could ascertain, both Central and Eagle since their incorporation and until August 12, 1949, have always had their registered agent and registered office in Chicago.

Section 23-53 of the Revised Cities and Villages Act (Ill. Rev. Stat. 1949, ch. 24, par. 23-53) confers power upon municipalities to impose a vehicle tax; but section 26a of the Motor Vehicle Law (Ill. Rev. Stat. 1949, ch. 95½, par. 32a) limits this power to resident owners. Whether Central and Eagle are residents of the city for the purpose of being subjected to the vehicle tax is a question of fact. *Appleton City* v. *Graham*, 54 S.W. (2d) 434, 227 Mo. App. 503) (1932).

In *City of Chicago* v. *Dorband*, 297 Ill. App. 617 (1938), the court had to pass upon the interpretation of section 26a and paragraph 671 of ch. 24, Ill. Rev. Stat. 1947. The court said (p. 627):

> "The prohibitions contained in the foregoing sections of the statutes clearly apply only to the unrestricted use of the public streets and highways throughout the State by any vehicle, the owner of which has secured the license required by the State and paid such tax as may be imposed by the *city, village, town or other municipal corporation wherein said owner resides or in case of a firm or corporation where it maintains and conducts its principal place of business.*"

If Central and Eagle maintain and conduct their principal place of business in Chicago, then they are residents of Chicago and their motor vehicles are subject to the vehicle tax.

The fact that Central and Eagle have their registered office and registered agent in Springfield has no bearing on the question of residence. This is clearly indicated by section 11 of The Business Corporation Act (Ill. Rev. Stat. 1949, ch. 32, par. 157.11) which provides in part as follows:

> "Each corporation shall have and continuously maintain in this State:
>
> (a) a registered office which may be, *but need not be, the same as its place of business.*
>
> (b) a registered agent, which agent may be either an individual resident in this State, whose business office is identical with such registered office, or a corporation authorized to transact business in this State having a business office identical with such registered office."

Aside from the question of the actual residence of Central and Eagle as corporations, we believe that the question of residence of their motor vehicles for the purpose of being subject to the vehicle tax must also be considered. The purpose of the vehicle tax ordinance is to obtain funds for the building, repair, and maintenance of the City's public ways. Since the owners of motor vehicles benefit from the upkeep of the City's

public ways they are the ones that are required to pay a vehicle for the privilege of using the public ways. (*City of Chicago Hastings Express Co.*, 369 Ill. 610 (1938).)

If Central and Eagle have any motor vehicles that do not leave the city, but use its public ways exclusively, then Central and Eagle have established residence in the City for such motor vehicles and they are subject to the vehicle tax. (*City of St. Louis* v. *Temples*, 149 S. W. (2d) 888, (No. App.) (1941).)

We are of the opinion that a domestic corporation having an office in the City, and that uses the City for the home office of its motor vehicles, is a resident of the City for the purposes of the motor vehicle tax ordinance. The City does not attempt to tax motor vehicles that are usually kept some place else and pay a vehicle tax to the municipality there, but only those motor vehicles that are usually kept in the City and consider the City as their home office. Of course, a *bona fide* resident of the City cannot evade the vehicle tax ordinance by purchasing a vehicle tax in a municipality where he is not a resident.

Those who seek shelter under an exemption law must present a clear case, free from all doubt, as such laws, being in derogation of the general rule, must be strictly construed against the person claiming the exemption and in favor of the public. (*Robinson* v. *Fix*, 151 So. 512, 117 Fla. 151 (1933).)

In the *Robinson* case, the court held that a motor vehicle operator employed within the state five months every year was during said period a "resident" and not a "nonresident of the state" within law exempting from license provisions of motor vehicle regulations statute, the motor vehicle owned by a nonresident. The court said (p. 513):

> "Automobiles are used on the public highways which are constructed and maintained at great expense by the state and *its governmental units*; and to maintain such highways license and other taxes are imposed upon the operation of such motor vehicles on the highways in the state."

On these facts it seems that Central and Eagle are residents of the City and subject to our ordinances.

What we have said concerning the vehicle tax applies equally to a certificate of inspection.

OUT OF CITY TRUCKS

(No. 11429—Commissioner of Police—L. L. K.—September 27, 1951.)

This will acknowledge receipt of your letter of September 21, 1951, requesting advice and information relating to the operation and licensing of motor trucks in Chicago. Attached thereto is a copy of a request from the chief of the traffic division for the answer to specific questions. Also attached are various orders and letters relating to the subject matter which refer to opinions heretofore rendered by this office.

The following questions are set out:

1. Does an Out-of-State trucking firm with headquarters in another city have the right to send trucks to Chicago to make pick-ups or deliveries daily or weekly need a State License, City License or Safety Sticker?

(a) Does the fact that they make more than one delivery alter the facts of the above?

2. A large trucking corporation whose headquarters are located outside the corporate limits of Chicago but whose trucks pick-up and deliver within the City of Chicago. What is their status? Do they need a City Vehicle License?

3. Are trucks, licensed out-of-state, permitted to make multiple pick-ups within the City of Chicago if such materials picked up are consigned to interstate commerce?

   (a) Are these trucks permitted to make deliveries from interstate equipment, direct to the consignee?

4. Are trucks being used in shuttling material within the City of Chicago, from a Chicago Loading Dock and using an out-of-state license, considered operating legally?

5. What is the status of interstate trucks, registered and licensed in an adjoining state yet carrying on the bulk of their operation within the City of Chicago.

Most of these questions have heretofore been covered by opinions of this office which now appear in Volume 22, Opinions of the Corporation Counsel and Assistants at pages 296 to 302 inclusive and in other opinions therein referred to. No changes have been made in the law which would alter the conclusions there stated.

The answer to your first question is found in Chapter 95½, Ill. Rev. Stats. 1949, paragraph 22, which provides that the requirements for state license shall apply to "foreign corporations, partnerships and individuals owning, maintaining or operating places of business in this state and using motor vehicles or motor bicycles in connection with such places of business * * * in so far as the motor vehicles and motor bicycles used in connection with such places of business are concerned." If the foreign trucking firm is not covered by the above-quoted provision, it is specifically exempted from the requirement for Illinois license fees if it has complied with the requirements of the place of its residence and displays evidence thereof provided the city, state, foreign country or province, territory or federal district of its residence, grants a similar exemption to motor vehicles or motor bicycles duly registered under the laws of and owned by residents of this state, but if the place of residence requires residents of this state to pay license fees there they are required to pay our state fees.

By Chapter 95½, Par. 32 (a), the power of the City of Chicago to require a city vehicle tag is limited in its application to those who reside in the city. A corporation resides in the state where it is incorporated and in the city where it has its principal place of business. Foreign corporations whose principal place of business is not in the City of Chicago cannot be compelled to purchase Chicago vehicle tags.

Chapter 95½, Par. 220, requires every truck operated in whole or in part over the highways of this state to pass a safety test and secure a certificate of safety, and Paragraph 220.8 requires tests in April and October of each year. Paragraph 220.10 prohibits operation upon the highways of the state without the safety sticker attached to the truck. Paragraph 220.11 exempts any truck displaying such safey sticker from any test required by ordinance or otherwise in any city, village or incorporated town in this state.

The foregoing requirements affecting foreign trucks are not affected by the number of pick-up or deliveries made in Chicago but are based solely upon ownership and residence.

Your second question relates to a large trucking corporation whose headquarters are located outside the corporate limits of Chicago but whose

trucks pick up and deliver within the City of Chicago and you ask whether they need a city vehicle license. The answer to your first question also answers this one. The power of the City of Chicago to collect vehicle tax license fees applies only to residents. If the principal place of business of the corporation is outside of Chicago, we have no power to make them purchase the city vehicle license.

Your third question relates to trucks licensed out of the state which make pick-ups or deliveries within the City of Chicago as part of an interstate shipment. The question of interstate commerce is not involved in the determination of the obligation to pay state and city vehicle license fees. Aside from the question of fees, out of state licensed trucks engaged in interstate commerce may pick up and deliver within the City of Chicago.

Your fourth question is whether out of state licensed trucks being used in shuttling material within the City of Chicago from a Chicago loading dock are operating legally.

In 1949 several hundred tickets were issued against trucks owned by foreign corporations whose principal place of business was not in Chicago, but these trucks were used exclusively in Chicago in making pick-ups and deliveries of merchandise which was received at or shipped from loading docks in the city as part of interstate commerce. After a series of conferences with the attorneys for the owners of these trucks, we prevailed upon them to purchase city vehicle tags. Notwithstanding that they contended that we were without legal authority to compel them to pay vehicle license fees, we took the position that the trucks were engaged exclusively within the city limits and we were prepared to test the question of whether, on that factual ground, we had a right to consider that the trucks for all practical purposes had a permanent situs in the city and were subject to our vehicle tax law. The agreement of the owners obviated the necessity of testing our theory. While there is some doubt that our theory is sustainable, the factual situation provides a basis for our continuing to adhere to this theory until such time as the courts decide that it is untenable.

Your fifth question inquires concerning the status of interstate trucks registered and licensed in an adjoining state yet carrying on the bulk of their operation within the City of Chicago. What we have hereinbefore stated applies to this situation. The fact that they come from an adjoining state is immaterial as is the fact that the bulk of their operaion is within the City of Chicago. The residence limitation on the City of Chicago governs its right to collect vehicle taxes.

TRUCKS REGISTERED OUTSIDE CITY

(No. 11528—Commissioner of Police—L. L. K.—May 9, 1952.)

This will acknowledge receipt of your letter of April 17, 1952 to which you attach copies of reports from Deputy Commissioner Breitzke, Chief of the Uniform Division Raymond Crane, Captain Joseph A. Hartnett, Lieutenant John A. Olson and Captain John I. Howe, all relating to the operation of trucks by Lightning Delivery Service.

From the foregoing reports, it appears that this corporation operates a number of trucks which are registered from the Round Lake, Illinois residence of Milton Dakoff, also known as Milt Day, bear Round Lake vehicle tags and some, if not all, have the Round Lake address lettered on

the sides. You inquire whether all of the trucks of this corporation should have Chicago vehicle tags.

We have been informed by the Secretary of State that the registered address of this corporation is 2535 N. Sacramento Boulevard, Chicago, Illinois, and that Milton Dakoff is the registered agent. The liability of the corporation for local vehicle tags is based upon residence. As we have heretofore advised you, a corporation is subject to the vehicle tax requirement of the municipality where it has its principal place of business. The principal place of business of this corporation is Chicago, Illinois, and any of its trucks operating in the City of Chicago are required to bear Chicago vehicle license stickers.

RESIDENCE REQUIREMENT

(No. 11587—Commissioner of Police—A. F. G.—September 25, 1952.)

We have your letter of September 20, 1952 to which was attached a communication from the chief of the traffic division in which he says:

> "In order to clarify the present section of the City Code covering the requirement for City Vehicle Licenses by residents of the City of Chicago; namely Chapter 29, Section 2, an opinion of the Corporation Counsel is requested. It is our desire to have them clarify whether or not it is illegal for a resident of the City of Chicago, who has either a place of business, summer home or relatives located outside the City of Chicago, to purchase and register their vehicle outside this City for the purpose of avoiding purchasing a Chicago Vehicle License.
>
> This official opinion would aid us in our present enforcement against violators of Chapter 29, Section 2, of the City Code."

The first and fourth paragraphs of Section 29-2 of the Municipal Code of Chicago are as follows:

> "It shall be unlawful for any person residing within the city to use, or to cause or permit any of his agents or employes to use, any motor vehicle upon the public ways of the city, unless such vehicle be licensed as hereinafter provided.
>
> * * * *
>
> No person residing within the city shall be exempt from the operation of this chapter, or released from the payment of the license fee required, by reason of the registering of any automobile or other vehicle in another state or sovereignty beyond the jurisdiction of the state of Illinois, but if such automobile or other vehicle is used or operated on the public ways of the city, it shall be subject to the provisions of this chapter, even though it has been registered in some other jurisdiction outside of the state."

A resident of Chicago who uses his motor vehicle on the public ways of the city is required by the first paragraph of Section 29-2 to take out a city wheel tax license.

If your department has reason to believe that a resident of Chicago has registered his motor vehicle outside of the jurisdiction of the city for the purpose of evading the payment of the Chicago license fee there are several tests you can apply which will help to prove that he is a resident of the city:

Is he registered to vote at a Chicago address?

Does he receive public utility service of a residential character at a Chicago address, such as gas, electricity or telephone?

Has he given a Chicago residential address at his place of employment?

Inquiry in the neighborhood of the Chicago address which your department believes is his actual residence.

If any or all of these tests indicate the person is a Chicago resident you should notify him to secure a Chicago license. If on the other hand he is able to prove notwithstanding such evidence that he is not a resident of the city he should not be required to secure the said license.

FIRE APPARATUS

(No. 11614—Fire Commissioner—A. F. G.—November 18, 1952.)

This will acknowledge your letter of November 13, 1952 in which you ask to be advised if fire department vehicles, including fire apparatus, are exempt from the provisions of the State law which requires license plates.

Under sections 8 and 9 of the "Motor Vehicle Law" every owner of a vehicle of the first division (passenger car) and of the second division (trucks) is required to file in the office of the Secretary of State an application for a certificate of registration, properly sworn to, giving his name and address, with a brief description of the vehicle to be registered including the name of the maker, factory and engine number, style of vehicle, the motor power and the amount of such power stated in figures of horsepower, on a blank to be furnished by the Secretary of State and shall pay to the Secretary for each calendar year a registration fee which in the case of privately owned vehicles varies according to the horse power of the motor or of the weight of the vehicle, but in the case of vehicles owned by the State, or by any county, city, village, or incorporated town, the registration fee for vehicles of either the first or second division shall be two dollars for each calendar year.

By section 14 of the same Act, the Secretary of State is required to supply and deliver to the address of the owner of each licensed motor vehicle registered in his office, two number plates for each passenger car and truck and such number plates shall be conspicuously displayed upon the front and back of the motor vehicles to which they are assigned. There is no exception in this section for vehicles owned by the City.

All of the other departments of the City, such as the police, public works and street departments which have motor vehicles under their jurisdiction, advise us that they list each motor vehicle on a separate registration blank. When the list is complete, the department head draws a voucher on the comptroller who in turn issues a check to the Secretary of State in an amount to cover each vehicle listed at the rate of two dollars each.

In our opinion your department should follow the same procedure.

ARMY CHAUFFEURS

(No. 11629—A. F. G.—December 19, 1952.)

This will acknowledge receipt of your letter of December 15, 1952 in which you say:

> "This Headquarters employs a number of civilian drivers for truck as well as ordinary sedan. Since this is operated under government supervision, is it necessary for our civilian drivers to have a chauffeur's license as well as a driver's license as required by the State for private vehicles?
>
> Any information you an give us pertaining to this matter will be appreciated."

We assume the vehicles on which these chauffeurs and drivers are employed are operated in the military service of the United States.

The licensing of chauffeurs and operators of motor vehicles is a State function and is provided for in sections 27 and 28a of the "Motor Vehicle Law" (Ill. Rev. Stats. 1951 pp. 204-205).

Section 27 of the said law defines a chauffeur to mean "any person whose principal occupation is that of operating a motor vehicle as a mechanic or employee, or who directly or indirectly receives pay or any compensation whatsoever for any work or service in connection with the operation of a motor vehicle for the transportation of passengers or merchandise for hire."

Such a person is required to be licensed by the Secretary of State. A proviso in that section reads as follows:

> "provided, further, that no person shall be held to be a chauffeur and subject to the provisions hereof who operates a motor vehicle in the service of the Army, Navy or Marine."

Section 28a of the said law is in part as follows:

> "No person except those hereinafter exempted shall drive any motor vehicle upon a highway in this State unless he has a valid license as an operator or chauffeur under the provisions of this Act, an operator being hereby defined to mean any person, other than a chauffeur, who is in actual physical control of a motor vehicle upon a highway. Any person holding a valid chauffeur's license hereunder need not procure an operator's license. The following persons are also exempt from the requirements of this section:
>
> 1. Any person while operating a motor vehicle in the service of the Army, Navy or Marine Corps of the United States:"

If our assumption that the vehicles referred to are operated in the military service of the United States is correct, we are of the opinion that the chauffeurs and drivers of such vehicles are not required to be licensed under the foregoing provisions of the "Motor Vehicle Law."

However, as the City of Chicago has nothing to do with the licensing of these persons, we would suggest that you write to the Secretary of State, who has jurisdiction in the matter, requesting his opinion as to the exemption of your drivers from the license requirements of the "Motor Vehicle Act."

POWER DRIVEN LIFT TRUCKS

(No. 11688—Commissioner of Police—M. I. W.—May 7, 1953.)

We have your letter of April 18th, in which you state that your Department is in receipt of a complaint about the Goldsmith Brothers Smelting Company, 1300 W. 59th Street who are allegedly operating "mules," a power lift truck on the streets of the City without license of any kind.

You further state that investigation indicates that the officials of this company have endeavored to procure license for these lifts, but have been told that such is not necessary.

You request our opinion as to what action your Department can take in this matter.

Section 29-2 of the Municipal Code provides in part as follows:

> "It shall be unlawful for any person residing within the City to use, or to cause or permit any of his agents or employees to use, *any motor vehicle upon the public ways of the city*, unless such vehicle be licensed as hereinafter provided." (Emphasis added.)

Section 29-1 defines a motor vehicle as "any vehicle propelled otherwise than by muscular power of man or animal * * *."

It is clear that the type of vehicle described in your letter is a motor vehicle within the definition of the ordinance.

The Illinois Motor Vehicle Law Chap. 95½, sec. 1, Ill. Rev. Stat. 1951, in defining a motor vehicle for which licenses are required uses similar language and this type of vehicle is therefore also subject to motor vehicle licensing by the state.

We have checked with both the office of the City Collector and the office of the Secretary of State and find that they are following this interpretation of the ordinance and statute and are issuing licenses for vehicles of his nature.

In attempting to ascertain the basis for the advice allegedly given to this company that no license is required, it has been suggested that the matter may rest upon the question of whether or not use is made of "the public ways." It is the practice and, we believe correctly so, of both licensing agencies referred to above, not to require licenses where use of these vehicles is confined solely to *within* the plant or yards of the Company.

In checking further with your office, we were informed that this company has two plants, one across the street from the other and that some of the vehicles owned by the company move from one plant to the other in the course of which they cross a public street.

It is possible that the company in describing its situation to the licensing agencies did not leave a clear picture as to the fact of the use of the public street.

It is our opinion that a motor driven power lift truck is a motor vehicle within the meaning of the Muncipal Code and the state statutes and that any such vehicle driven on any public street is required to have both a city and state license. Any such vehicle of the Goldsmith Brothers Smelting Company that appears on a city street should be licensed accordingly. The city and state licensing agencies have informed us that they are operating in conformity with this opinion and will issue the required licenses to this company.

In view of the above it is proper for your department to inform this company that they will be required to procure licenses for any vehicle using the streets. In the event of failure to procure such licenses the procedures you have customarily used for enforcement may be used.

We wish to state again that such licenses are necessary only for those vehicles owned by the company which make use of the streets and that this opinion is in no way intended to suggest that vehicles confined solely to intra-plant operations are subject to licensing.

LICENSING FEDERAL RESERVE BANK VEHICLES

(No. 11696—City Clerk—M. I. W.—May 29, 1953.)

We have your request of May 19, for an opinion as to whether the City of Chicago is authorized to exempt the Federal Reserve Bank of Chicago from payment of the city vehicle tax license for its vehicles.

You have also a copy of a letter from the Assistant to the General Counsel of the Federal Reserve Bank in which it is argued that the bank is exempt from this licensing requirement as an agent and instrumentality of the United States Government and that this exemption is authorized by Section 29-15 of the Municipal Code as well as by act of congress. You have also attached a copy of an opinion of the Attorney General of Illinois dated March 14, 1953 holding that the Bank was not required to pay the registration fee for motor vehicles provided in the Illinois Motor Vehicle Act on the grounds of immunity from taxation established by act of congress. Title 12, U. S. Code, par. 531.

Section 29-15 of the Municipal Code provides in part as follows:

> "All vehicles *owned or operated by * * * the United States government* * * * shall be exempt from the provisions of the chapter requiring the payment of a vehicle tax. Every vehicle owned by the United States government which is not plainly marked to indicate that it is the property of he United States government * * * shall at all times while being operated upon the public ways of the city have a metal plate or transparent sticker license affixed thereto of the kind and type provided in sections 29-6 and 29-7, to be furnished by the city clerk free of charge." (emphasis added)

The precise question as to whether the Federal Reserve Bank of Chicago is entitled to an exemption was considered in an opinion dated January 10, 1936 addressed to the city clerk, 19 Op. Corp. Coun. 309 (No. 9010) in which we held that the city clerk was without power to issue such a license gratuitously. That opinion was based on the fact that the vehicle was viewed as personal property of the bank and not of the United States government.

Since that opinion was rendered two decisions interpreting the status of Federal Reserve Banks have been handed down by the supreme courts of other states holding that the functions of Federal Reserve Banks are an exertion of sovereign power of the United States government and that said banks are agencies and instrumentalities of the federal government. *Geery* v. *Minnesota Tax Commission,* 202 Minn. 336, 278 N. W. 594 (1938); *Federal Reserve Bank* v. *Register of Deeds,* 288 Mich. 120, 284 N. W. 667.

Under a provision of the Federal Reserve Act any surplus of a Federal Reserve Bank remaining upon dissolution is to be paid into the treasury of the United States. This provision even in the absence of the decisions referred to above would appear to give the federal government a direct proprietary interest in all assets of the bank. Title 12 U. S. Code, par. 290.

It is therefore our opinion that vehicles owned and operated by the Federal Reserve Bank of Chicago are "owned or operated by the United States government" within the meaning of the exemption granted by the ordinance and the bank is therefore not required to pay the Chicago vehicle tax.

CARS GARAGED OUTSIDE CITY AT NIGHT

(No. 11708—City Collector—M. I. W.—July 2, 1953.)

We have your letter of June 25, 1953 regarding vehicles owned by the Standard Oil Company, 20 N. Wacker Drive, which vehicles are registered with the State of Illinois at this address. You enclose a letter from the Company, which raises the question of the right of the city to impose a tax on its vehicles for which it is claimed municipal vehicle tags have been and are secured from the suburban towns in which the cars are garaged at night. These vehicles are used by salesmen of the company, some of whom reside in the suburbs.

Section 29-2 of the Municipal Code provides in part as follows:

> "It shall be unlawful for any person residing within the city to use, or to cause or permit any of his agents or employees to use any motor vehicle upon the public ways of the city, unless such vehicle be licensed as hereinafter provided."

Section 26a of the Illinois "Motor Vehicle Law" provides in part as follows:

> "No *owner* of a motor vehicle or motor bicycle who shall have obtained a certificate from the Secretary of State and paid the registration fee as hereinbefore provided, shall be required by any city, village, town or other municipal corporation within the State, *other than that within which said owner resides* to pay any tax or license fee for the use of such motor vehicle or motor bicycle; * * *" (emphasis added.) Chap. 95½, sec. 32a Ill. Rev. Stat. (1951).

This section, plainly designed to protect vehicle owners from a multiplicity of municipal license requirements, places the point of licensing in the municipality wherein the *owner* resides. The test is, who is the owner and where does he reside. The *owner* of the vehicles in this case is the Standard Oil Company and not the individual salesmen.

The Company "resides" at its business address which in this case is at 20 N. Wacker Drive, *within the City of Chicago.*

We have held in situations similar to that which you describe that the fact that a vehicle may be garaged at night outside the city does not modify the effect of the plain meaning of the statute quoted above. 19 Op. Corp. Coun. 158 (No. 9456); 19 Op. Corp. Coun. 158 (No. 9485). Indeed it seems obvious that the statute was intended to resolve once and for all any uncertainty of this nature.

It is, therefore, our opinion that this Company should be required to procure a vehicle tax license from the City of Chicago for all vehicles owned by it which make use of any public way within the city. The Company is protected from the licensing requirements of other municipalities by the terms of the statute cited above.

C. AMUSEMENT LICENSE AND TAX

AMUSEMENT TAX EXEMPTIONS

(No. 11104—Chairman, Finance Committee—J. F. G.—December 12, 1947.)

We have your letter transmitting communication from Mr. Ben Maidenburg, Promotion Director of the Chicago Daily News, requesting

a ruling as to whether the 3% amusement tax recently adopted by the City Council is applicable to amusements offered to raise funds for charitable purpose.

It is said the Daily News yearly sponsors a number of events for charity. The net proceeds are set aside in what is known as the Daily News Veterans Fund which is ultimately distributed to the United, Catholic and Jewish charities, and to the American Legion, Veterans of Foreign Wars and Disabled American Veterans.

The ordinance passed by the City Council on November 6, 1947 (C. J. p. 1168] imposes a license tax upon all amusements as therein defined, excepting automatic machines, and makes it "unlawful for any person to produce, present or conduct any such amusements for gain or profit, without payment of the tax." (Sec. 104-2).

The word "person" is defined in the Municipal Code of Chicago to mean "any natural individual, firm, trust, partnership, association, or corporation in his or its own capacity or as administrator, conservator, executor, trustee, receiver, or other representative appointed by the court (Sec. 1-9).

There is no provision in the amusement tax ordinance (Chap. 104) exempting any person from payment of the tax. However, the license tax is necessarily an occupation tax, since there are only three forms of taxation authorized by the Illinois Constitution, viz., (1) ad valorem or property, (2) license or occupation, and (3) franchise or privilege taxes (*Brachrach* v. *Nelson*, 349 Ill. 579; *Reif* v. *Barrett*, 355 Ill. 104). So construed, the tax does not apply to an isolated or occasional amusement offered for the benefit of some religious, educational, charitable or social organization (*Svithiod Singing Club* v. *McKibbin*, 381 Ill. 194). But the mere fact that the amusement is offered by or for a non-profit corporation or association or that the net receipts therefrom are used for religious, educational or eleemosynary purposes does not exempt it from the tax, if the amusement is produced, presented or conducted in regular course as a profession or in the operation of an amusement business.

Each event must be considered separately upon the facts to determine if it is subject to the tax. For instance, if admission tickets to a professional performance or entertainment are purchased for resale at a profit for any eleemosynary purpose, or if an auditorium, theater or other public place of amusement is leased for such purpose, and the rent therefor includes compensation for a professional performance or entertainment which is regularly conducted at that place, the tax must be paid by the person producing, presenting or conducting the amusement or by the lessor of the public place of amusement based upon his gross receipts from admission fees, rent or other compensation. The tax is not imposed on the lessee or person who purchases admission or upon the profit of the lessee or purchaser which is devoted exclusively to religious, educational or charitable purposes.

To determine whether the Chicago Daily News amusement projects are taxable we will require more information as to the means used for the conduct of the amusement and the financial operations involved.

AMUSEMENT TAX DEFINITION

(No. 11106—City Comptroller—J. F. G.—December 16, 1947.)

Reference is made to your letter of December 5, 1947 asking for our interpretation of the term "gain or profit" as used in sections 104-2,

104-5 and 104.1-2 of the Municipal Code of Chicago as amended November 6, 1947 (C. J. pp. 1168-1169); also, whether the term "gross receipts" in said section 104-2 includes the federal tax on admissions.

We have transmitted to you copy of an opinion dated December 12, 1947 addressed to the Honorable John J. Duffy, Chairman of the Committee on Finance, on the subject of amusement tax exemptions. You will find in that opinion a full explanation of the significance of the term "gain or profit" as used in section 104-2. The same term as used in section 104-5 which relates to automatic amusement machines means that the automatic amusement machine must be the instrumentality of a business or occupation of the licensee to be subject to the annual license tax imposed by section 104-4. The term "for gain or profit" in section 104.1-2 relating to public places of amusement means the same as that term is used in section 104-2 imposing a license tax upon the amusement itself as defined in our opinion to the Chairman of the Committee on Finance dated December 12, 1947, hereinbefore referred to.

The term "gross receipts from admission fees" does not include the federal tax which constitutes no part of the admission fee since it is an excise tax. However, to clarify the language of section 104-2 relating to this subject the City Council on December 12, 1947 amended this section imposing a tax upon all amusements of an amount equal to 3% of "the gross receipts from admission fees or other charges, *exclusive of federal taxes,* to witness or to participate in such amusements."

MOTION PICTURES IN TAVERNS

(No. 11170—Commissioner of Police—A. M.—August 24, 1949.)

We have your letter dated March 30, 1949, to which is attached a memorandum dated March 29, 1949 from Captain Harry A. Fulmer, requesting our opinion as to whether restaurants, taverns and other public places, other than theatres, showing motion pictures for the entertainment of patrons, must obtain amusement licenses or permits for the exhibition of such pictures.

Section 2, Chapter 104, Municipal Code of Chicago, prescribes a license tax of 3% based upon gross receipts from admission fees or other charges for the amusements enumerated in section 1 of said chapter. Although "motion picture show" is included in the amusements so taxed, it is necessary that an admission fee be collected or other charge made to witness the show to render it subject to the tax.

Section 2 of Chapter 104.1, Municipal Code of Chicago, requires a license to be taken out by public places of amusement. Section 1 of Chapter 104.1 defines a "public place of amusement" as "any building or part of a building, park or other grounds used or intended to be used for any amusement as defined in chapter 104 of this code." Inasmuch as a tavern or restaurant is a place to which the general public is invited, it is clearly a "public place"; and since a "motion picture show" is one of the amusements defined in Chapter 104, the exhibition of a motion picture show in a tavern or restaurant converts it into a "public place of amusement."

Section 7 of Chapter 104.1 divides public places of amusement into three catagories: (1) places where the amusement is, among other things, in the nature of an exhibition; (2) places where the amusement is participated in by those attending; and (3) cabarets. A tavern, restaurant or

other public place exhibiting a motion picture, therefore, comes within class 1. Section 8 of Chapter 104.1 prescribes an annual license fee for each class 1 public place of amusement, graduated according to maximum seating capacity, plus maximum additional floor and field area, but fixing the minimum annual fee at $200.

Based upon the foregoing considerations, it is our opinion that a tavern, restaurant or other public place exhibiting motion pictures is subject to such annual license fee as a class 1 public place of amusement.

The last question is whether a permit is necessary for the exhibition of motion pictures at taverns, restaurants and other public places other than theatres. Chapter 155, Municipal Code of Chicago, provides for the inspection by the Commissioner of Police of all motion pictures before their exhibition in any public place, and further provides for the payment of $3.00 for each one thousand lineal feet of film or fraction thereof, in the event that the permit is granted.

The manifest purpose of the requirement of prior inspection and the issuance of a permit is to prevent the exhibition of immoral, obscene or otherwise harmful motion pictures in public places. Section 1 of Chapter 155 makes it unlawful for any person to show or exhibit any motion picture without a permit "in a public place, or in a place where the public is admitted." This definition is broad enough to include taverns, restaurants and other public places. While the size of the film generally exhibited by taverns and restaurants is sixteen millimeters, whereas the standard size of films exhibited in motion picture theatres is thirty-five millimeters, the ordinance makes no distinction with respect to the size of the film projected.

It is our opinion, therefore, that the inspection and permit requirements of Chapter 155, Municipal Code of Chicago, are applicable to restaurants, taverns and other public places, to the same extent as to motion picture theatres.

KIWANIS BLACK HILLS PASSION PLAY

(No. 11176—City Collector—A. M.—September 14, 1949.)

The letter of August 25, 1949 inadvertently addressed by The Kiwanis Club of Chicago, George Huth, President, to John C. Prendergast, Commissioner of Police, and which should have been directed to you instead, has been referred to this department for answer to the inquiry made therein, namely, whether the Black Hills Passion Play, which is to be presented under the sponsorship and auspices of Chicago Kiwanis at the Civic Opera House from October 31st to November 12th, 1949, is subject to the city amusement tax prescribed by Chapter 104, Municipal Code of Chicago.

From said letter, and from a personal conference with Messrs. George Huth and J. W. North of Chicago Kiwanis, we have been furnished with the following facts:

The Kiwanis Club of Chicago is an unincorporated club or association chartered under and as a branch of Kiwanis International, which is a non-profit corporation organized and existing under the laws of the State of Michigan. The objects and purposes of Kiwanis are charitable and educational, with benefits distributed on a non-sectarian basis.

The Black Hills Passion Players is a famous aggregation of professional theatrical performers (presently consisting of about thirty-two per-

sons) organized on a permanent basis for the recurrent presentation of "the Passion Play" under various sponsorships throughout the world. Originally headquartered at Oberammergau, Germany, it is now based at Spearfish, in the Black Hills region of South Dakota.

Under a written contract between Black Hills Passion Players and Chicago Kiwanis, the gross receipts from the performances of the Passion Play will be divided, 50% to Black Hills Passion Players, and 50% to Chicago Kiwanis, the Players to assume transportation and living expenses for the period and to furnish certain advertising aids, and Kiwanis to assume all other expenses, including printing, advertising, theatre rental and administration costs.

The share of the proceeds accruing to Chicago Kiwanis, after deduction of its expenses, are intended to be used to finance certain youth programs and activities sponsored by Kiwanis in the Chicago area, which purposes are asserted to be charitable, and we shall so assume.

Section 104-1 of the Municipal Code of Chicago defines "amusement" as including "any theatrical, dramatic, musical or spectacular performance." Applying this definition, the Black Hills Passion Play is clearly embraced within the term "amusement" as used in the ordinance.

Section 104-2 imposes a license tax upon all amusements within the city (excepting automatic amusement machines which are otherwise taxed) in an amount equal to 3% of the gross receipts from admission fees or other charges, exclusive of federal taxes, to witness or to participate in such amusements. The same section makes it unlawful for any person to "produce, present or conduct" any amusement, "for gain or profit," without payment of the tax.

There is no provision in the ordinance exempting any person from the payment of the tax, or basing any exemption upon the objects or purposes to which the proceeds may be applied. Consequently, the fact that Kiwanis' share of the net proceeds will be expended for a charitable purpose affords no ground for granting exemption from the tax.

It is clear from the facts presented that Black Hills Passion Players, who are parties to the contract with Kiwanis and who are to receive 50% of the gross receipts, are a permanent professional group engaged in the presentation of the Passion Play as a regular occupation. The fact that the Players procure non-professional sponsors for their performances does not change the character of their occupation in the production and presentation of theatrical performances in the regular course of their business for gain or profit.

We must conclude, therefore, that the contemplated performances of the Black Hills Passion Play, although sponsored by Kiwanis for a charitable purpose, are subject to the 3% tax on the gross receipts therefrom, exclusive of federal taxes, as prescribed by the city ordinance above referred to.

SHUFFLEBOARD AND TOTAL ROLL

(No. 11180—City Comptroller—M. H. F.—September 28, 1949.)

You have requested our opinion as to the application of the City's 3% Amusement tax to receipts of shuffle boards and "Total Roll" games. The statement is made that the games consist of rolling a series of balls into numbered openings with a view to obtaining the highest possible score and that the balls are released for play by the deposit of a coin.

If the games to which you refer come within the definition of bagatelle or pigeonhole then they would come within the prohibition of section 193-26 of the Municipal Code of Chicago which makes it unlawful for any person to keep or use in any place of public resort within the city any tables or implements for any game of bagatelle or pigeonhole. The term "bagatelle or pigeonhole" is defined to mean "a game played with any number of balls or spheres upon a table or board having holes, pockets or cups into which such balls or spheres may drop or become lodged and having arches, pins, and springs, or any of them, to control, deflect, or impede the direction or speed of the balls or spheres put in motion by the player, and shall include the modern variety of bagatelle or pigeonhole commonly known as pin games."

Whether the games referred to are prohibited by section 193-26 would require examination of the devices to see whether they possess the necessary elements or factors to bring them within the definition.

In the case of *Berman* v. *Prendergast*, now pending in the Appellate Court of Illinois, First District, this department is contending for the reversal of a decree of the Circuit Court of Cook County, entered May 14, 1948, which enjoined the City from interfering with the keeping of a particular device known as "Total Roll." If the "Total Roll" device to which your letter refers is the same "Total Roll" contraption involved in this litigation, then the City should refrain from attempting to prohibit its use unless and until the injunction order of May 14, 1948 is dissolved.

If the so-called "Total Roll" games are not those protected by the injunction order and are not such as are prohibited by the Bagatelle or Pigeonhole ordinance, then they and the other so-called shuffle board devices not falling within the definition of bagatelle or pigeonhole, would in our opinion be entitled to be kept and used in places of public resort provided they were licensed under and paid the tax imposed by the Automatic Amusement Machines ordinance, sections 104-4 to 104-6 inclusive, of the Municipal Code of Chicago. Your letter states that all the games in question are automatic or coin operated in the sense that the balls are released for play by the deposit of a coin.

CONCERT IN UNIVERSITY FIELDHOUSE

(No. 11188—City Collector—M. H. F.—October 17, 1949.)

Mr. Howard H. Moore, Legal Counsel of the University of Chicago, 5801 Ellis Avenue, Chicago 37, has requested an opinion as to whether the giving of a proposed performance by the Fred Waring Orchestra in the University Field House on November 29, 1949, would jeopardize the present status of the Field House and subject the performance to the 3% tax imposed by chapter 104 (Amusements) of the Municipal Code of Chicago and the University to license under the Public Places of Amusement ordinance, chapter 104.1 of the Municipal Code. His communication reads as follows:

> "Under dates of January 16 and February 19, 1948, Colonel Martin H. Foss, Assistant Corporation Counsel, gave The University of Chicago a ruling that its activities and operations did not make it subject to the provisions of chapters 104 and 104.1 of the Muncipal Code of Chicago providing for an amusement tax and for the licensing of public places of amusement, which became effective January 1, 1948. Copies of Colonel Foss' letters are enclosed herewith for your ready reference.

We should appreciate a ruling from your office as to whether the giving of the performance hereinafter referred to would, in any way, jeopardize the present exempt status of the Field House located on the University campus.

Mr. Robert Weems, agent for the Fred Waring orchestra, has offered to bring Mr. Waring's group to the University Field House on November 29, 1949, under the following arrangement: The University will make the Field House available for the performance without rental or other charge except for reimbursement for necessary expense involved in erecting stage, putting up seats, printing tickets, etc. The net proceeds from the affair after the payment of such expense will be divided on a basis statisfactory to the University between the orchestra, the agent, and a student organization known as the Student Assembly which is recognized and approved by the Dean of Students of the University and whose purpose is to sponsor and encourage worthwhile student activities.

It should be noted that only one performance is to be given; that the Field House is not to be leased or rented with a view to profit; that the University itself will receive no share whatever of the proceeds of the affair, and that the persons attending the performance for the most part will be University students, faculty and employees. No guarantee whatever is made to Mr. Warning or his agent. The above plan for a performance at The University of Chicago is similar to a plan that Mr. Waring has carried out at the University of Wisconsin, the University of Kansas, the University of Oklahoma and other large universities.

The only publicity that will be given the affair will be restricted to the immediate University neighborhood. In view of the splendid reputation of Mr. Waring's orchestra and of the educational and entertainment advantages resulting from the performance, it is hoped that it will be possible to hold the affair at the Field House as contemplated without disturbing the present status of the property under the above-numbered sections of the Municipal code. We shall be pleased to give you such further information as you may desire relative to this matter. An early reply from you would be greatly appreciated."

Copies of the opinions of January 16 and February 19, 1948, referred to, were supplied to you at the time they were rendered.

We understand that the Fred Waring organization is a professional orchestra of good reputation and presents throughout the country and over the radio orchestral performances of merit; that while the University will make the Field House available for the performance without rental or other charge except necessary expenses involved in erecting stage, putting up seats, printing tickets, etc., the Waring organization will receive a portion of the net proceeds from the sale of tickets of admission after payment of such expenses, said net proceeds to be divided on a basis, satisfactory to the University, between the orchestra, its business agent and a student organization known as the Student Assembly, which is recognized and approved by the Dean of Students of the University and whose duty it is to sponsor and encourage worth while activities. What this portion will be is not disclosed. One performance only is contemplated. The University itself will receive no share of the proceeds of the affair. It is expected that the persons attending the performance for the most part will be University students, faculty, and employees, as the publicity to be given the affair will be restricted to the University neighborhood.

The ordinance defines the word "amusement" to include the contemplated musical performance or orchestral concert. Without doubt the Fred Waring organization is engaged in the business or profession of regularly presenting musical performances and as such is subject to the amusement tax imposed by chapter 104. The fact that it splits the receipts derived

from the sale of tickets to witness the performance with a business agent and a student organization would not change its status as one subject to the tax. How the tax should be borne or apportioned between the Waring organization and the Student Assembly would seem to depend upon their relative interest in the proceeds. At all events our opinion is that those offering, conducting, or presenting the proposed musical performance, whether the Waring organization, the University, or the Student Assembly, or two or more of these in concert, would be subject to the tax imposed by the ordinance.

Chapter 104.1 of the Public Places of Amusement ordinance, makes it unlawful for the owner or person in control of any property to produce, present or conduct thereon or to permit any person to produce, present or conduct thereon, for gain or profit, any amusement defined in chapter 104, without first having obtained a license for a public place of amusement, and as the University is the owner or person in control of the Field House, the holding of this concert in the Field House would require the University to be licensed as a public place of amusement and to guarantee the payment of the amusement tax to the city.

A copy of this opinion is enclosed herewith for transmission by you to Mr. Moore in order that he may be informed of our views.

CONSIDERATION OF STATE TAX

(No. 11195—City Collector—L. L. K.—October 25, 1949.)

We have given careful consideration to the question submitted to us by your letter of March 1, 1949, directed to the City Comptroller, in which you refer to the problem of the collection of the three per cent Amusement Tax on the amount of the State Tax on Admissions to athletic exhibitions. We have also considered your oral request that we prepare and recommend to the City Council an amendment to the ordinance to provide for the exemption of the State Tax.

It is our opinion that the State Tax on Admissions is not exempt and we reiterate the position taken by this office in the opinion issued February 17, 1948 to the City Comptroller upon this subject.

We have also concluded that it is inadvisable for us to recommend to the City Council an amendment to the ordinance to exempt the State Admissions Tax. We are of the opinion that the granting of any exemptions by ordinance may open the door to future requests for exemptions and that the granting of exemptions may possibly have an effect on the validity of the ordinance from the standpoint of discrimination.

CHICAGO TRIBUNE OUTDOORS SHOW

(No. 11194—City Collector—L. L. K.—October 25, 1949.)

We are in receipt of a letter dated July 19, 1949 from Kirkland, Fleming, Green, Martin & Ellis, attorneys for Chicago Tribune Charities, Inc., addressed to this department, requesting our opinion as to whether the

Chicago Outdoors Show, sponsored and conducted by Chicago Tribune Charities, Inc., at Navy Pier in the City of Chicago from February 4 to February 13, 1949, was subject to the 3% city amusement tax. The facts set forth in said letter, and upon which Chicago Tribune Charities, Inc., relies in support of its contention that the gross receipts from admissions charged to witness this event are not subject to the tax, are substantially as follows:

Chicago Tribune Charities, Inc., is a non-profit Illinois corporation, and its corporate purpose, as stated in paragraph 2 of its charter, is as follows:

> "The object for which it is formed is for the relief of the poor, care of the indigent and sick, welfare of children, and other charitable objects, and, for the purpose of raising funds for such objects, to conduct amusements, entertainments, exhibitions, etc. * * *"

The Chicago Outdoors Show was sponsored and presented by Chicago Tribune Charities, Inc., between February 4 and February 13, 1949, and was not produced, presented or conducted for gain or profit, but as an educational exhibit, and for the purpose of raising funds for charitable purpose pursuant to its charter. All the proceeds of the show, over and above the expenses of conducting it, have been or will be distributed to recognized organized charities operating in the City of Chicago. The corporation accumulates no surplus, pays no salaries to its officers, and no part of its funds goes to any private shareholder or individual. A charge was made for admission to defray the expenses of holding the show, but the actual receipts from admissions did not in fact defray all of the expenses of the show.

Additional facts are that the show was in the nature of a sports and travel exhibit, with fees being charged to merchandisers of sporting equipment and travel tours for displaying their wares or services, and various athletic, aquatic and other games, contests and exhibitions being presented.

On the basis of the foregoing facts, Chicago Tribune Charities, Inc., takes the position that the gross receipts from the show are not subject to the 3% tax imposed by Section 104, Municipal Code of Chicago.

The statutory basis for the 3% gross receipts tax on amusements in Section 23-54 of the Revised Cities and Villages Act which empowers the city—

> "To license, tax, regulate, or prohibit * * * theatricals and other exhibitions, shows, and amusements * * *." (Chap. 24, par. 23-54, Ill. Rev. Stat. 1947, p. 454.)

Section 104-1 of the Municipal Code of Chicago defines "amusement" to mean:

> "(1) any theatrical, dramatic, musical or spectacular performance, motion picture show, flower, poultry or animal show, animal act, circus, rodeo, athletic contest, sport, game or similar exhibition for public entertainment, including, without being limited to, boxing, wrestling, skating, dancing, swimming, racing or riding on animals or vehicles, baseball, basketball, softball, football, tennis, golf, hockey, track and field games, bowling, billiard and pool games; (2) any entertainment offered for public participation, including, without being limited to, dancing, carnival, amusement park rides and games, bowling, billiard and pool games."

Section 104-2 imposes a license tax upon all amusements within the city (excepting automatic amusement machines which are otherwise taxed) in an equal amount to 3% of the gross receipts from admission fees or other charges, exclusive of federal taxes, to witness or to participate in such amusements. The same section makes it unlawful for any person

to "produce, present or conduct" any amusement, "for gain or profit", without payment of the tax.

From the letter of July 19, 1949 above referred to it appears that this tax is asserted to be inapplicable on the following grounds:

(1) Chicago Tribune Charities, Inc., is a non-profit corporation.

(2) The projects sponsored and presented by it are not conducted for gain or profit, the corporation accumulating no surplus, paying no salaries to its officers, and distributing all proceeds from its projects, over and above expenses, to recognized organized charities operating in the City of Chicago.

(3) Its corporate objects are purely charitable, the proceeds derived from the projects which it sponsors and presents being entirely devoted to charitable purposes.

(4) The Chicago Outdoors Show is not an "amusement" within the meaning of Section 104-1, Municipal Code of Chicago.

It will be observed that some of these propositions overlap, and, moreover, with the exception of point (4), that they apply not only to the Chicago Outdoors Show but to all amusements, entertainments and exhibitions that have been or will be conducted by Chicago Tribune Charities, Inc. We shall attempt, as far as practicable, to give separate treatment to each point.

(1) *The non-profit character of the corporation is no ground of exemption.*

There is no provision in the ordinance exempting any person from the payment of the tax. Consequently, the fact that Chicago Tribune Charities, Inc., is organized as a non-profit corporation furnishes no basis for exempting it on that ground. The test of taxability is not whether the person conducting the amusement is organized as a "profit" or "non-profit" corporation, but whether the amusement produced or presented by it is conducted with the view of making a gain or profit therefrom. Since it is the declared corporate object of Chicago Tribune Charities, Inc., to distribute all proceeds derived from its enterprises, over and above the expenses thereof, to local charities, it follows that there exists the purpose of making a gain or profit from the amusements presented.

(2) *The Chicago Outdoors Show was an amusement conducted in the regular course of the corporation's business.*

The character of Chicago Tribune Charities, Inc., expressly states that its object is "to conduct amusements, entertainments, exhibitions, etc." Treating the 3% amusement tax as a license tax imposed on the occupation of conducting amusements, the Chicago Outdoors Show cannot properly be viewed in isolation, but must be treated as one of a series of amusements conducted and to be be conducted by Chicago Tribune Charities, Inc., in the regular exercise of its corporate objects. So viewed, the Chicago Outdoors Show was an amusement presented by the corporation as a regular occupation, in the ordinary course of its business and for gain or profit. But even if the show be considered by itself, without reference to prior or subsequent amusements conducted or to be conducted by the corporation, it is still not an isolated or occasional presentation, because (a) it represents the exercise of a stated corporate purpose, and (b) it ran continuously from February 4 to February 13, 1949, inclusive, a period of ten days.

(3) *No exemption can be predicated on the use of the proceeds for charitable purposes.*

The ordinance contains no exemption based upon the application of the proceeds, in whole or on part, to charitable purposes. Hence, the fact that the net profits derived from these amusements are distributed exclusively to organized local charities affords no ground for granting any exemption from the tax.

(4) *The Chicago Outdoors Show was an "amusement" within the purview of the ordinance.*

In the letter of July 19, 1949 above referred to the position was taken, as an additional reason for nonliability, that the Chicago Outdoors Show was not an "amusement" within the meaning of that term as defined in Section 104-1 of the Municipal Code of Chicago, but no reason was given or argument made in support of such contention. In our opinion, the Chicago Outdoors Show was clearly an "exhibition for public entertainment" and therefore an "amusement" within the meaning of the ordinance.

It is asserted that receipts from admissions were insufficient to defray all the expenses of the show, but there was additional income from fees to exhibitors, and it is not claimed that no net profit was realized from the venture. However, since the tax is imposed on gross receipts, not on net profits, the question whether or not a net profit was in fact realized is wholly immaterial.

In view of all of the foregoing considerations, it is our opinion that Chicago Outdoors Show conducted by Chicago Tribune Charities, Inc., is subject to the 3% tax on the gross receipts therefrom, exclusive of federal taxes, by virtue of the provisions of the city ordinance above referred to.

While a previous oral opinion of this office may have indicated that certain of the activities of Chicago Tribune Charities, Inc., might not have been taxable, a full consideration of the problem compels us to the conclusion that the 1949 Chicago Outdoors Show, sponsored and presented by Chicago Tribune Charities, Inc., is subject to the 3% amusement tax.

1949 LIVE STOCK EXPOSITION

(No. 11222—City Collector—A. M.—December 15, 1949.)

We have your letter of November 23, 1949, to which is attached a letter dated November 22, 1949 from Winston Strawn, Shaw & Black, addressed to you, requesting the opinion of this Department as to whether the International Live Stock Exposition, sponsored annually by the International Live Stock Exposition Association at the International Amphitheatre, Union Stock Yards, Chicago, Illinois, and held this year from November 26 to December 3, 1949, is subject to the 3% City Amusement Tax levied by Chapter 104 of the Municipal Code of Chicago.

The identical question arose with respect to the 1948 International Live Stock Exposition held from November 27 to December 4, 1948, and, based upon an exhaustive analysis of the facts presented and of the law applicable thereto, this Department rendered a lengthy written opinion under date of September 7, 1948 holding that the Exposition was not subject to the tax. (See Volume XXII Op. Corp. Coun. 373) (No. 11074.)

The letter of November 22, 1949 aforementioned, attached to your communication of November 23, 1949, states that there has been no

change in the facts submitted upon which said opinion of September 7, 1948 was based. In the light of these facts and upon a thorough reexamination of the issues presented, we find no reason to change the conclusion reached in our former opinion, and we adhere thereto.

It is our conclusion, therefore, that the 1949 International Live Stock Exposition is not subject to the 3% City Amusement Tax.

HIGH SCHOOL BAND CONCERT

(No. 11237—City Collector—A. M.—January 18, 1950.)

We are in receipt of your letter of September 27, 1949, wherein you set forth verbatim a letter, addressed to you under date of September 23, 1949, from Harrison Band Parents Association, Theo. W. Johnson, President, requesting a blanket exemption from the 3% city amusement tax for events conducted by said association for the purpose of obtaining revenue to help maintain the Harrison High School Band.

The facts presented, and on which such blanket exemption is requested, are as follows:

Harrison Band Parents Association is a Voluntary, non-profit, charitable organization, whose members consist of parents of students attending Harrison High School. The Association conducts and presents various events for the sole purpose of obtaining revenue to help support the 100-piece Harrison High School Band. No details are given as the kind or character of any specific event held or scheduled, the view of the Association being that its non-profit character, coupled with the above stated purpose to which the revenue derived from these events are to be devoted, entitles it to a blanket exemption from the 3% city amusement tax as to all such events conducted by it.

The statutory basis for the 3% gross receipts tax on amusements is contained in Section 23-54 of the Revised Cities and Villages Act which empowers the City—

> "To license, tax, regulate, or prohibit * * * theatrical and other exhibitions, shows, and amusements; * * *". (Chap. 24, par. 23-54, Ill. Rev. Stat. 1949, Vol. 1, p. 503).

Pursuant to the above statutory authorization, the City Council of the City of Chicago duly enacted the city amusement tax ordinance which appears as Chapter 104, Municipal Code of Chicago. Section 104-1 of the ordinance defines "amusement" to mean:

> "(1) Any theatrical, dramatic, musical or spectacular performance, motion picture show, flower, poultry or animal show, animal act, circus, rodeo, athletic contest, sport, game or similar exhibition for public entertainment, including, without being limited to, boxing, wrestling, skating, dancing, swimming, racing or riding on animals or vehicles, baseball, basket-ball, softball, football, tennis, golf, hockey, track and field games, bowling, billiard and pool games; (2) any entertainment offered for public participation, including, without being limited to, dancing, carnival, amusement park rides and games, bowling, billiard and pool games."

Section 104-2 imposes a license tax upon all amusements within the city (excepting automatic amusement machines which are otherwise tax-

ed) in an amount equal to 3% of the gross receipts from admission fees or other charges, exclusive of federal taxes, to witness or to participate in such amusements. The same section makes it unlawful for any person to "produce, present or conduct" any amusement, "for gain or profit", without payment of the tax.

The tax imposed by the ordinance is in the nature of an occupation tax, and the test of taxibility is whether the amusement is presented or conducted as an occupation or business for the purpose of making a gain or profit. The fact that the person or organization conducting the amusement is a non-profit institution does not exempt it from the tax, if the purpose of the enterprise is to make a gain or profit. Furthermore, the fact that the profits derived from the venture are to be devoted exclusively to charitable purposes furnishes no ground for exemption from the tax. The presentation of an isolated or occasional amusement is not taxable, however, because that does not constitute engaging in an occupation or business.

If a club, lodge, church or school presents an amusement, the admission to which is limited to its members, the gross receipts from admissions are not taxable under the ordinance for the reason that the event is not being conducted as an occupation or business. However, if the event is open to the public, and is not an isolated or occasional venture, then it is subject to the tax as an amusement presented in the course of engaging in an occupation or business for gain or profit.

In the light of the foregoing considerations, it is evident that no blanket exemption from the 3% city amusement tax can be granted, since the question of taxability depends upon the particular facts and circumstances as to each event conducted or presented.

Reference is made in the Association's letter to the fact that it is exempt from paying Federal income tax, but this is based upon considerations peculiar to the income tax laws, and furnishes no ground for exempting the Association from the city amusement tax.

Under all the circumstances, it is our opinion that Harrison Band Parents Association is not entitled to the blanket exemption requested with respect to the 3% city amusement tax.

TEMPLE SHOLOM LECTURES

(No. 11240—City Collector—A. M.—January 23, 1950.)

We are in receipt of your letter of Decmber 19, 1949, transmitting a letter dated December 16, 1949 addressed to you by Samuel Kassel, Chairman, Concert Forum Committee, Temple Sholom, and requesting our opinion as to the liability of Temple Sholom to pay the 3% amusement tax under Chapter 104 of the Municipal Code of Chicago on the gross receipts from admission fees to a concert and lecture series sponsored and presented annually by Temple Sholom.

The facts submitted are as follows: Temple Sholom is a religious institution, organized as a non-profit corporation under the laws of the State of Illinois. As one of its Temple functions, it sponsors annually, through its Concert Forum Committee, a series of between eight and ten lectures and concerts usually presented at bi-weekly intervals. The series commences in late October or early November and continues through February or March of the following year. Attendance is not limited to

Temple membership but open to all persons purchasing series books or individual admission tickets. The venture usually results in a deficit which is met from other Temple funds and net profits, if any, are devoted to the maintenance and operation of Temple facilities and activities. The lecturers and artists appearing on the forum are professionals and receive a fee or honorarium for their services.

The question presented is whether, under the foregoing facts, Temple Sholom is subject to the city amusement tax measured by three (3%) per cent of the gross receipts from admissions derived from this annual series of lectures and concerts.

The statutory basis for the 3% gross receipts tax on amusements is Section 23-54 of the Revised Cities and Villages Act, which empowers the City:

> "To license, tax, regulate, or prohibit * * * theatricals and other exhibitions, shows, and amusements; * * * (Chap. 24, par. 23-54, Ill. Rev. Stat., 1949, Vol. 1, p. 503.)

Pursuant to the above statutory authorization, the City Council of the City of Chicago duly enacted the city amusement tax ordinance which appears as Chapter 104, Municipal Code of Chicago. Section 104-1 of the ordinance defines "amusement" to mean:

> "(1) any theatrical, dramatic, musical or spectacular performance, motion picture show, flower, poultry or animal show, animal act, circus, rodeo, athletic contest, sport, game or similar exhibition for public entertainment, including, without being limited to, boxing, wrestling, skating, dancing, swimming, racing or riding on animals or vehicles, baseball, basketball, softball, football, tennis, golf, hockey, track and field games, bowling, billiard and pool games; (2) any entertainment offered for public participation, including, without being limited to, dancing, carnival, amusement park rides and games, bowling, billiard and pool games."

Section 104-2 imposes a license tax upon all amusements within the city (excepting automatic amusement machines which are otherwise taxed) in an amount equal to 3% of the gross receipts from admission fees or other charges, exclusive of federal taxes, to witness or to participate in such amusements. The same section makes it unlawful for any person to "produce, present or conduct" any amusement, "for gain or profit," without payment of the tax.

The first question to be determined is whether lectures and concerts are "amusements" within the statute and the ordinance. In the recent case of *Stiska, et al.* v. *City of Chicago, et al.*, decided by the Illinois Supreme Court on January 18, 1950, which upheld the constitutional validity of the ordinance and the statutory power of the city to enact it, the court defined "amusement" as "synonymous with diversion, entertainment, recreation, pastime and sport." The court further pointed out, however, that not all "entertainment" is necessarily "amusement", and that "each case must depend upon its own particular facts". Applying this test, it is our opinion that a concert is an "amusement", but that a lecture is not. Lectures, speeches and symposia impart information and stimulate thought. A concert, on the other hand, primarily affords pleasurable sensation. While concerts and lectures both may be classed as "entertainment," a reasonable and sensible interpretation of the word "amusement" requires the conclusion that a concert is an "amusement," but that a lecture is not. It will also be noted that the ordinance defines the word "amusement" to include a "musical performance,"—which a concert clearly is,—whereas, a lecture is not enumerated as one of the types of amusement within the ordinance.

The next question presented is whether the concert portion of the series is subject to the tax. In this connection it should be noted that the

fact that the amusement is being sponsored or presented by a non-profit institution, or that the net profits, if any, are devoted to educational, religious or charitable purposes, or that the venture results in a net loss, does not constitute any ground of exemption from the tax.

For example, we have held that a non-profit corporation organized for the express purpose of sponsoring and presenting amusements, the gains or profits from which are devoted to various local charities, is subject to the tax notwithstanding that the net profits, if any, accruing to the witness or participate in such amusements.

We have likewise held non-profit civic symphony and opera companies to be subject to the tax, notwithstanding that such ventures resulted in recurring deficits, because they were engaged in producing, presenting or conducting musical, dramatic or theatrical performances as an occupation or business for gain or profit, although their expectation of deriving a net gain or profit was seldom, if ever, realized.

So, also, where a non-profit civic organization, which was engaged in numerous charitable activities, sponsored a professional group of entertainers in a series of theatrical exhibitions under a joint adventure contract which entitled the latter to a fixed percentage of the gross receipts, we held that the entire gross receipts derived from the venture were subject to the tax notwithstanding that the net profits if any, accruing to the non-profit civic organization were earmarked for charitable purposes.

We have held that the occasional presentation of an amusement as an isolated instance is not subject to the tax because it does not constitute engaging in such venture as an occupation or business. Here, however, the concert series is a regular Temple function, a recurring annual event, and spread over a period of more than four months. This, in our opinion, is sufficient to constitute the venture an occupation or business conducted by the Temple for the time being.

We have also held that where a club, school, lodge or religious institution presents an amusement, the admission to which is limited to its members, the gross receipts from admissions are not subject to the tax because the event is a private affair and not being conducted as an occupation or business for gain or profit. This ruling, however, is clearly not applicable to the concert series here under consideration since it is open to the general public.

Based upon all of the foregoing considerations, it is our conclusion that the gross receipts from the lectures are not subject to the tax, but that the gross receipts from the concerts are subject to the tax.

In view of the fact that the gross receipts are made up of revenue from series books as well as charges for individual admission tickets, it is our opinion that the amount of tax payable for each concert or musical event shall be measured by 3% of the gross receipts from all of the series books sold, divided by the total number of events in the series, *plus* 3% of the gross receipts derived from all individual admission tickets sold for each such concert or musical event.

1950 AUTOMOBILE SHOW

(No. 11250—City Collector—February 16, 1950.)

We are in receipt of your letter of February 6, 1950, wherein you set forth verbatim a copy of a letter addressed to you under date of February 3, 1950 from Chicago Automobile Trade Association, by Ed-

ward L. Cleary, General Manager, requesting an opinion as to whether the Automobile Show which will be conducted by the said Association at the International Amphitheatre from February 18 through February 26, 1950 is subject to the 3% city amusement tax.

From the facts presented in the Association's letter, and from information orally furnished by its Mr. Birmingham, it appears that the Automobile Show (which is the first one since 1940] will consist of a display of various new models of automotive vehicles of all the leading manufacturers, and that the various makes of cars will be exhibited in display areas for visitors attending the Show, and that there will also be a demonstration of cars in motion, with living models.

Twice daily, once at 3:30 P. M. and again at 9:00 P. M., there will be presented, as part of the Show, a pageant, entitled "Wheels of Freedom", depicting the development in means and methods of transportation from the vehicles in use in George Washington's time to the latest designs in automotive transportation now being produced. Each performance of this pageant will be approximately fifty minutes in length, and a portion of this period will consist of some appropriate singing and dancing by professional entertainers. The general admission charge is ninety cents per person, Federal tax included, but no separate charge is made for viewing the pageant, the purchaser of a general admission ticket being entitled to enjoy all features of the Show including the pageant.

From the foregoing recital of facts it appears that the Automobile Show is essentially a trade exposition for the purpose of exhibiting and demonstrating to the public the latest developments in automotive transportation for the purpose of stimulating consumer demand for automobiles, and the question presented is whether the gross receipts from this show are subject to the 3% tax imposed by Section 104, Municipal Code of Chicago.

The statutory basis for the 3% gross receipts tax on amusements is Section 23-54 of the Revised Cities and Villages Act which empowers the City—

> "To license, tax, regulate, or prohibit * * * theatricals and other exhibitions, shows, and amusements * * *". (Chap. 24, par. 23-54, Ill. Rev. Stat. 1949, Vol. 1, p. 503.)

Section 104-1 of the Municipal Code of Chicago defines "amusement" to mean:

> "(1) any theatrical, dramatic, musical or spectacular performance motion picture show, flower, poultry or animal show, animal act, circus, rodeo, athletic contest, sport, game or similar exhibition for public entertainment, including, without being limited to, boxing, wrestling, skating, dancing, swimming, racing or riding on animals or vehicles, baseball, basketball, softball, football, tennis, golf, hockey, track and field games, bowling, billiard and pool games; (2) any entertainment offered for public participation, including, without being limited to, dancing, carnival, amusement park rides and games, bowling, billiard and pool games."

Section 104-2 imposes a license tax upon all amusements within the city (excepting automatic amusement machines which are otherwise taxed) in an amount equal to 3% of the gross receipts from admission fees or other charges, exclusive of Federal taxes, to witness or to participate in such amusements. The same section makes it unlawful for any person to "produce, present or conduct" any amusement, "for gain or profit", without payment of the tax.

It will be noted that while the statute empowers municipalities to tax "shows and amusements", the city ordinance simply taxes "amusements" as defined in Section 104-1, which enumerates several specific types of

"show", but does not include "trade show". In view of this limitation, it is our opinion that a "trade show" is not within the purview of the ordinance, although not excluded by the statute.

The next question presented is whether the "Wheels of Freedom" pageant changes the character of the entire event from a "trade show" to an "amusement" within the ordinance so as to render the gross receipts derived therefrom subject to the tax. From the facts submitted, it is perfectly clear that the presentation of the pageant is not the primary purpose of the Automobile Show but purely incidental to its main objective which is to display automobiles, not to furnish amusement. The principal function of the pageant is to add beauty and appeal to the trade exhibition, and no separate charge is made for viewing the pageant. The present case is not one where the amusement features are so extensive and primary as to overbalance the "trade show" character of the venture.

A substantially similar question was presented with respect to the International Live Stock Exposition sponsored and presented annually by the International Live Stock Association at the International Amphitheatre in Chicago. We there held, in a comprehensive opinion dated September 7, 1948, that the Live Stock Exposition was a "trade show" and not subject to the 3% city amusement tax. (See Vol. XXII Op. Corp. Coun. 373) (No. 11074.) (See also the recent opinion of this Department on the same subject addressed to the City Collector under date of December 15, 1949.)

Based upon all of the foregoing considerations, it is our opinion that the Automobile Show is not subject to the 3% city amusement tax.

CARNIVAL OF CHAMPIONS BOXING SHOW

(No. 11251—City Collector—A. M.—February 17, 1950.)

We are in receipt of your letters of September 27th and October 25th, 1949, wherein you set forth verbatim a copy of a letter addressed to you under date of September 23, 1949 from Tabernacle Missionary Baptist Church, by Louis Rawls, requesting an opinion as to whether the "Carnival of Champions" boxing show, which was presented at the Chicago Stadium on September 3, 1949 under the auspices of Tabernacle Neighborhood Center and Friendly Big Sisters for Colored Girls, is subject to the 3% City Amusement Tax.

From the facts submitted and additional information ascertained, it appears that the Carnival of Champions consisted of the presentation of a group of prominent professional boxers in a program of boxing exhibitions for which the performers received substantial remuneration. Both of the aforementioned sponsors of the boxing show are non-profit corporations and were to be the recipients of the net proceeds of the venture which, however, resulted in a net loss of approximately $28,000. The Chicago Stadium is withholding approximately $700 from the gross receipts for the purpose of the 3% tax, and the question presented is whether this amount should be paid over to the City or to the sponsors of the venture.

The statutory basis for the 3% gross receipts tax on amusements is Section 23-54 of the Revised Cities and Villages Act which empowers the city—

> "To license, tax, regulate, or prohibit * * * theatricals and other exhibitions, shows, and amusements * * *". (Chap. 24, par. 23-54, Ill. Rev. Stat. 1949, Vol. 1, p. 503.)

Furthermore, Section 23-55 of the Revised Cities and Villages Act empowers the city—

> "To license, tax, and regulate all athletic contests and exhibitions carried on for gain. This tax shall be based on the gross receipts derived from the sale of admission tickets, but the tax shall not exceed three per cent of the gross receipts." (Chap. 24, par. 23-55 Ill. Rev. Stat. 1949 Vol. 1, p. 504.)

Section 104-1 of the Municipal Code of Chicago defines "amusement" to mean:

> "(1) any theatrical, dramatic, musical or spectacular performance, motion picture show, flower, poultry or animal show, animal act, circus, rodeo, athletic contest, sport, game or similar exhibition for public entertainment, including, without being limited to boxing, wrestling, skating, dancing, swimming, racing or riding on animals or vehicles, baseball, basketball, softball, football, tennis, golf, hockey, track and field games, bowling, billiard and pool games; (2) any entertainment offered for public participation, including, without being limited to, dancing, carnival, amusement park rides and games, bowling, billiard and pool games."

Section 104-2 imposes a license tax upon all amusements within the city (excepting automatic amusement machines which are otherwise taxed) in an amount equal to 3% of the gross receipts from admission fees or other charges, exclusive of federal taxes, to witness or participate in such amusements. The same section makes it unlawful for any person to "produce, present or conduct" any amusement, "or gain or profit", without payment of the tax.

The Carnival of Champions boxing show was either an "amusement" within Section 23-54, or an "athletic contest or exhibition" within Section 23-55, and in either case was an "amusement" as defined by the ordinance. This would serve to subject the gross receipts derived therefrom to the tax, unless its sponsorship by non-profit corporations and the dedication of its net proceeds to charitable purposes constitute grounds of exemption from the tax. The ordinance confers no such exemptions, and we have consistently held that neither the fact that amusements are conducted or sponsored by non-profit organizations, nor that the net proceeds are devoted to charitable purposes, furnish any basis for exemption from the tax.

We have likewise consistently held that the fact that a venture, otherwise subject to the tax, results in a net loss, provides no ground for depriving the City of its tax revenue. This is because the 3% tax is imposed on gross receipts, not on net profits, so that the question of whether or not a profit was in fact realized is wholly immaterial. The large net loss which it is asserted was incurred in this boxing venture is probably due principally to the substantial fees paid to the professional performers, but whatever the reason for the net deficit, no exemption may be claimed because of that circumstance.

It is true that the tax levied by the ordinance is in the nature of an occupation tax imposed upon persons or business for gain or profit. For that reason, in "isolated" or an "occasional" presentation is not subject to the tax. Accordingly, we have held that the presentation of a single, annual event does not constitute engaging in the amusement business. However, where the performers are professionals and make repeated appearances, although under separate sponsorships, the fact that the venture may be "isolated" or "occasional" so far as the successive sponsors are concerned does not deprive the event of its occupational or business status so far as the professional performer is concerned. In such a case we have held that the character of the event is determined by the status of the performer and not by that of the sponsor. In the case under consid-

eration here, the persons appearing on the Carnival of Champions program were all professional boxers who were engaged in exhibiting their boxing prowess as an occupation or business for gain or profit.

In the light of the foregoing considerations, we are of the opinion that the "Carnival of Champions" boxing show was subject to the tax and that the money withheld by the Chicago Stadium from the gross receipts for the purpose of such tax is payable to the City.

UNIVERSITY OF WISCONSIN PLAY

(No. 11254—City Collector—A. M.—February 24, 1950.)

We are in receipt of your letter of February 15, 1950, wherein you set forth verbatim a copy of a letter addressed to you under date of February 8, 1950 from the Haresfoot Club, University of Wisconsin, Madison, Wisconsin, by Rome Taft, Director of Public Relations, requesting an opinion as to whether a single presentation of a musical comedy entitled "Good For the Girls" by the Haresfoot Club, an amateur, collegiate theatrical society, at the Eighth Street Theatre in Chicago on April 13, 1950 is subject to the 3% tax imposed upon the gross receipts from amusements by Chapter 104, Municipal Code of Chicago. The question presented is whether, under the facts submitted, any tax liability arises.

There is no question that the musical comedy presentation is an "amusement" within Section 104-1 of the ordinance. However, in order to be subject to the tax, the "amusement" must be conducted as an occupation or business for gain or profit. In the recent case of *Stiska, et al.*, v. *City of Chicago, et al.*, (No. 31187) decided by the Illinois Supreme Court on January 18, 1950, which sustained the constitutionality of the ordinance and the city's statutory power to enact it, it was held that the characted of the tax levied by the ordiance was "an occupation tax upon those engaged in furnishing the amusement, and measured by the gross receipts from the admission fees or other charges collected to witness or to participate in the amusement." In conformance with the nature of the tax as an occupation tax, we have applied the rule that an "isolated" or "occasional" presentation is not subject to the tax because not constituting the carrying on of an occupation or business for gain or profit. In our view, a single presentation of an amusement, even though recurring annually, is "isolated" and "occasional", and is not an occupation or business either so far as the sponsoring society is concerned or from the standpoint of the performers, all of whom are amateurs. We are, therefore, of the opinion that the single performance of the musical comedy is not subject to the tax.

The suggestion continued in the letter of inquiry of February 8, 1950, that "colleges, churches, etc., are exempt from any form of city tax", rests upon an erroneous assumption. The fact that amusements may be presented by religious, educational or other non-profit institutions, and their proceeds devoted to religious, educational or charitable purposes, furnishes no ground of exemption from the tax. In order to obviate any possible misapprehension as to the precise basis for our holding of nontaxability in the present instance, we wish to make clear that it is predicated not upon the religious, educational or non-profit character of the sponsor, or the purpose to which the proceeds may be devoted, but solely upon the proposition that a single amateur theatrical presentation by a collegiate dramatic society does no constitute engaging in an occupation or business.

AUGUSTANA COLLEGE CHOIR CONCERT

(No. 11255—City Collector—A. M.—February 24, 1950.)

We are in receipt of your letter of February 6, 1950, to which is attached a letter addressed to you under date of February 2, 1950 from Willard L. Anderson, of the Augustana Choir, Augustana College, Rock Island, Illinois, requesting an opinion as to whether the annual spring concert to be presented by the Augustana Choir at the Civic Opera House in Chicago on Sunday, May 7, 1950 is subject to the 3% City Amusement Tax.

From the facts submitted it appears that the Choir is composed exclusively of students of Augustana College. Eligibility for membership in the Choir is contingent upon the student's ability to devote five to seven hours a week to the Choir and still maintain a "C" average in the college. No compensation whatsoever is paid to any member of the Choir either for the time devoted to Choir practice or for participation in the annual spring concert. The director of the Choir is a professor in the School of Music of Augustana College and Head of its Voice Department. Only one performance a year is presented, admission to which is open to the general public. The question presented is whether the gross receipts derived from this annual performance are subject to the 3% tax upon amusements imposed by Chapter 104, Municipal Code of Chicago.

There is no question that the Choir concert is an "amusement" within Section 104-1 of the ordinance. However, in order to be taxable under the ordinance, the "amusement" must be produced, presented or conducted as an occupation or business for gain or profit. In the recent case of *Stiska, et al.*, v. *City of Chicago, et al.*, (No. 31187) decided by the Illinois Supreme Court on January 18, 1950, which sustained the constitutionality of the ordinance and the city's statutory power to enact it, it was held that the character of the tax levied by the ordinance was "an occupation tax upon those engaged in furnishing the amusement, and measured by the gross receipts from the admission fees or other charges collected to witness or to participate in the amusement." In conformance with the nature of the tax as an occupation tax, we have applied the rule that an "isolated" or "occasional" presentation is not subject to the tax because not constituting the carrying on of an occupation or business for gain or profit.

Here the concert is given only once a year, and the performers are all members of the student body of the sponsoring college and receive no remuneration for their services. Under the circumstances, neither the sponsoring college nor the choristers, all of whom are amateurs, can properly be said to be engaging in the occupation or business of conducting amusements for gain or profit. It is our opinion, therefore, that the gross receipts from such Choir concert is not subject to the 3% City Amusement tax.

WEST SIDE INTER-CLUB COUNCIL DANCES

(No. 11256—City Collector—A. M.—February 24, 1950.)

We are in receipt of your letter of February 14, 1950, to which is attached a letter addressed to you under date of February 10, 1950, from Nick A. Taccio, Corresponding Secretary, West Side Inter-Club Council, requesting an opinion as to whether the annual dances sponsored by three

of its affiliates, Columbia Knights S.A.C., Knights of Rowland S.A.C., and Cavaliers S.A.C. on January 7th, 14th and 21st, 1950 respectfully, at the Ashland Auditorium in Chicago are subject to the 3% City Amusement Tax.

From the facts submitted it appears that the three social and athletic clubs aforementioned are not-for-profit organizations affiliated with the West Side Inter-Club Council; that each of these clubs sponsor an annual benefit dance, admission to which is open to the public, and the proceeds of which are devoted to various civic, community and charitable purposes. A list of the activities engaged in by these clubs and the purposes to which their funds are devoted is attached to the letter of February 10, 1950 above referred to. Mr. Klant, the manager of the Ashland Auditorium, where the dances were given, is withholding $40 to cover the 3% tax liability and has advised the organizations that this would be refunded upon the receipt of an afficial opinion that no tax liability exists. The question presented is whether, under the facts submitted, the gross receipts derived from these dances are subject to the 3% tax upon amusements imposed by Chapter 104, Municipal Code of Chicago.

Section 104-1 of the ordinance specifically includes "dancing" within the definition of "amusement," and this is further supported by the decision of the Illinois Supreme Court in *City of Chicago* v. *Geen Mill Gardens*, 305 Ill. 87, 93. However, in order to be taxable under the ordinance, the "amusement" must be produced, presented or conducted as an occupation or business for gain or profit. In the recent case of *Stiska, et al.*, v. *City of Chicago, et al.*, (No. 31187) decided by the Illinois Supreme Court on January 18, 1950, which sustained the constitutionality of the ordinance and the city's statutory power to enact it, it was held that the character of the tax levied by the ordinance was "an occupation tax upon those engaged in furnishing the amusement, and measured by the gross receipts from the admission fees or other charges collected to witness or to participate in the amusement." In consonance with the nature of the tax as an occupation tax, we have applied the rule that an "isolated" or "occasional" event, although an amusement, is not subject to the tax because not involving the carrying on of an occupation or business for gain or profit. It appears, from the facts submitted, that each club is a separate and independent organization, although affiliated with the Inter-Club Council, and that each of the dances was sponsored by a particular club and not by the Council. Consequently each dance constituted a single event as to each club and not a series of three events by the same society. Although each club sponsors a dance annually, we have held that the presentation of a single annual event does not constitute the carrying on of an occupation or business. In coming to this conclusion, we are assuming that the orchestras furnishing the music at these dances were not contract parties to the ventures or entitled to a percentage of the gross receipts. Events which are "isolated" or occasional" so far as a sponsor is concerned might well be occupational from the standpoint of the professional performers who make it a practice of presenting repeated performances under different sponsorship. In such circumstances, tax liability would arise because their presentation of the amusement would constitute an occupation or business for gain or profit so far as the professional performers are concerned. No such problem is presented here, and it is our opinion, therefore, that the gross receipts derived by each club from its annual dance are not subject to the 3% tax imposed by the ordinance.

We wish to make it clear that the fact that the clubs are non-profit organizations, and that the proceeds from these dances are devoted to civic, community and charitable objects does not present any ground for exemption from the tax. Our conclusion of nontaxability is predicated upon the proposition that the sponsorship of an annual dance by each of these clubs, under the facts presented, was an "isolated" and "occasional" venture, and did not constitute the presentation of an amusement as an occupation or business for gain or profit.

CHILDREN'S AID BENEFIT PERFORMANCE

(No. 11286—City Collector—A. M.—April 10, 1950.)

We are in receipt of your letter of March 28, 1950, to which is attched a letter addressed to you under date of March 23, 1950, from the Illinois Children's Home and Aid Society, 1122 North Dearborn Street, Chicago, Illinois, requesting an opinion as to whether it is liable for the 3% City Amusement Tax under the following state of facts:

The Children's Aid Society has purchased a large block of tickets at regular box-office prices from the Allied Arts Corporation, which is sponsoring a series of opera performances by the Metropolitan Opera Company at the Civic Opera House, and intends to resell these tickets at an increased price to persons interested in the activities and objects of the society. The entire proceeds derived from the resale of these tickets will be devoted to the various charitable activities of the society which are described in a 1949 resume of the socity's activities attached to its letter of March 23, 1950, as well as in a brochure entitled "Illinois Children's Home and Aid Society, Information for Lawyers and Trust Officers" submitted with said letter. The block of seats involved in this transaction pertains to a single performance to be given on May 8, 1950 at the Civic Opera House. It is anticipated that the proceeds of resale will aggregate somewhat over $16,000, exclusive of federal taxes, and that the profit to the society on such transaction will be slightly in excess of $8,000. The question presented is whether any part of the proceeds received by the society upon the resale of such tickets will be subject to the 3% City Amusement Tax.

The statutory basis for the 3% gross receipts tax on amusements is Section 23-54 of the Revised Cities and Villages Act which empowers the city—

> "To license, tax, regulate, or prohibit * * * theatricals and other exhibitions, shows, and amusements * * *." (Chap. 24, par. 23-54, Ill. Rev. Stat. 1949, Vol. 1, p. 503.)

Section 104-1 of the Municipal Code of Chicago defines "amusement" to mean:

> "(1) any theatrical, dramatic, musical or spectacular performance, motion picture show, flower, poultry or animal show, animal act, circus, rodeo, athletic contest, sport, game or similar exhibition for public entertainment, including, without being limited to, boxing, wrestling, skating, dancing, swimming, racing or riding on animals or vehicles, baseball, basketball, softball, football, tennis, golf, hockey, track and field games, bowling, billiard and pool games; (2) any entertainment offered for public participation, including, without being limited to, dancing, carnival, amusement park rides and games, bowling, billiard and pool games."

Section 104-2 imposes a license tax upon all amusements within the city (excepting automatic amusement machines which are otherwise taxed) in an amount equal to 3% of the gross receipts from admission fees or other charges, exclusive of federal taxes, to witness or to participate in such amusements. The same section makes it unlawful for any person to "produce, present or conduct" any amusement, "for gain or profit," without payment of the tax.

From the facts submitted it appears that the person or organization producing, presenting or conducting the opera performances is the Allied Arts Corporation, which would be liable for the payment of the 3% tax on the gross receipts which it derives from admission or other charges to witness such performances. Included in such taxable gross receipts would be the proceeds derived by it from the sale of the block of tickets to the Children's Aid Society for the May 8th performance.

There is no basis, however, for the imposition of any tax upon the Children's Aid Society in this instance because it is not the person or organization either producing, presenting or conducting the amusement in question. The non-liability of the Children's Aid Society is not based upon the fact that it devotes its revenue to charitable purposes, since no such exemption is granted by the ordinance, but upon the proposition that it is not engaged in any taxable occupation under the ordinance.

1950 LIVE STOCK EXPOSITION

(No. 11344—City Collector—A. M.—November 13, 1950.)

We are in receipt of copy of a letter dated September 19, 1950 addressed you by Winston, Strawn, Shaw & Black inquiring whether our former opinion still stands as to the nonliability of the International Livestock Exposition Association for the 3% city amusement tax with respect to the annual expostion presented by it at the International Amphitheater located in the Union Stock Yards.

Some of our previous opinions holding the Association not liable for the tax include the extensive opinion rendered on September 7, 1948 (XXII Op. Corp. Coun. 373) (No. 9245). On December 13, 1949, we transmitted to your office a similar opinion on the same subject.

In order to further assure ourselves as to whether the forthcoming 1950 Exposition presented no new aspects calling for a change in our views, we addressed a series of questions under date of October 4, 1950 to Winston, Strawn, Shaw & Black, in response to which we have received the following communication dated November 10, 1950. We quote in part from that letter:

> "We wish to advise you that since the rendering of your opinion of September 7, 1948, nothing in connection with the International Live Stock Exposition has been changed and it remains entirely and definitely educational throughout. The Exposition is carried on to encourage the breeding and raising of better livestock and better horses. There are no special features in conjunction with the Exposition which are not a part of it or for which a separate charge is made. There are no professional groups that put on any performance at the Exposition or sponsor any entertainment feature or otherwise. Furthermore, no compensation is paid for any performance."

In the light of the foregoing facts, we find no reason to change our views, and we hereby confirm our prior opinion that the International Livestock Exposition is not subject to the 3% city amusement tax.

CHICAGO MUSICAL COLLEGE BENEFIT

(No. 11375—City Collector—C. P. H.—April 11, 1951.)

We have your communication of March 30, 1951 transmitting the letter addressed to you by Mr. Otto K. Eitel, a trustee of the Chicago Musical College. From the facts disclosed in the letter and information obtained orally from Mr. Eitel, it appears that the Chicago Musical College

has entered into a written contract with Mr. Harry Zelzer, concert manager, who has offices at 20 W. Wacker Drive, Chicago, wherein he agrees to engage members of the cast of the Metropolitan Opera Company to present the musical production "Die Fledermaus" in the Chicago Civic Opera House, on May 10, 1951. The contract further provides that Mr. Zelzer will receive $19,000.00 for his services from the Chicago Musical College, out of which he will pay all costs and expenses incident to the musical production. The Chicago Musical College has the right to sell all admission tickets to the performance at prices which will yield approximately $35,000.00. The proceeds received by the Chicago Musical College from this enterprise will accrue to its scholarship fund. You request our opinion as to whether or not the 3% amusement tax prescribed by chapter 104 of the Municipal Code of Chicago is applicable to the receipts from this musical production.

The statutory basis for the 3% gross-receipts tax on amusements is found in Section 23-54 of the Revised Cities and Villages Act which empowers the City "to license, tax, regulate, or prohibit * * * theatricals and other exhibitions, shows, and amusements * * *." (Par. 23-54, ch. 24, Ill. Rev. Stat. 1949.)

Section 104-1 of the Code, defines "amusement" to mean:

> "(1) any theatrical, dramatic, musical or spectacular performance, motion picture show, flower, poultry or animal show, animal act, circus, rodeo, athletic contest, sport, game or similar exhibition for public entertainment, including, without being limited to, boxing, wrestling, skating, dancing, swimming, racing or riding on animals or vehicles, baseball, basketball, softball, football, tennis, golf, hockey, track and field games, bowling, billiard and pool games; (2) any entertainment offered for public participation, including, without being limited to, dancing, carnival, amusement park rides and games, bowling, billiard and pool games."

Section 104-2 imposes a license tax upon all amusements within the city (excepting automatic amusement machines, which are otherwise taxed) in an amount equal to 3% of the gross receipts from admission fees or other charges, exclusive of federal taxes, to witness or to participate in such amusements. The same section makes it unlawful for any person to "procure, present or conduct" any amusement, "for gain or profit," without payment of the tax.

In the case of *Stiska* v. *City of Chicago*, 405 Ill. 374, the court in upholding the constitutionality of the 3% amusement tax ordinance and the city's statutory power to enact it, held that the character of the tax levied by the ordinance was "an occupation tax upon those engaged in furnishing the amusement." In the instant case, the person engaged in the business of producing, presenting, or conducting the musical production is Mr. Harry Zelzer, who, in our opinion, will be liable for payment of the 3% tax on the gross receipts which he derives from admission or other charges to witness the performance. Included in such taxable gross receipts would be the proceeds he receives from the Chicago Musical College for the performance. (Opinion of the Corporation Counsel to City Collector dated April 10, 1950.)

It is also our opinion that there is no legal basis for the imposition of any tax upon the Chicago Musical College because it is not the person or organization producing, presenting or conducting the musical performance. The non-liability of the Chicago Musical College is not based upon the fact that it devotes its revenue to educational purposes, since no such exemption is granted by the above sections of the Code, but upon the proposition that it is not engaged in any taxable occupation under the said sections.

KEENEY'S FLYING BULLETS MACHINE

(No. 11571—City Collector—W. J. K.—A. A. P.—July 31, 1952.)

We have your letter of June 13, 1952 transmitting communication and enclosure from Paul A. Huebsch, Sales Manager of J. H. Keeney & Company, Inc. You request our opinion as to whether a so-called "Keeney's Flying Bullets," an automatic amusement device, when placed in places of public resort in the city will violate any of the city ordinances or state laws, or whether a license would be required for its operation.

This device as described in the attached letter, and photostatic copy accompanying the same is a coin-operated amusement game. Structurely, it consists of a metal and wooden cabinet 6′ 6″ in height, and its base is 32″x24″. A simulated machine gun is bolted and attached to the frame of said device and is practically incased in the target area. The target area, or range, has a movable target or rotary disk which revolves and brings into view of the player a series of airplanes. Upon the insertion of a coin into a slot, the game is put into operation, the target area is illuminated, actuates a relay, the disk or target revolves, and the player presses the trigger of the incased simulated machine gun and a stream of bullets are then propelled toward the disk striking or contacting the airplanes, and the more airplanes that are contacted the higher the player's score. Each player has approximately 240 bullets or ball-bearings in which to test his markmanship. There are no awards or prizes for high scores, nor does the device have a unit for free plays or games upon attaining a given score, so that it is definitely an amusement device to prove the player's skill.

The game has balls or spheres (small ballbearings but is not played on a "table or board, having holes, pockets or cups into which such balls or spheres may drop or become lodged and has no arches, pins, or any of them, to impede or deflect the direction or speed of the balls or spheres put into motion by the player" and is not a "modern variety of bagatelle or pigeonhole game." It is obvious that this device does not come within the purview of the bagatelle or pigeonhole ordinance, so as to bring it within the prohibition of Sec. 193-26 of the Municipal Code of Chicago, to wit:

> "* * * The term "bagatelle or pigeonhole," as used in this section, shall mean a game played with any number of balls or spheres upon a table or board having holes, pockets or cups into which such balls or spheres may drop or become lodged and having arches, pins, and springs, or any of them, to control, deflect, or impede the direction or speed of the balls or spheres put in motion by the player, and shall include the modern variety of bagatelle or pigeonhole commonly known as pin games."

Being considered in the view of determining whether it violates the Illinois Gaming or Lottery laws or the City's ordinance prohibiting lotteries and gambling devices, in our opinion it does not appear to be a pay-off gambling device as nothing in the way of financial reward is given the player in return for the coin deposited by him. Applying the lottery test, the element of prize seems to be lacking. The Supreme Court, in the case of *Iris Amusement Company* v. *Kelly*, (1937) 366 Ill. p. 256 has held that a lottery consists of three elements, (1) price, (2) chance, (3) prize. In the "Kenney's Flying Bullets" amusement device, a price is paid in the form of a coin deposited in a coin slot for the purpose of putting the game in operation. As to the element "prize," if the machines were to award the player attaining a high score or rating with something of value, such as a free game or even prolonged play, then we would have no hesitancy in declaring the element of prize to be present. (*People* v. *One Pin Ball Game*, (1942) 316 Ill. App. 161), but no such reward is involved and the element of "prize" is lacking. So, therefore, it is unnecessary for

us to go into the question whether the element of "chance" is present. However, should at any time a prize in the form of a cash reward, merchandise or other thing of value be given in connection with the game, then it will be necessary that a determination be made as to whether "chance" or "prize" is involved.

The next point for consideration is whether the device is subject to a license tax under the City's Automatic Amusement Machine ordinance. Sec. 104-1 and 104-4 to 104-6 of the Municipal Code. This automatic amusement device, being designed for amusement, it is our opinion that the same comes within the purview of said section. Sec. 104-1 defined the term "automatic amusement machine" to mean "any mechanical amusement machine or device, the operation of which is governed or controlled by the deposit of a coin or token * * *." Sec. 104-4 imposes an annual tax of $25 upon each automatic amusement machine used within the city limits for gain or profit from its operation; and Sec. 104-5 makes it unlawful for any person to deliver and install an automatic amusement machine within the city, for use by any other person for gain or profit from its operation, or for any person to install, keep, maintain or use upon his premises any automatic amusement machine upon which the tax has not been paid and for which a license has not been issued for the current year.

Therefore, in our opinion, the use and operation of "Keeney's Flying Bullets," an automatic amusement device, is not prohibited within the city, but the device is subject to the Automatic Amusement Machine license tax.

INFANT WELFARE SOCIETY ICE SHOW

(No. 11590—City Collector—A. M.—September 26, 1952.)

We have your communication of August 15, 1952, transmitting letters of August 6, 1952 and August 14, 1952 addressed to you by Mr. Edward L. Vollers, of the Law Firm of Milliken, Vollers & Parsons, attorneys for the Infant Welfare Society of Chicago, a charitable organization, (hereinafter referred to as the Society), which is sponsoring one performance of the "Ice Follies" at the Chicago Arena on October 9, 1952.

From the facts disclosed by the letters above referred to, and from additional information obtained orally from Mr. Vollers, it appears that the "Ice Follies" are being staged at the Chicago Arena under a contract between the Shipstad-Johnson Ice Follies and the Chicago Arena Corporation. Under this contract the Chicago Arena Corporation furnishes the place of public amusement where the "Ice Follies" are being staged and the Shipstad-Johnson organization furnishes the performers. The net proceeds remaining after the payment of all expenses are divided between the parties to the contract on an agreed percentage basis.

Under the arrangement between the Society and the Chicago Arena Corporation, the Society has purchased the rights to a one-night sponsorship of the "Ice Follies" for $7,650.00. This sum covers the rental of the Arena, the salaries of the performers, light, refrigeration, maintenance, overhead, ushers, and all other expenses incidental to the production and presentation of the Ice Follies for that one night. The Chicago Arena Corporation has assured the Society that the $7,650.00 represents merely the basic cost of operation and personnel; that there will be no profit from this performance either to the Arena or to the Ice Follies; and that the Arena officials are even apprehensive of sustaining a net loss. The Society, in turn, will endeavor to sell tickets to the public at prices ranging from $3.00 to $6.00 each, which is considerably in excess of the usual price of admission. All

proceeds derived from the sale of tickets, less the $7,650.00 payable to the Chicago Arena Corporation, will be devoted by the Society to its charitable enterprises and purposes. The Society sponsors a venture of this kind no more than once a year.

You request our opinion as to whether the 3% amusement tax prescribed by Chapter 104 of the Municipal Code of Chicago is applicable to any part of the receipts from this single performance presented by the Chicago Arena Corporation and the Shipstad-Johnson Ice Follies, and sponsored by the Society.

The statutory basis for the 3% gross-receipts tax on amusements is found in Section 23-54 of the Revised Cities and Villages Act which empowers the City "to license, tax, regulate, or prohibit * * * theatricals and other exhibitions, shows, and amusements * * *." (Chap. 24, par. 23-54, Ill. Rev. Stat. 1951).

Section 104-1 of the Code, defines "amusement" to mean:

> "(1) any theatrical, dramatic, musical or spectacular performance, motion picture show, flower, poultry or animal show, animal act, circus, rodeo, athletic contest, sport, game or similar exhibition for public entertainment, including, without being limited to, boxing, wrestling, skating, dancing, swimming, racing, or riding on animals or vehicles, baseball, basketball, softball, football, tennis, golf, hockey, track and field games, bowling, billiard and pool games; (2) any entertainment offered for public participation, including, without being limited to, dancing, carnival, amusement park rides and games, bowling, billiard and pool games."

"Skating" and "dancing" exhibitions are specifically included within the enumeration of "amusements" under the section of the City Code aforementioned.

Section 104-2 of the City Code imposes a license tax upon all amusements within the city (excepting automatic amusement machines, which are otherwise taxed) in an amount equal to 3% of the gross receipts from admission fees or other charges, exclusive of federal taxes, to witness or to participate in such amusements. The same section makes it unlawful for any person to "produce, present or conduct" any amusement, "for gain or profit," without payment of the tax.

In the case of *Stiska* v. *City of Chicago*, 405 Ill. 374, the court, in upholding the constitutionality of the 3% amusement tax ordinance and the city's statutory power to enact it, held that the character of the tax levied by the ordinance was "an occupation tax upon those engaged in furnishing the amusement."

From the facts submitted it appears that the parties producing, presenting or conducting the performance are the Chicago Arena Corporation and the Shipstad-Johnson Organization under the contract between them. Therefore, they would be liable for the payment of the 3% tax on the gross receipts derived by them "from admission or other charges" for such performance. The sum of $7,650.00 which the Chicago Arena Corporation will receive from the Society constitutes the "gross receipts" to the producer "from admissions or other charges." This sum is equivalent to gross receipts from a block sale by the Chicago Arena Corporation to the Society for all the admission tickets for that single performance.

There is no basis, however, for the imposition of the 3% amusement tax upon the Society in this instance because it is not the person or organization either producing, presenting or conducting the amusement in question. The non-liability of the Society is not based upon the fact that it devotes its revenue to charitable purposes, since no such exemption is granted by the ordinance, but upon the proposition that it is not engaging in any taxable occupation under the ordinance.

The fact that the Chicago Arena Corporation will derive no net profit from the venture does not exempt from the tax the $7,650.00 which it will receive from the Society, because the tax is based upon "gross receipts" and not upon "net profits."

It is our conclusion therefore, that the 3% amusement tax is applicable to the $7,650.00 which will be received by the Chicago Arena Corporation from the Society, but not to the excess derived by the Society from its resale of the tickets for this performance.

"RIDE THE CHAMPION" MACHINE

(No. 11620—City Collector—E. R. H.—November 25, 1952.)

We acknowledge your letter of November 12, 1952, with which you enclose a letter from Attorney Martin M. Nelson and a photograph of an amusement device bearing the name "Ride the Champion." You ask our opinion as to whether the device is governed by the provisions of Chapter 104 or Chapter 104.1 of the Municipal Code of Chicago. Your office informs us that the device is operated by the deposit of a coin or token. Mr. Nelson, in his letter, states that your office considers the device as a "Class 2 place of amusement."

Chapter 104 of the Municipal Code of Chicago, among other things, provides for a three per cent license tax on amusements and a separate license tax on automatic amusement machines.

Chapter 104.1 applies to public places of amusement.

Section 104.1-7 provides:

"All public places of amusement are divided into the following classes:

Class 1. Auditorium, theater, tent or stadium provided with a screen, stage, arena or other space designed, used, or intended to be used for the amusement or entertainment of an audience or spectators, without being limited thereto. This class shall not, however, include a cabaret.

Class 2. Amusement park, billiard and pool room, bowling alley, or other public resort, exclusive of such parts thereof as fall within Class 1 places of amusement, designed, used or intended to be used only for participation in the amusement or entertainment by the public assembly.

Class 3. Carbaret."

The device referred to definitely does not come within the purview of any of the above classifications. The classifications cover "places of amusement" only.

Section 104-1 of the Municipal Code provides in part:

"As used in this ordinance: * * *

The term 'automatic amusement machine' means any mechanical amusement machine or device, the operation of which is governed or controlled by the deposit of a coin or token including, without being limited thereto, any such coin controlled instrument or device capable of producing or reproducing any vocal or instrumental sounds."

Section 104-2 provides in part:

"A license tax is imposed upon all amusements within the city, *except automatic amusement* machines, of an amount equal to three per cent of the gross receipts from admission fees," etc., * * *

Section 104-4 provides:

"An annual license tax or twenty-five dollars is imposed upon each automatic amusement machine used within the city for gain or profit from operation."

This device comes within the above code provision. It is subject to a license tax of twenty-five dollars as an automatic amusement machine and is not subject to the three per cent amusement tax, being expressly excepted therefrom.

Under date of September 28, 1949, we rendered an opinion to the City Comptroller which notes a carbon copy sent to your office, in which we held in effect that automatic or coin operated games were entitled to be kept and used in places of public resort provided they were licensed under and paid the tax imposed by the automatic amusement machine ordinance, appearing in Sections 104-4 to 104-6 inclusive of the Municipal Code of Chicago.

It is our opinion that "Ride the Champion" amusement device referred to in your letter is subject to an annual license tax of $25.00 as an automatic amusement machine and that the device should not be considered to be within the classification known as Class 2 place of amusement as defined by Section 104.1-7 above referred to.

LICENSE EXEMPTION FOR Y. M. C. A. BILLIARD FACILITIES

(No. 11639—City Collector—E. R. H.—January 21, 1953.)

We acknowledge your letter of January 9, 1953, enclosing a letter from the law offices of Sidley, Austin, Burgess and Smith, in which they contend that their client, The Young Men's Christian Association, is not subject to the license fee provisions of Chapter 104 of the Municipal Code of Chicago, in the operation of certain billiard and pool tables at 1621 W. Division Street. You ask our opinion as to whether or not the Young Men's Christian Association is subject to the payment of the license fee required by the above chapter of the Code.

In our opinion of December 12, 1947, referred to by counsel for the Young Men's Christian Association in their letter, we said:

"But the mere fact that the amusement is offered by or for a non-profit corporation or that the net receipts therefrom are used for religious, educational or eleamosynary purposes does not exempt it from the tax. * * *

Each event must be considered separately upon the facts to determine if it is subject to the tax."

In their letter, counsel for the Young Men's Christian Association state the following facts:

"The Young Men's Christian Association * * * was organized * * * for the purpose of establishing and maintaining free libraries

and reading rooms and for benevolent and religious purposes. The billiard and pool tables operated at 1621 W. Division Street are for the use and convenience of Y.M.C.A. members and a nominal charge is made for their use in order to provide for maintenance and upkeep."

In our opinion No. 11018, January 16, 1948, Volume 22, Opinions of the Corporation Counsel, page 357, upon certain activities and operations of the University of Chicago as being subject to the tax referred to in Chapter 104 of the Code, we said:

"As to the bowling alleys and billiard and pool tables operated by the University, for which playing charges are made, provided these facilities are not available for use by the public, our opinion is that the tax would not apply thereto."

From the statement of facts set forth in the letter of counsel for the Y.M.C.A., above referred to, the billiard and pool facilities are "for the use and convenience of the Y.M.C.A. members."

It is our opinion, therefore, that the Young Men's Christian Association is not subject to the lincensee fee provisions of Chapter 104 of the Code on account of its operation of billiard and pool facilities at 1621 W. Division Street, as above referred to, providing the facilities are used by Y.M.C.A. members and are not available for use by the public.

CHICAGO BUSINESSMEN'S ORCHESTRA

(No. 11646—City Collector—C. P. H.—February 6, 1953.)

We have your communication of February 6, 1953, transmitting letters from the Chicago Businessman's Orchestra, 111 S. Wabash Avenue, Chicago. This orchestra plans to present a symphony concert at Orchestra Hall on February 6, 1953.

It appears that the Chicago Businessmen's Orchestra was organized in 1922 under the General Not For Profit Act of the State of Illinois for educational and cultural purposes to provide an opportunity for amateur musicians to play the standard symphonic repertoire. The present members of the orchestra are former professional musicians who receive no compensation for their services except the conductor who is paid an annual salary of $1200.00, the harpist who is paid the usual union scale whenever she appears and the secretary who receives $450.00 per annum. Concerts are held three times a year, to which admission fees are charged, for the purpose of affording an opportunity to local soloists to gain experience in appearing before the public with an orchestra of established reputation. Proceeds from these concerts are used to defray the expenses of the orchestra.

You request our opinion as to whether or not the 3% amusement tax prescribed by Chapter 104 of the Municipal Code of Chicago is applicable to the receipts from this symphony concert.

The statutory basis for the 3% gross-receipts tax on amusements is found in Section 23-54 of the Revised Cities and Villages Act which empowers the City "to license, tax, regulate, or prohibit * * * theatricals and other exhibitions, shows, and amusements * * *." (Par. 23-54, ch. 24, Ill. Rev. Stat. 1951.)

Section 104-1 of the Code, defines "amusement" to mean:

"(1) any theatrical, dramatic, musical or spectacular performance, motion picture show, flower, poultry or animal show, animal act, circus, rodeo, athletic contest, sport game or similar exhibition for public entertainment, including, without being limited to, boxing, wrestling, skating, dancing, swimming, racing or riding on animals or vehicles, baseball, basketball, softball, tennis, golf, hockey, track and field games, bowling, billiard and pool games; (2) any entertainment offered for public participation, including, without being limited to, dancing, carnival, amusement park rides and games, bowling, billiard and pool games."

Section 104-2 imposes a license tax upon all amusements within the City (excepting automatic amusement machines, which are otherwise taxed) in an amount equal to 3% of the gross receipts from admission fees or other charges, exclusive of federal taxes, to witness or to participate in such amusements, The same section makes it unlawful for any person to "produce, present or conduct" any amusement, "for gain or profit," without payment of the tax.

There is no question that the symphony concert under consideration here is an "amusement" within Section 104-1 of the Code. However, in order to be subject to the tax, the "amusement" must be conducted as an occupation or business for gain or profit. In the recent case of *Stiska, et al.*, v. *City of Chicago*, 405, Ill. 374 (1950), which sustained the constitutionality of the ordinance and the City's statutory power to enact it, it was held that the character of the tax levied by the ordinance was "an occupational tax upon those engaged in furnishing the amusement, and measured by the gross receipts from the admission fees or other charges collected to witness or to participate in the amusement." In conformance with the nature of the tax as an occupational tax, we have applied the rule that an "isolated" or "occasional" presentation is not subject to the tax because such presentation does not constitute the carrying on of an occupation or business for gain or profit. (Opinion of the Corporation Counsel to the City Collector of February 24, 1950, No. 11264.)

Hence it is our view that the giving of three symphony concerts, even though recurring annually, is "isolated" and "occasional" and is not an occupation or business. We are, therefore, of the opinion that there is no legal basis for the imposition of any tax upon the gross receipts received by the Chicago Businessmen's Orchestra from admission fees to the symphony concert under consideration here. The non-liability of the Chicago Businessmen's Orchestra is not based upon the fact that it devotes its revenue to educational purposes, since no such exemption is granted by the above sections of the Code, but upon the proposition that it is not engaged in any taxable occupation under said sections.

RESPONSIBILITY FOR PAYMENT OF AMUSEMENT TAX

(No. 11757—M. T. W.—October 27, 1953.)

We have your letter of October 19, requesting our opinion as to who is responsible for payment of the three per cent tax on admissions imposed by the city under the Chicago Amusement tax ordinance in the case of dancing parties and similar social functions conducted in halls rented out for such specific parties by various fraternities and social groups. You ask whether responsibility for payment of the tax rests with the owner of the building who rents the premises out to various organizations or with the leasing organization.

Section 104-12 of the Municipal Code reads as follows:

> "A license tax is imposed upon all amusements within the city, excepting automatic amusement machines, of an amount equal to three per cent of the gross receipts from admission fees or other charges, exclusive of federal taxes, to witness or to participate in such amusements. *It is unlawful for any person to produce, present or conduct any such amusements for gain or profit, without payment of the tax.*" (Emphasis added.)

The above section imposes responsibility on the party producing, presenting or conducting a taxable amusement to pay the tax.

However, each person holding a license for a public place of amusement, which would generally be the person owning or controlling the premises must, under section 104.1-6 of the Municipal Code, before any license is issued to him, "execute a written undertaking conditioned that the taxes imposed upon any amusement at the licensed premises will be paid in the manner and at the times provided in chapter 104 of this code."

The owner thus becomes a guarantor for the payment of taxes due no matter who may conduct the affair.

In some cases owners of licensed public places of amusement have sought to facilitate the collection of taxes from various groups using their halls by notifying the City Collector's office prior to the event, of the date and the name of the persons who will conduct the affair. The City Collector will then generally forward a notice of tax liability and forms to accompany payment of the tax to the specific sponsors. It remains understood, however, that in the event such payment is not made, the city is entitled to look to the licensee for payment of the amount due.

D. UNDERTAKER'S LICENSES

MULTIPLE LICENSES

(No. 11230—President, Board of Health—H. A. I.—December 30, 1949.)

This will acknowledge receipt of your communication of September 16, 1949, relative to the licensing of undertakers, and directing our attention to the contents of an attached memorandum from the Funeral Services Associated. This memorandum urges the Board of Health to adopt the principle of issuing so-called "multiple license", that is, more than one person to a license. The memorandum further contains this assertion, which we quote:

> "It is our opinion that the licensing ordinance contemplates a license will be issued which will run to an establishment operating at a particular location in the names or name of the persons or person who make the application to operate the establishment."

You conclude your communication with the request that we answer the following questions:

(1) May a single license be legally issued in Chicago for an undertaking establishment operating at a particular location in the name of more than one qualified person who makes application to operate the establishment?

(2) Is it in conformity with the provisions of the Chicago Municipal Code and the Statutes of the State of Illinois to require that each undertaker, who is a member of a firm operating an undertaking establishment at a particular location, secure a separate individual license in order that he may operate from such an establishment?

Before answering these questions, we should like to set out the pertinent provisions of the Municipal Code with reference to the licensing of undertakers. (Key words are emphasized.)

"181.1. *It shall be unlawful for any individual to act as an undertaker,* or to prepare a dead body for burial or cremation, or to manage a funeral, or to conduct, manage, or be in charge of an undertaking room, store or place or in any way to advertise or hold himself out to the public as an undertaker by card, sign, solicitation, or otherwise, *without first obtaining a license as an undertaker.*"

181.2. An application for a license under this chapter shall be made to the board of health. *The applicant shall state his name and residence address, that he is licensed by the state to practice embalming and funeral directing, give the number of his state registration card,* and the location of the room, store, or place where he intends to engage in the business of undertaking."

"181.4. The *fee* for a *license for each undertaker licensed hereunder shall be sixty dollars per year.* If at the time such license shall issue, less than six months of the current year shall have expired, the fee shall be the full sum of sixty dollars."

"181.5. *Any license issued pursuant to this chapter shall entitle the licensee to engage in the business of undertaking only at and from the store, room, or place designated in such license,* and if the applicant for such license shall desire to engage in the business of undertaking at more than one store, room, or place in the city, he shall be permitted to do so only upon the payment of a license fee as hereinbefore fixed for each such store, room, or place."

"181.6. *No individual other than a licensed undertaker,* or authorized assistant shall be permitted to manage or control any undertaking room, store, place, or establishment, or to prepare dead bodies for burial or cremation, other than the embalming by a state licensed embalmer, or to manage or conduct funerals in the capacity of any undertaker . . ."

It will be readily observed from an analysis of these provisions that the licensing requirements run to the individual and not to the establishment, although the provisions restrict the individual licensee to engage only at and from the establishment designated in the ilcense. The language of the ordinance is so specific that it does not permit of any other construction. Throughout the entire provisions of the chapter dealing with the licensing of undertakers, the ordinance refers to the licensee in his individual capacity, not as a member of a firm or partnership or association of individuals.

The concept of so-called "multiple license", that is, more than one person to a license, alluded to in the memorandum from the Funeral Services Associated, has no basis in any existing ordinance and is apparently a device to evade paying the legal license fee established for each individual undertaker.

It is therefore our opinion, in view of the above cited provisions of the Code, that each individual undertaker licensed by the City of Chicago is required to secure an individual license and pay an annual fee of $60.00 for such license.

We are therefore answering your questions as follows:

(1) A single license *may not* be legally issued in Chicago for an undertaking establishment operating at a particular location in the name of more than one person who might make application to operate the establishment.

(2) It is in keeping and in harmony with the provisions of the Chicago Municipal Code and the statutes of the State of Illinois to require that each undertaker who may be a member of a firm operating an undertaking establishment at a particular location, secure a separate individual license in order to operate from that establishment.

EXAMINATION FOR LICENSE RENEWAL

(No. 11390—President, Board of Health—C. P. H.—June 1, 1951.)

We have your letters of March 12 and May 3, 1951, which state that an individual who had an undertaker's license that expired nine years ago has made application for a license to act as an undertaker during the current license period. You request our opinion as to whether or not you should require the applicant to take any further examination to ascertain his qualifications before issuing the license.

Section 181-2 of the Municipal Code of Chicago provides, as follows:

"An application for a license under this chapter shall be made to the board of health. The applicant shall state his name and residence address, that he is licensed by the state to practice embalming and funeral directing, give the number of his state registration card, and the location of the room, store, or place where he intends to engage in the business of undertaking."

"Every such applicant shall also furnish to the board of health evidence that he has knowledge of, and is familiar with, the state laws, the provisions of this code, and the rules and regulations of the board of health, governing and concerning the removal, preparation, and burial or cremation of the dead, and that such applicant has a practical knowledge of approved and sanitary methods of caring for dead bodies and preparing the same for burial or cremation, including the embalming and disinfection of dead bodies. The board of health shall give to each applicant not less than three days' notice of the time when said applicant will be required to furnish the said evidence of his qualifications. Said applicant shall further furnish to the said board, evidence that the applicant is a resident of the city or maintains an undertaking establishment in the city, and that he is of good moral character and a fit person to be licensed as an undertaker. No license shall be issued unless the foregoing requirements have been complied with."

The above section of the Code requires the applicant to furnish evidence that he is qualified to act as an undertaker and no license shall be issued to him unless he possesses the qualifications specified in the section. It is

plain that the test to be applied is whether the applicant is qualified at the time you are called upon to issue the license to him, and not whether he was qualified at some time prior thereto. In an opinion addressed to the president of the Board of Health under date of July 5, 1934, we held that a person who passed an examination for an undertaker's license three years prior to applying for a license may be required to pass a new examination before the license is issued (Ops. of Corp. Coun., Vol. XVIII, p. 546). It is therefore our opinion that you must require the individual referred to in your communications to take an examination and furnish evidence that he now possesses the qualifications prescribed by the above section of the Code before you issue an undertakers' license to him.

From the facts disclosed in your letters and information obtained through Mr. Harry Stanton of the Bureau of Vital Statistics, it also appears that one G. O. Nossen who had an assistant undertaker's license that expired in 1942 has made application for a license to act as an undertaker during the present license period. You also request our opinion as to whether or not you should require this applicant to take an examination before issuing an assistant undertaker's license to him.

Under section 181-6 of the Code, an applicant for an assistant undertaker's license must possess the same qualifications required of an applicant for an undertaker's license. The necessary qualifications for assistant undertaker's license are enumerated in Section 181-2 of the Code above quoted.

As we have already stated, the test to be applied is whether or not the applicant is qualified at the time you are called upon to issue the license to him and not whether he was qualified at some time prior thereto. It is therefore our opinion that you must require Mr. Nossen to submit to an examination in order to determine whether or not he is qualified to receive an assistant undertaker's license during the current license period.

USE OF FIRM NAME

(No. 11391—President, Board of Health—C. P. H.—June 1, 1951.)

We have your letter of May 4, 1951. From the facts disclosed in the letter and information obtained through Mr. Harry Stanton, of the Bureau of Vital Statistics, it appears that Stephen D. Lachawich and his son, Stephen C. Lachawich, have been engaged in the practice of funeral directing and embalming at 10756 S. Michigan Avenue and 2314 W. 23rd Place, under the name of "Lachawich & Son" since 1932. Both father and son have been licensed undertakers from 1932 continuously to 1950. The son has obtained an undertaker's license for 1951 but the father has filed an application for an assistant undertaker's license for 1951. You request our opinion as to whether or not the undertaking establishments may be advertised under the name of "Lachawich & Son" if an assistant undertaker's license is issued to the father.

Section 181-1 of the Municipal Code of Chicago, provides as follows:

"181-1. It shall be unlawful for any individual to act as an undertaker, or to prepare a dead body for burial or cremation, or to manage a funeral, or to conduct, manage, or be in charge of an undertaking room, store, or place, or in any way to advertise or hold himself out to the public as an undertaker by card, sign, solicitation, or otherwise, without first obtaining a license as an undertaker.

"In conducting any business under a license herein provided for, no licensee shall use, or join in using, as part of or in connection with the

name under which said business is conducted, the name of any person who is not both licensed hereunder and actually engaged in said business; provided, however, that any person of good moral character and temperate habits who on July 1, 1935 was engaged in the practice of funeral directing as defined in an act of the General Assembly of the State of Illinois entitled 'An Act in relation to the regulation of persons engaged in the practice of funeral directing and embalming, and to repeal an Act therein named, filed July 8, 1953, as an owner, member or employee of a corporation, partnership or association, or any corporation, partnership or association so engaged, shall be permitted to continue to engage in the practice of funeral directing, as so defined, and to advertise publicly as being so engaged, if the said owner, member or employee shall have complied with all other provisions of this chapter."

In the instant case both the father and son have been engaged in the practice of funeral directing and embalming under the name of "Lachawich & Son" since 1932. Under the above section of the Code they may continue to operate and advertise the two undertaking establishments under the name of "Lachawich & Son" provided they both are licensed undertakers. A person who is licensed as an assistant undertaker is not an undertaker within the above provisions of the Code. It was not the intention of the city council in adopting these provisions to permit a person licensed as an assistant undertaker to hold himself out to the public as being an undertaker by operating an undertaking establishment under the name of a corporation, partnership or association. The said section expressly prohibits an individual from advertising as an undertaker without first obtaining a license as an undertaker.

In view of the foregoing, it is our opinion that the said undertaking establishments may not operate and advertise under the name of "Lachawich & Son" unless the father, Stephen D. Lachawich, as well as the son, Stephen C. Lachawich, is licensed to act as an undertaker.

DECEASED LICENSEE

(No. 11418—President, Board of Health—H. A. I.—August 29, 1951.)

This will acknowledge receipt of your communication of July 5, 1951, relative to the undertaking establishment of one Herman R. Sauer, deceased, and directing our attention to the contents of an attached memorandum from Attorney Harold C. Osburn.

This memorandum in substance states that the deceased, Herman R. Sauer, was at the time of his death on May 4, 1951, a licensed funeral director and undertaker, with an establishment at 10517 Ewing Avenue, Chicago, Illinois. Mr. Sauer died, leaving him surviving a widow, Dorothy F. Sauer, and a minor child, Mary Louise Sauer, who was a daughter by a former wife, Maude E. Sauer, who divorced him in 1947.

The deceased left a will naming his widow as executor. Because of the insolvency of the estate she filed her renunciation to act as executor of the estate and nominated in the application for letters of administration with the will annexed one John L. Grady, who is one of the chief creditors of the estate. Whether or not John L. Grady has qualified himself in the Probate Court does not appear from the memorandum.

The memorandum points out that the former wife, Maude E. Sauer, prior to the divorce, assisted the deceased in the establishment and growth

of the funeral business, although at no time has she ever been licensed by the State of Illinois as a funeral director or as an embalmer.

Mr. Osburn states that his letter is addressed to the Board of Health as "a request on behalf of Maude E. Sauer for a license to continue the operation of the funeral business at the above address for and in behalf of the minor child as well as perpetuating the activities of the business and good will created thereby."

The writer further states that "I am not unmindful of the fact that she is not the legal widow of the decedent, but being the mother of this child, all factors should militate in her favor. The widow has disclaimed any interest whatsoever in the business, whether the same is closed up or continued, and inasmuch as the former wife has the same obligations to consider, she is fundamentally interested in providing for the child and, I might add, to provide for her own well being as set forth in the divorce decree between the parties. This decree provided for certain monthly payments to be made by decedent to Maude E. Sauer but of course these have now been stopped and she is without any source of income to carry on."

You conclude your communication with a request that we answer the following questions:

1. Can the Board of Health legally permit Maude E. Sauer to operate the funeral parlors under the conditions set forth in the letter from Harold C. Osburn, particularly since Maude E. Sauer was divorced from Herman R. Sauer prior to his death, according to Mr. Osburn?

2. If the answer to the foregoing question is "no," what if any steps can be taken by Maude E. Sauer legally to operate the funeral parlors?

Before answering these questions, we should like to set out pertinent provisions of the Municipal Code of the City of Chicago with reference to the licensing of undertakers:

> "181.1. It shall be unlawful for any individual to act as an undertaker, or to prepare a dead body for burial or cremation, or to manage a funeral, or to conduct, manage, or be in charge of an undertaking room, store, or place in any way to advertise or hold himself out to the public as an undertaker by card, sign, solicitation, or otherwise, without first obtaining a license as an undertaker."
>
> "181.2. An application for a license under this chapter shall be made to the board of health. The applicant shall state his name and residence address, that he is licensed by the state to practice embalming and funeral directing, give the number of his state registration card, and the location of the room, store, or place where he intends to engage in the business of undertaking."
>
> "181.6. No individual other than a licensed undertaker, or authorized assistant shall be permitted to manage or control any undertaking room, store, place, or establishment, or to prepare dead bodies for burial or cremation, other than the embalming by state licensed embalmers, or to manage or conduct funerals in the capacity of any undertaker . . ."

From your letter and the attached memorandum, it appears that Maude E. Sauer is not licensed by the State of Illinois as a funeral director or as an embalmer. Answering your first question, it is our opinion that Maude E. Sauer, not possessing the requisite qualifications, cannot receive a license as an undertaker from the Board of Health of the City of Chicago. Reasons of hardship or financial distress, or personal or family considerations referred to at length in the memorandum, however

meritorious, are not factors which the Board of Health of the City of Chicago may legally take into account in the issuance of an undertaker's license.

Your second question, "what, if any, steps can be taken by Maude E. Sauer legally to operate the funeral parlors," is in effect a request that we render a legal opinion to a private person in connection with her own private affairs. This office is confined to furnishing written opinions to heads of departments upon subjects dealing only with their official functions. This specific inquiry is, therefore, not within our province and we indicate no answer thereto.

Recognizing, however, that your inquiries do raise questions of broader implications, we are setting out the statutory provision governing the continuation of the business of a deceased funeral director for your guidance in your official function of regulating and licensing undertakers and undertaking establishments. Chapter 111½, Sec. 73.10a of the Revised Statutes of the State of Illinois entitled "Continuation of business by personal representative of deceased funeral director" provides as follows:

> "The personal representative of a deceased funeral director, who, at the time of his death, was licensed under this Act and owned and maintained a place for the practice of funeral directing at such time, may, upon authority of the county or probate court, continue to operate such place for a reasonable period for the liquidation or sale of the business, if the personal representative operates it under the immediate supervision and control of a registered funeral director, whose name shall be published in connection with the operation of the business; provided, such representative shall not continue the operation of the business for a period of more than one year from the date of death of the funeral director, except upon application, the court may, upon finding that further time is necessary for the liquidation or sale of business and that it is being operated in conformity with this Act, authorize the continuance thereof for a further period not exceeding two (2) years from the date of death of the funeral director, 1935, July 8, Laws 1935, p. 1083, art. 1, par. 11, added 1943, July 16, Laws 1943, vol. 1, p. 1016, par. 1."

It should be observed that the authority granted in this statute is limited to the personal representative of the estate of the deceased funeral director.

The personal representative of the estate of a deceased funeral director, who is appointed by the Probate Court, may petition that court for leave to continue the operation of the establishment pursuant to the provisions of Chapter 111½, Sec. 73.10a. In naming the personal representative of the Probate Court is governed by the Administration Act and such personal representative may be the executor under a will or an administrator appointed according to the rules of preference laid down by the Administrative Act. Such representative must designate a licensed funeral director and undertaker, under whose immediate supervision and control the business will be operated. The funeral director and undertaker's name must be published in connection with the operation of the business. Under these circumstances, the Board of Health may legally permit the personal representative to continue the business for the period and purposes specified in the statute.

RESIDENCE TELEPHONE LISTING

(No. 11507—Health Department—E. R. H.—April 2, 1952.)

In your letter of November 23, you state that a question has been raised by the Fire Prevention Bureau with reference to Nursing Homes

regarding conflicting provisions of Chapter 136 and Chapter 136.1 of the Municipal Code.

You ask for a clarification of those two chapters since it is your understanding that chapter 136.1 was enacted as a temporary war-time measure.

Section 15 of Chpter 136.1 reads as follows:

> "This chapter shall be in force and effect only for the duration of the war and six months thereafter. For the effective period of this chapter the provisions hereof which are in conflict with the provisions of chapter 136 or any of the building provisions elsewhere in this code now or hereafter in force shall supersede those other provisions, but those provisions shall remain in full force and effect as to "homes" covered by chapter 136 which are not "nursing homes as defined in this chapter".

In an opinion to the president of the board of health dated April 29, 1952, we considered the question of the period of effectiveness of this chapter and held that chapter 136.1 "expired six months after the duration of the war".

It is therefore our opinion that the provisions governing the regulation of homes are those found in chapter 136, and that chapter 136.1 is no longer in force.

MULTIPLE LICENSES

(No. 11585—President, Board of Health—E. R. H.—September 18, 1952.)

We acknowledge receipt of your letter of August 29, 1952 in which you state that John J. Dulski, Jr., now holds a full undertaker's license at his father's funeral home (2100 W. 18th Place), and that he is desirous of taking out another license to permit him to work for another undertaker. You quote in your letter part of Section 181-6 of the Municipal Code of Chicago and state that it is your interpretation that a second license cannot be issued to him. You ask our opinion as to the following:

> "Can a fully licensed undertaker hold a second license at another establishment in which he has no financial interest?"

Two kinds of licenses are provided for in Chapter 181 of the Municipal Code, undertaker's licenses and undertaker's assistant's licenses. After setting forth the requisites for an undertaker's license in previous sections, Section 181-5 provides.

> "Any license issued pursuant to this chapter shall entitle the licensee to engage in the business of undertaking only at and from the store, room, or place designated in such license, and if the applicant for such license shall desire to engage in the business of undertaking at more than one store, room, or place in the city, he shall be permitted to do so only upon the payment of a license, fee as hereinbefore fixed for each such store, room, or place."

The section above quoted expressly provides that the undertaker shall be permitted to engage in the undertaking business at more than one location if he pays a license fee for each location and we find no provision

in the entire Chapter 181 of the Code applicable to undertakers requiring an undertaker to have a financial interest in the location from which he is licensed.

Section 181-6 of the Code regulates the issuance of licenses to undertaker's assistants and there is nothing in its provisions referring to undertaker's licenses.

We rendered an opinion to Dr. Bundesen upon a similar question under date of September 8, 1941, Opinions of Corporation Counsel, vol. 21, page 146, No. 10528, in which Section 181-6 was considered. This section at that time was almost identical with the present section, the only change being the increase in the license fee. We said in that opinion:

> "The above section of the code regulates the issuance of licenses to undertaker's assistants. This section is silent with reference to the issuance of licenses to undertakers. Obviously there is nothing in this section which prohibits the issuance of licenses to two or more persons to conduct an undertaking business from the same undertaking establishment.
>
> This office as early as August 19, 1909 passed on this question. In an opinion to the Secretary of the Mayor it was expressly stated that two undertakers' licenses could be issued to two individuals to conduct an undertaking establishment at the same location."

Touching on the question of the undertaker's financial interest in the location or locations from which he is licensed, we said in that opinion:

> "Mr. Crane further contends that under the above quoted provisions of the code, in order for an applicant to qualify for an undertaker's license, he must be either the owner or co-owner of the establishment for which the license is sought. From an examination of these provisions of the code I am unable to find any provision which would expressly or impliedly support this contention. If it were the intention of the City Council that ownership of an undertaking establishment was necessary before a license could be issued to an individual to conduct the undertaking business the council would have so provided in the ordinance."

Answering your specific question above quoted, it is our opinion that a fully licensed undertaker can hold a second license at another establishment in which he has no financial interest.

SIGNING APPLICATION CARDS

(No. 11668—President, Board of Health—M. I. W.—March 24, 1953.)

We have your letter of February 26, 1953 in which you state that it has been the policy of the board of health to request undertakers seeking licenses, and assistant undertakers requiring certificates, to call at your office and personally sign their application cards.

You further state that in a few instances where a person was ill and was unable to come in for that purpose, and in an endeavor to co-operate, you would send a representative to his home to obtain a signature thus maintaining your regular custom.

You indicate that it is your purpose to adhere to this same ruling for persons desiring "no license" certificates and you describe a problem with

respect to those applicants residing outside of the city who cannot be reached in order to secure their personal signatures in the presence of your representatives.

You therefore request our opinion as to whether the application cards for "no license" certificates may be mailed to the undertakers in order to secure their signatures, or whether you should adhere to your present policy requiring such persons to call at your office and sign the cards personally.

We have found no express requirement in the ordinances of the city that applications for "no license" certificates for undertakers must be made in person. Neither section 187-7.1 of the Municipal Code, which deals with such applications, nor the general licensing provisions of the code, chapter 101, make such a procedure mandatory.

In the case of persons seeking "no license" certificates the board of health has already indicated its satisfaction that such person is fit to conduct or operate an undertaking establishment or to act as an undertaker's assistant when it approved the application by a licensed undertaker to have such individuals certified in the first instance. Section 181-7.1 requires no further determination by the board as to fitness of an individual than it has already presumably made. By permitting the mailing in of signed applications the board is not avoiding or short-cutting any responsibilities placed on it by the ordinance.

The intent of the section permitting "no license" certificates was apparently to protect the eligibility of individuals whose employment relationship with a particular licensed undertaker is severed to re-enter this field of endeavor at some subsequent time as an employee of the same or another licensed undertaker without being required to re-establish his fitness by as rigorous a standard as is applied in the first instance. It is obvious that there can be a variety of reasons for the severance of an employment relationship among which are included extended illness and absence from the city. Permitting qualified individuals to protect their status when they find themselves in either of the two circumstances described above cannot be viewed as defeating the purpose of the ordinance but would rather appear to be helping to effectuate that purpose.

It is, therefore, our opinion that application cards for "no license" certificates may be mailed to applicants in order to secure their signatures. There is no express or implied obligation imposed by the ordinances that the board of health insist on applicants appearing in person to sign such cards.

MULTIPLE LICENSES

(No. 11697—President, Board of Health—M. I. W.—June 4, 1953.)

We have your request for further interpretation of an opinion rendered by this office on December 30, 1949 in which we wrote as follows:

> "(2) It is in keeping and in harmony with the provisions of the Chicago Municipal Code and the statutes of the State of Illinois to require that each undertaker, who may be a member of a firm operating an undertaking establishment at a particular location, secure a separate individual license in order to operate from that establishment."

You describe a situation that has arisen regarding the Piser Undertakers Company. The facts relating to the partnership which you detail in your letter have been modified by Miss Stahnke of your department who in a phone conversation described the situation as follows:

> "Prior to 1953, there were three co-partners and three places of business, with each partner procuring a license to operate at each place making a total of nine licenses.
>
> "This year the company has acquired two additional locations making a total of five. You have on file a total of five applications. Three of these applications are from the three co-partners, each seeking to be licensed at a different address. The other two applications are from employees who seek to be licensed, each at one of the other two locations."

You request our opinion as to whether you may issue licenses as applied for above or whether each co-partner must procure a license for each of the five locations.

Section 73.8a of Chapter 111½, Illinois Revised Statutes (1951), provides in the second paragraph as follows:

> "No license, and no partnership or association of licensees, formed since July 1, 1935, shall engage in the practice of funeral directing under a trade-name or partnership or firm name unless in the use and advertising of such trade-name, partnership or firm name there be published in connection therewith the name of the owner or owners thereof as such owner or owners."

Since it appears from the applications that this partnership was formed on February 1, 1952, the Piser Undertakers Company comes under the requirement of this section and must under the statute, wherever the firm name is used or advertised, publish in connection therewith the name of the owners.

Section 181-1 of the Municipal Code, makes it "unlawful for any individual to act as an undertaker . . . or in any way to advertise or hold himself out to the public as an undertaker . . . without first obtaining a license as an undertaker."

Therefore, it follows that since the firm name or trade-name of Piser Memorial Chapels must be accompanied by the names of the owners wherever it is used at each location all three copartners are, or should be if the law is being complied with, being held out to the public as being engaged as undertakers at each location.

Under the opinion referred to and quoted above which held, and we believe correctly, that "each undertaker who may be a member of a firm operating . . . at a particular location, secure a separate individual license in order to operate from the establishment," each co-partner of Piser Undertakers Company should be required to procure a license to operate from all five locations, making a total of fifteen licenses.

The two applications from employees may be granted, each to operate from the specific location designated and no other.

LICENSE REQUIREMENTS

(No. 11768—President, Board of Health—M. I. W.—November 16, 1953.)

We have your letter regarding the Ellison Funeral Home, 736 W. North Avenue, in which you state that the Ellison Funeral Home has been in existence since 1926 and that Mr. Arthur D. Ellison holds a Funeral

Director's license issued by the State of Illinois, but does not have an embalmer's license. You further state that for a period of years a fully licensed Chicago undertaker has procured a license to manage this establishment and that it has come to your attention that this licensed individual took little part in the business with the funerals being conducted by Mr. Ellison.

You also say that there is now on file in your office an application by Mr. Alfred Niemeyer to operate this establishment and that it is your understanding that he will also take little part in the conduct of the business and that Mr. Ellison will conduct the funerals.

The question on which you ask our opinion is "as to whether Mr. Ellison is legally qualified to act in this capacity since he is not licensed by the City of Chicago".

Section 181-1 of the Municipal Code provides in part that:

"It shall be unlawful for any individual to act as an undertaker or to prepare a dead body for burial or cremation, or to manage a funeral, or to conduct, manage, or be in charge of an undertaking room, store, or place or in any way to advertise or hold himself out to the public as an undertaker by card, sign, solicitation or otherwise, without first obtaining a license as an undertaker.

In conducting any business under a license herein provided for, no license shall use, or join in using, as part of or in connection with the name under which said business is conducted, the name of any person who is not both licensed hereunder and actually engaged in said business; provided, however, that any person of good moral character and temperate habits who on July 1, 1935 was engaged in the practice of funeral directing as defined in an act of the General Assembly of the State of Illinois entitled 'An Act in relation to the regulation of persons engaged in the practice of funeral directing and embalming, and to repeal an Act therein named', filed July 8, 1935, as an owner, member or employee of a corporation, partnership or association, or any corporation, partnership or association so engaged, shall be permitted to continue to engage in the practice of funeral directing, as so defined, and to advertise publicly as being so engaged, if the said owner, member or employee shall have complied with all other provisions of this chapter."

Section 181-2 provides in part as follows:

". . . The applicant shall state his name and residence address, that he is licensed by the state to practice embalming and funeral directing. . ."

Section 181-6 reads in part:

"No individual other than a licensed undertaker, or authorized assistant, shall be permitted to manage or control any undertaking room, store, place, or establishment, or to prepare dead bodies for burial or cremation, other than the embalming by a state licensed embalmer, or to manage or conduct funerals in the capacity of an undertaker; provided that when any individual licensed as an undertaker hereunder shall desire to have any room, store, place or establishment in which he is licensed . . . be conducted or operated for him by any agent, assistant, clerk, or employee . . . he shall be permitted to do so upon making application to the board of health for that purpose . . . and upon his furnishing satisfactory evidence . . . that such person is qualified to act as an undertaker and possesses the same qualifications as are required to be possessed by applicants for a license as an undertaker under this chapter . . ."

It is plain from the foregoing sections that Mr. Ellison cannot act as an undertaker without a license therefor, cannot be issued a license unless he holds a state embalmers license, cannot act as an assistant to a licensed undertaker in the conduct of funerals unless he is granted an assistant's certificate and cannot be granted an assistant's certificate since he does not possess "the same qualifications" as required for an undertaker's license which as stated above includes the holding of a state embalmer's license.

With reference to the application of Mr. Niemeyer, we fail to see any legal basis for pre-judging the manner in which he might exercise the privileges of the lincense for which he qualifies, according to the statements in your letter.

E. PUBLIC VEHICLE LICENSES

POWER TO REPEAL TAXICAB ORDINANCE

(No. 11100—Committee on Local Transportation—J. F. G.—September 11, 1945.)

We have your letter of August 28, 1945 requesting an opinion as to the power of the City Council to repeal the ordinance passed June 26, 1945 (Coun. J. 3743) which in effect extends the term to the grant by the City Council for the operation of taxicabs within the city until December 31, 1950.

That ordinance purports to amend Section 4 of the ordinance relating to taxicab licenses passed December 22, 1937 (Coun. J. 5027) which, in turn, extended the original grant of authority to operate taxicabs on city streets to December 31, 1945.

In the year 1933 the taxicab business in the city of Chicago was chaotic. Vacant taxicabs were cruising the streets for passenger business. The cost of taxicab operations was excessive because of the large percentage of dead mileage. Individual operators and drivers employed by corporate operators were unable to make a decent living because of the keen competition and a war of cutting rates to attract business caused congestion of the streets, endangered taxicab passengers and others making ordinary use of the streets and created such disorder as to require police intervention.

On June 28, 1933 the City Council passed an ordinance establishing a new Public Vehicle License Commission composed of the Commissioner of Police, the City Comptroller and the Corporation Counsel and also passed resolutions directing the new commission to investigate the question of just and proper rates of fare and the number of taxicabs that should be licensed in the city of Chicago, with directions that the commission report its findings and recommendations to the City Council (Com. J. 642). That commission, after many public hearings and examination of taxicab operators, their books and records, and testimony of applicants for licenses to operate taxicabs, reported to the City Council on April 27, 1934 (Coun. J. 2069). It recommended the issuance of 4,108 taxicab licenses

for the year 1934 and the establishment of a uniform schedule of meter rates for all taxicabs operated in the city; also, that provision be made for the appointment of a commission independent of any other department of city government with all necessary specific powers to regulate and control the taxicab business in Chicago.

To carry out the recommendations of the commission the City Council on May 18, 1934 passed an ordinance granting permission and authority for the operation of taxicabs within the city and for the appointment of a Public Vehicle License Commissioner (Coun. J. 2271). In substance the ordinance was an offer to the owners of licensed taxicabs to furnish public service subject to its conditions and limitations for a term ending December 31, 1940. By formal written acceptance of the ordinance the license, in consideration of the right to use the streets for private gain in the operation of taxicabs, was obligated to pay compensation for the use of the streets (Section 3); agreed to abide by a temporary schedule of rates and charges uniform as to all taxicabs operated within the city (Section 4); agreed to pay all final judgments or awards in sixty days; agreed not to work or employ any person to work as a driver for more than twelve out of twenty-four consecutive hours (Section 4); agreed to operate every licensed taxicab regularly to the extent reasonably necessary to meet the public demand for taxicab service (Section 7); and agreed to keep in the city complete and accurate books and records and to file statements of its assets, liabilities, gross earnings and operating expenses and other information as required for the purpose of enabling the City to keep informed as to the character and quality of service rendered and just and uniform reasonable rates of fare to be fixed from time to time by the Council (Section 8). To protect the licensees against unreasonable competition the City agreed not to issue any license for a taxicab unless the commission, after a public hearing, by resolution should declare that public convenience and necessity required additional taxicab service (Section 6).

More than five years before, the City Council of Chicago had passed an ordinance which provided that no taxicab license should be issued unless the Public Vehicle License Commission should declare that public convenience and necessity required the proposed taxicab service. In *The People* v. *Thompson,* (1930) 341 Ill. 166, our Supreme Court upheld the ordinance as a proper exercise of the police powers of the State delegated to the City Council. At page 169 the court said:

> "* * * No one has any inherent right to use the streets or highways as a place of business. Where one seeks a special or extraordinary use of the streets or public highways for his private gain, as by operation of an omnibus, truck, motorbus or the like, the State may regulate such use of the vehicle thereon or may even prohibit such use."

In considering the effect of that ordinance the United States District Court for the Northern District of Illinois in *Capitol Taxicab Company* v. *Cermak,* (1932) 60 F. (2d) 608, before a court consisting of three judges, Circuit Judge Page and District Judges Lindley and Woodward, said:

> "To the argument that no ordinance tends to create a monopoly, it is sufficient answer that the city has not by its legislation, surrendered its rights to grant other and further certificates to all other applicants. It may still grant applications, and undoubtedly adequate remedy exists against affirmative exercise of arbitrary authority in that respect. The public policy of Illinois has been declared by the Legislature of Illinois, according to the interpretations of the Supreme Court, to be that, before one utility or public carrier is permitted to enter the business of another already in the field, it is but a matter of fairness and justice that it be shown that the new utiliy answers the demands of public convenience and necessity."

In *City of Chicago* v. *Eagle Taxi Co., et al.*, (1933) 273 Ill. App. 614, the validity of the same ordinance was involved. The City instituted suit to restrain the company and individual operators or chauffeurs from operating taxicabs as public passenger vehicles for hire upon the streets of Chicago without public vehicle licenses. Thirty-five persons had made application October 24, 1933 for public vehicle licenses claiming to be the owners of taxicabs and immediately after filing their applications and before the Public Vehicle License Commission had an opportunity to consider the applications in accordance with the provisions of the city ordinances proceeded to operate or cause to be operated for hire the taxicabs described in their applications. The City of Chicago caused arrests to be made of numerous chauffeurs of the taxicabs for operating them without licenses. Despite such arrests, immediately after their release from custody on bonds and pending the trial of their cases the chauffeurs resumed the operation of the taxicabs and threatened to continue such operation in violation of the ordinances and in defiance of the requirements of the City of Chicago and of its Public Vehicle License Commission. Thereafter the individual defendants withdrew their applications for license and October 28, 1933 defendant Eagle Taxi Company filed application for licenses for the same taxicabs claiming to be the owner of them. The company proceeded to operate without having first secured public vehicle licenses in violation of the ordinances of the City of Chicago and in defiance of it and of its Public Vehicle License Commission. The Circuit Court of Cook County entered an order granting to the City of Chicago a temporary injunction restraining defendants from operating these taxicabs on the streets without public vehicle licenses as provided by ordinance. An appeal from this injunction was taken to the Appellate Court and that court upheld the right of the City to prohibit that operation, citing *The People ex rel. v. Thompson* and *Capitol Taxicab Co.* v. *Cermak, supra,* as to the validity of the ordinance, and then said:

> "Under the circumstances disclosed we are constrained to hold that the legal remedy of complainant of prosecuting the offending chauffeurs of defendants' taxicabs for their persistent and continued violations of the ordinances was inadequate and that a court of equity was fully justified in exercising its jurisdiction to the end that the city might be afforded complete and adequate relief. Their can be no question but that the operation of the taxicabs in the manner described in the bill in contempt and disregard of the ordinances of the City of Chicago constituted a public nuisance on the city's streets."

The opinion of the court is not reported in full in the Illinois Appellate Court Reports. The facts involved and the above quotation were taken from the original opinion in this case December 29, 1933.

Although the City Council has authority to declare the public policy in regard to operation of a public service facility within the city and to determine whether such operation shall be competitive or monopolisitc (*Venner* v. *Chicago City Ry. Co.*, (1913) 258 Ill. 523, 546) the ordinance of May 18, 1934 did not grant exclusive rights to any person, firm or corporation to operate taxicabs upon the streets. It expressly reserved the right to pass all ordinances and make all regulations affecting the licenses to promote or secure health, safety, morals, comfort, convenience and general welfare (Section 6).

The ordinance was accepted as provided by Section 13 thereof by ten corporations including, among others, Yellow Cab Company, Checker Taxi Company, Capitol Taxicab Company, Commercial Cab Company, Inc., Public Taxi Service, Inc., and 171 individuals owning licensed taxicabs. For any default in the observance or performance of "*any one or more of the agreements, conditions or obligations imposed upon such licensee*" the permission and authority granted to those who accepted the ordinance could be terminated by the City Council and, when terminated, the Mayor would be required to revoke all taxicab licenses held by such licensee (Section 10).

Because of the world wide economic depression, operations under the ordinance of May 18, 1934 did not prove as successful as was hoped. On November 20, 1935 the Public Vehicle License Commissioner addressed a communication to the City Council calling attention to the fact that the safety of passengers and pedestrians was affected by the unprofitable operation of taxicabs, that operators were not able to make reasonable returns on their investment, that drivers were not earning a living wage, and if such conditions were suffered, to continue it would result in injury to the public. He recommended that the City Council determine whether or not there should be a reduction in the number of cabs to be operated in Chicago as a measure of relief from existing conditions. The communication was referred to the Committee on Local Transportation for consideration on November 26, 1935 (Coun. J. 868). The committee took no action upon this recommedation until conditions became critical through strikes of taxicab drivers resulting in violence upon the streets of Chicago. Federal concilliators from Washington came to Chicago and recommended a substantial increase in taxicab rates to enable the taxicab chauffeurs to obtain a satisfactory wage but a compromise was effected upon recommendation of the Committee on Local Transportation to grant a small increase in the rates of fare and to extend the term of the contract ordinance of May 18, 1934 to December 31, 1945 upon condition that a sufficient number of taxicab licenses be surrendered by licensees to reduce the number of taxicabs within the city of Chicago from the authorized number of 4,108 to 3,000.

Two of the operators, Yellow Cab Company and Checker Taxi Company, voluntarily offered to surrender sufficient licenses to reduce the number of taxicabs to 3,000 upon condition that if public convenience and necessity required additional taxicabs in the future those licensees who would voluntarily surrender some of their licenses should have a prior right to the number of taxicab licenses surrendered. Accordingly the City Council on December 22, 1937 passed two ordinances to effectuate that compromise: The first increasing the rates of fare for taxicabs for the first third of a mile from fifteen to twenty cents, and the second to decrease the number of taxicabs to 3,000 (Coun. J. 5026-7). Section 4 of the second ordinance extended the permission and authority granted by the ordinance of May 18, 1934 to December 31, 1945 and it was expressly made "Subject to the conditions and limitations of this ordinance and an ordinance granting permission and authority for the operation of taxicabs within the city and for the appointment of a public vehicle license commissioner, passed May 18, 1934."

SCREENING APPLICANTS

(No. 11122—Commissioner of Police—A. F. G.—January 27, 1949.)

On January 10, 1950 you referred to this office a memorandum and recommendation of the Chief of Traffic of the Traffic Bureau of your department, to which was attached specimen forms of questionnaire to be used in the screening of applicants for 1950 taxicab licenses.

You ask an opinion or our approval as to form of the said questionnaire.

The memorandum is in part as follows:

"Attached hereto are copies of questionnaire forms to be used in the screening of applicants for 1950 taxicab licenses, submitted by Mr. Benjamin Samuels of the Yellow Cab Company, and also by Mr.

Edward J. Gorman, the Public Vehicle License Commissioner. Both forms are practical and I would suggest that the better features of these forms be consolidated into one questionnaire."

Section 28-7 of the Municipal Code of Chicago is in part as follows:

"Applications for public passenger vehicle licenses shall be made in writing to the commissioner by the owner upon forms provided therefor. Such application shall contain the full name and address of the owner, the class of the vehicle for which a license is desired, the length of time the vehicle has been in use, the number of persons it is capable of carrying, and the horsepower thereof. * * *"

Neither of the forms submitted for owner's application contained all of the requirements of the said section and we are submitting herewith a form of owner's application which contains the requirements of the ordinance and in addition contains a consolidation of the questions suggested in the submitted forms.

Section 2 of the Supplemental Taxicab Ordinance adopted February 6, 1948 (C. J. p. 1918) has this provision:

"The owner may designate any licensed driver to operate said taxicab and the commissioner shall issue to said driver a certificate or card of identification as the authorized driver of said taxicab.

In our opinion the form of questionnaire submitted entitled "Questions to be asked of agent" is proper for such application.

RIDING IN FRONT SEAT

(No. 11172—Public Vehicle License Commission—A. F. G.—August 30, 1949.)

In your letter of August 25, 1949 you call attention to the prohibition in section 28-20 of the Municipal Code of Chicago, which is as follows:— "No passenger shall be permitted to ride in the front seat with the driver of a taxi cab." You state further:

"There are some taxi cabs put out by the Packard Automobile Company, in use in Chicago that have a seat for a passenger which can face either forward or in the tonneau of the car. There is also a seat put out by the Waters Equipment Company, Inc. which can be installed in any car. This particular seat always faces backward, however, is in a line with the drivers seat (A copy of the ad. showing that seat is enclosed)."

You ask to be advised whether these two seats constitute a front seat under the code.

There is no definition of "front seat" of a motor vehicle in the code, but the term has a generally accepted meaning as being that seat in a motor vehicle one half of which is occupied by the driver of the vehicle. The other half in private cars generally is occupied by a passenger. In some taxi cabs the half of the front seat not occupied by the driver is cut away and the space used for luggage.

It would appear that the purpose of the city council in prohibiting occupancy of the front seat of taxi cabs except by the driver was twofold. First, to prevent distraction of the driver by conversation with the passenger and secondly, to give the driver greater visibility. Both of these

purposes would be frustrated by the use of either type of aforementioned seats, and in our opinion their use would constitute a violation of the front seat rule.

PARMELEE DRIVERS

(No. 11173—Mayor—P. H. C.—J. F. G.—August 30, 1949.)

Mr. W. Antiporek, Secretary-Treasurer Parmelee Drivers License Committee, protested to you against our opinion of January 24, 1949 that the public vehicle drivers license provisions in the City code apply to limousine drivers employed by Parmelee Transportation Company.

It is contended that the drivers are not subject to local regulations because the Parmelee operations of transporting passengers and baggage between stations in Chicago constitute interstate commerce. Conceding the fact that Parmelee is engaged in interstate commerce exclusively, that fact alone does not exempt its drivers from the public vehicle drivers license ordinance.

The law is well settled by the U. S. Supreme Court that in the absence of national legislation specially covering the subject State and local authorities, when authorized by State law, may regulate the use of their highways by motor vehicles engaged in interstate commerce as well as in local trade, if the regulations do not impose undue burdens on interstate commerce, are not unreasonable and are not discriminatory. *Continental Baking Co.* v. *Woodring*, 286 U. S. 352, 76 L. Ed. 1155, 52 S. 595, 81 A. L. R. 1402; *Bradley* v. *Public Utilities Commission*, 289 U. S. 92, 77 L. Ed. 1053, 53 S. Ct. 577; *Sprout* v. *South Bend*, 277 U. S. 163, 72 L. Ed. 833, 48 S. Ct. 502.

It has been specifically held that the licensing of motor vehicle drivers is necessary for the safety and comfort of the citizens of a State and a valid exercise of the State police power, despite the fact that they may be engaged in interstate commerce exclusively. *Hendrick* v. *Maryland*, 235 U. S. 610, 622, 59, L. Ed. 385; 390, 35 S. Ct. 140; *Clark* v. *Poor*, 274 U. S. 554, 557, 71 L. Ed. 1199, 1200, 47 S. Ct. 702; *Bradley* v. *Public Utilities Commission*, 289 U. S. 92, 77 L. Ed. 1053, 53 S. Ct. 577. In the Hendrick case the court stated:

> "In the absence of national legislation covering the subject a State may rightfully prescribe uniform regulations necessary for public safety and order in respect to the operation upon its highways of all motor vehicles—those moving in interstate commerce as well as others. And to this end it may require the registration of such vehicles and the licensing of their drivers, charging therefor reasonable fees graduated according to the horse-power of the engines—a practical measure of size, speed, and difficulty of control. This is but an exercise of the police power uniformly recognized as belonging to the States and essential to the preservation of the health, safety and comfort of their citizens; and it does not constitute a direct and material burden on interstate commerce. The resonableness of the State's action is always subject to inquiry in so far as it affects interstate commerce, and in that regard it is likewise subordinate to the will of Congress."

We do not question the power of Congress to free persons engaged in interstate commerce from State or municipal legislation affecting such commerce. *Gilvary* v. *Cuyahora Valley Ry. Co., Ohio*, 292 U. S. 57, 78 L.

Ed. 1123, 54 S. Ct. 573. But there is no national legislation preempting local regulation of motor carriers engaged in interstate commerce. Chapter 8, Part II of the Interstate Commerce Act, popularly known as the "Federal Motor Carrier Act", applies to the transportation of passengers or property by motor carriers engaged in interstate commerce and vests power of regulation of such commerce in the Interstate Commerce Commission. However, except as to qualifications and maximum hours of service of employees; Congress has not delegated to the Commission control over the type of interstate transportation in which Parmelee Company is engaged. Section 202 (e) (2) of this act is as follows:

> "(c) Notwithstanding any provision of this section or of section 203, the provisions of this Chapter, except the provisions of Section 204 relative to qualifications and maximum hours of service of employees and safety of operation and equipment, shall not apply * * *
>
> (2) to transportation by motor vehicle by any person (whether as agent or under a contractual arrangement) for a common carrier by railroad subject to chapter 1 of this title, a motor carrier subject to this chapter, a water carrier subject to chapter 12 of this title or a freight forwarder subject to chapter 13 of this title, in the performance within terminal areas of transfer, collection, or delivery service; but such transportation shall be considered to be performed by such carrier, express company, or freight forwarder as part of, and shall be regulated in the same manner as, the transportation by railroad, express, motor vehicle, or water, or the freight forwarder transportation or service, to which such services are incidental."

Interpretation of this section was rendered in a report of the Commission, Division 5, in *Grayline Motor Tours, Inc.* 41 M.C.C. 592. In that case the motor company transported passengers and their baggage for the Baltimore & Ohio Railroad Company between Jersey City, N. J. and New York City, N. Y., obviously a service of an interstate nature. In determining that the operation came within the exemption of Section 202 (c) (2) the Commissioners stated:

> "Under the circumstances here involved, if the transportation performed by applicant is actually within the railroad company's terminal area at New York, we should have no difficulty in concluding that it is partially exempt from regulation under Part II of the act. * * * In the instant proceeding, though the rail line physically ends at Jersey City, its service is extended to a number of terminals in Manhattan and Brooklyn by means of motor vehicle. The service rendered by applicant is a transfer service between the rail station at Jersey City and off-track rail terminals in New York City. Upon consideration of all the facts and circumstances here presented, we are of the opinion that Jersey City is within the railroad company's terminal area at New York; and that applicant's service constitutes an intranterminal operation and is within the partial exemption provided in section 202 (c) (2) of the act."

Application of this interpretation of the act to Parmelee operations readily shows that this company is not within the jurisdiction of the Interstate Commerce Commssion execept as to the reasonable qualifications and minimum hours of employees that the Commission may establish under section 204 of the act. Inquiry addressed to the Director of the Bureau of Motor Carriers of the Interstate Commerce Commission has brought us information that Parmelee holds no operating authority from the Commission under the "Federal Motor Carrier Act" and that its drivers are subject only to maximum hours of service requirements. To date the Commission has established no requirements with respect to qualifications of such drivers.

In the absence of express action by the Commission, notwithstanding the Congressional delegation of power to require qualifications, the City of Chicago is free to exert its power to license drivers using city streets. *Missouri Pacific Railway* v. *Larabee Mills*, 211 U. S. 612, 53 L. Ed. 352, 29 S. Ct. 214; *Terminal Railroad Association* v. *Brotherhood of Railroad Trainmen*, 318 U. S. 1, 87 L. Ed. 571, 63 S. Ct. 420. The court in the Missouri Pacific case said:

> "On the other hand, it is said that Congress has already acted, has created the Interstate Commerce Commission, and given to it a large measure of control over interstate commerce. But the fact that Congress has entrusted power to that commission does not, in the absence of action by it, change the rule which existed prior to the creation of the commission. Congress could always regulate interstate commerce, and could make specific provisions in reference thereto, and yet this has not been held to interfere with the power of the State in these incidental matters. A mere delegation by Congress to the commission of a like power has no greater effect, and does not of itself disturb the authority of the State. It is not contended that the commission has taken any action in respect to the particular matters involved. It may never do so, and no one can in advance anticipate what it will do when it acts. Until then the authority of the State in merely incidental matters remains undisturbed. In other words, the mere grant by Congress to the commission of certain national powers in respect to interstate commerce does not of itself and in the absence of action by the commission interfere with the authority of the State to make those regulations conducive to the welfare and convenience of its citizens. Running through the entire argument of counsel for the Missouri Pacific is the thought that the control of Congress over interstate commerce and a delegation of that control to a commission necessarily withdraws from the State all power in respect to regulations of a local character. This proposition cannot be sustained. Until specific action by Congress or of the commission the control of the State over these incidental matters remains undisturbed."

From the foregoing it is apparent that the regulation of qualifications of Parmelee drivers is still a matter within the province of local police control. Section 28-35 of the City code prescribes qualifications for public vehicle drivers which do not burden interstate commerce and which are neither unreasonable nor discriminatory. A city license is required of every person so employed, as evidence of his qualifications to operate a public vehicle upon the city streets, whether the public vehicle be engaged by contract, as in tht case of a livery vehicle, or whether it be a taxicab engaged in local transportation operations exclusively, or a Parmelee coach engaged in interstate commerce exclusively between railroad terminals within the city of Chicago.

OUT OF TOWN CABS

(No. 11192—L. L. K.—October 19, 1949.)

This will acknowledge receipt of your letter of October 12, 1949 in which you ask whether the City of Chicago has enacted an ordinance relating to out-of-town cabs bringing passengers into the city.

The City of Chicago has no such ordinance. Its ordinance deals only with licensing and the regulation of taxicabs operating within the city, inasmuch as municipalities in Illinois have no extra-territorial powers

except where the statutes have specifically granted such powers in relation to health and nuisances. We have, however, litigated the question of the right of out-of-town cabs to operate in the city and the courts have held that an out-of-town cab has the right to bring a passenger into the city and to respond to calls from the city to take passengers out of the city to the place where the cab is licensed. Cruising on the streets of the city by out-of-town cabs has been held a violation of our ordinance and out-of-town cabs are not permitted to pick up passengers on the streets in the city.

COUPON FARE BOOKS

(No. 11212—Public Vehicle License Commissioner—J. F. G.—November 25, 1949.)

Your letter of October 4, 1949, quoting a letter from Lane, Duffy & Connell, who propose the issue and sale to the public of coupon books for taxicab rides in taxicabs belonging to members of American United Cab Association, has been given careful consideration.

We assume that it is intended that the coupon books will be sold without discount by the American United Cab Association. However, the Association is not a licensee and it may be difficult to enforce Section 28-29 of the Municipal Code relating to rates of fare which are fixed so as to prohibit either lower or higher rates of compensation for taxicab service than those established by the section of the ordinance.

If the issuing authority were the licensee and not an association of licensees there could be no legal objection or administrative problem in the enforcement of the established rate schedule since more than one conviction of the public vehicle license ordinance is cause for revocation of license. (See Section 28-14.)

ASSIGNMENT OF PARKING PERMIT

(No. 11213—Commissioner of Police—A. A. P.—W. J. K.—November 29, 1949.)

In the above entitled cause the plaintiff, Eagle Bus Lines, Inc. seeks to obtain a temporary and permanent injunction restraining the City of Chicago, a municipal corporation, John C. Prendergast, Commissioner of Police, Edward T. Krupa, an automobile livery operator, Flash Cab Company, a corporation, and C. C. Krupa, a cab operator, in any way from interferring with or molesting the plaintiff, its agents and servants in the parking of its bus or busses on the northwest corner of Randolph and Clark Streets, being on the north curb of West Randolph Street from the west building line of North Clark Street to a point twenty-five feet west thereof between the hours of 11 A. M. and 1:30 P. M. and between the hours of 6 P. M. and 8 P. M. claiming that this area has been designated as a motor bus stand by an ordinance of the City of Chicago. The plaintiff claims the right of the aforesaid bus stand by virtue of an ordinance passed by the City Council of the City of Chicago on the 4th day of August, 1932 as section number 2138 of the revised Chicago code of 1931 as follows:

"Along the north curb of West Randolph Street from the West building line of North Clark Street to a point twenty-five feet west thereof between the hours of 11 A. M. and 1:30 P. M. and between the hours of 6 P. M. and 8 P. M., only one bus at any one time."

and by virtue of an amendment to said section 2138 passed by the City Council of the City of Chicago on April 17, 1933 in words and figures as follows:

"SECTION 1. That an ordinance passed by the City Council establishing a public motorbus stand on West Randolph Street and appearing on page 2900 of the Council Proceedings of August 4, 1932, be and the same is hereby amended by eliminating the word 'only' in the first line in the right-hand column on page 2900 of the Council Proceedings of said date, and substituting in lieu thereof the following language:

'to allow Edward J. Levin to stand.'

SECTION 2. This ordinance shall take effect and be in full force from and after its passage."

and that plaintiff, Eagle Bus Lines, Inc. alleges that it is the assignee of Edward J. Levin and being interferred with by the police in the utilization of this bus stand as designated and also being interferred with by Edward T. Krupa, C. C. Krupa and Flash Cab Company.

This matter came up for hearing before Judge Frank M. Padden, one of the judges of the Superior Court of Cook County, for a temporary injunction on the 9th day of November, 1949, and the court having heard evidence in open court and arguments of respective counsel, found that the plaintiff was entitled to a temporary injunction and entered the following order, to-wit:

"(a) That the Peoples Writ of Injunction be issued by the Clerk of this Court, restraining and enjoining the defendant, John C. Prendergast, Commissioner of Police of the City of Chicago, Illinois, and all those acting under his authority and by his commands, his agents and servants and each of them, from in any way interfering with or molesting the plaintiff, its agents and servants, and each of them in the parking or operation of its busses on the northwest corner of Randolph and Clark Street in the City of Chicago, Illinois, between the hours of 11:00 A. M. and 1:30 P. M. and between the hours of 6:00 P. M. and 8:00 P. M. daily in such area which has been designated as a motor bus stand by the ordinances of the City of Chicago heretofore passed and still in full force and effect, until the further order of this court;

(b) That the Peoples Writ of Injunction be issued restraining and enjoining the defendant, Edward T. Krupa, his agents and servants and each of them, from parking his motor vehicles in that area designated as a motor bus stand by the ordinances of the City of Chicago between the hours of 11:00 A. M. and 1:30 P. M. and between the hours of 6:00 P. M. and 8:00 P. M. daily on the northwest corner of Randolph and Clark Streets, in Chicago, Illinois, and that he be further restrained from soliciting passengers for hire to be transported to the racetracks situated in or near the environs of the City of Chicago, and from said racetracks back to the city of Chicago, until the further order of this court;

(c) That the Peoples Writ of Injunction be issued restraining and enjoining the defendant, C. C. Krupa, his agents and servants and each of them, from advertising and holding themselves out as a carrier of passengers from the northwest corner of Randolph and Clark Streets, Chicago, Illinois, to the racetracks near the environs of the City of Chicago, and from representing themselves to be

carriers of passengers for hire for that specific purpose to the destination herein designated and no other, until the further order of this court.

(d) That the plaintiff, Eagle Bus Lines, Inc., a corporation, furnish a bond with good and sufficient surety in the penal sum of One Thousand Dollars ($1,000.00)."

It is our opinion that the Plaintiff, Eagle Bus Lines, Inc., is not entitled to the use of the bus stand between those hours because the ordinances as heretofore quoted granted a special privilege to one Edward J. Levin (who, as we are informed, is now deceased) who had no right to assign this permit to anyone without the consent of the City Counsel of the City of Chicago because the privilege is not a vested right but a personal right.

The order of the court as above noted must be followed until such time as you receive further advice from this office.

PARMELEE VEHICLES

(No. 11257—Public Vehicle License Commissioner—P. H. C.—February 27, 1950.)

Your office recently requested our opinion as to the applicability of section 28-17 of the Municipal Code of Chicago to the vehicles operated by the Parmelee Transportation Company.

This provision of the Code prohibits advertisement of any kind on the outside of any livery vehicle having a seating capacity of less than eight persons. It is contended that the limousines used by the Parmelee Company are Checker cabs used as livery vehicles and that the company by the display of the name "Parmelee" on the doors of its vehicles is in continuing violation of that section.

Neither the comparison of measurements of the Checker cab with those of the limousine used by Parmelee nor the advertising brochure put out by Checker Cab Manufacturing Corporation controls the right of Parmelee to have its name on its vehicles. It is the actual seating capacity of the vehicles which determines whether section 28-17 is applicable. If these vehicles provide seating facilities for eight or more persons, Parmelee may advertise its name on its vehicles, otherwise not.

RENEWAL—NEW PARTNERS

(No. 11265—Public Vehicle License Commissioner—P. H. C.—March 9, 1950.)

Your letter of March 2, 1950 requests our opinion on renewal of taxicab licenses in those cases in which applications for renewal disclose either a change in partnership personnel or a partnership arrangement for the first time.

Section 28-9 of the Municipal Code of Chicago provides that public passenger vehicle licenses shall be issued to the "owner" authorizing "him" to operate the vehicle during the license period. Section 1-10 of the Code provides that words used in the Code that import the singular shall be deemed to include the plural. Since the Supplemental Taxicab Ordinance (chapter 196.1A, Municipal Code of Chicago) permits the joint ownership of taxicabs, there is no bar to the issuance of licenses in the name of the joint "owners" permitting "them" to operate the vehicle.

It is our opinion that in the case of an original individual licensee making application for renewal of the license in the name of two joint owners, of which he is one, a renewal license may be issued to the joint owners since the original licensee retains an interest and no assignment, lease or transfer of the license occurs within the intent and purpose of the prohibition of section 2, chapter 196.1A, Municipal Code of Chicago.

However, once a license has been issued in the name of two joint owners, no subsequent joint license may be issued to other than the two original joint owners as any change in ownership of a joint license would violate the provision that public vehicle licenses shall not be subject to assignment, lease or transfer.

CASH IN LIEU OF BOND

(No. 11270—Public Vehicle License Commissioner—P. H. C.—March 20, 1950.)

Your letter of March 10, 1950 asks our opinion in reference to the request of Emery Drexel Livery that it be permitted to post cash or a surety bond rather than file a $2,000.00 property damage insurance policy for each of its vehicles as required by section 28-4 of the Municipal Code of Chicago.

It is well settled that a municipality may require a public passenger vehicle owner to carry liability insurance against injury to property from the negligent operation of the vehicle as a condition precedent to issuance of a license for the right to use the public ways of the municipality. Corpus Juris Secundum, vol. 60 (Motor Vehicles, section 111, page 397); McQuillan on Municipal Corporations, vol. 3 (section 993, page 288). The purpose of such requirement is to provide compensation to innocent persons who suffer property damage through the faulty or negligent operation of a public passenger motor vehicle.

The section of the Code from which Miss Janet Lowell of Emery Drexel Livery seeks exception has been passed for just such a purpose and by its terms is applicable to all public passenger vehicles operating on the streets of Chicago. As long as the City Council does not see fit to provide for an alternative type of security, such as the cash or the surety bond suggested by Miss Lowell, you have no choice other than to require that Emery Drexel Livery insure each of its vehicles for the sum of $2,000.00 for property damage resulting from negligence in the operation of such vehicles during the license period.

The fact that this company may find it difficult to pay premium rates on the property damage insurance required by section 28-4 does not excuse it from compliance with this section as a condition precedent to lawful operation of its vehicles on City streets. In *People's Taxicab Company* v. *City of Wichita*, 34 P.(2) 545, an ordinance requiring property damage

insurance for $2,000.00 on each vehicle was attacked on the ground that it was oppressive, unreasonable and unjust. The court in declaring the ordinance reasonable said at page 548:

> "These authorities all sustain the power of the city to require those operating taxicabs to carry liability insurance. We are unable to say that the amount of insurance required to be carried is so unreasonable and oppressive as to render the ordinance void. The fact alone that the plaintiff will be unable to furnish the insurance required is not sufficient to render the requirement unreasonable."

We are returning the letter from Emery Drexel Livery attached to your request for this opinion.

"RADIO DISPATCHED"

(No. 11282—Public Vehicle License Commissioner—P. H. C.—April 5, 1950.)

Reference is made to your letter of March 31, 1950 in which you request our opinion regarding permission to use the words "Radio Dispatched" on cabs operated by members of the American-United Cab Association.

Attached to your request is correspondence from the attorneys representing this association which indicates that they wish to place these words on the front door panels or other advantageous position toward the front of some of their vehicles in order to identify those which operate two-way radio sets.

The first paragraph of Section 28-19 of the Municipal Code of Chicago provides that every licensed taxicab shall have the name of the owner and the public passenger vehicle number in the center of the main panel of the rear door of the vehicle. This same paragraph permits the appearance of the licensee's telephone number on his taxicab.

Although Section 28-17 prohibits advertisements on certain types of livery vehicles, there is nothing in the ordinance prohibiting advertising matter from being displayed on taxicabs.

The apparent purpose of the provisions of the ordinance relating to taxicabs is to identify the corporation, person or persons who is or are responsible for the safety of the passenger and his baggage. A descriptive legend like "Radio Dispatched" indicating facilities for service will not deceive or confuse the public if occasion should arise for a passenger to make any claim against the taxicab operator chargeable with a duty to him.

Neither the terms nor the intent of Section 28-19 will be violated by the display of such advertising matter on taxicabs.

OPERATION BY AGENT

(No. 11287—Public Vehicle License Commissioner—P. H. C.—April 12, 1950.)

Reference is made to your letter of March 31, 1950 in which you request our opinion regarding financial arrangements made by owners of

licenses issued under the Supplemental Taxicab Ordinance of February 6, 1948. Correspondence from the attorneys representing some of the licensees indicates that some taxicabs are being operated pursuant to agreements in which the "licensee receives a certain sum for each shift during which the taxicab is operated by an agent."

We believe it is inaccurate to say that one who pays a licensee for the privilege of operating his taxicab is his agent. By such arrangement the taxicab driver is not subject to control or direction of the licensee in the operation of his cab nor accountable to him for the expense of operation or for the fares charged or collected. The taxicab driver is an independent operator for the time being. The licensee is not responsible to passengers or the public while the cab is in control of such operator because the relationship of master and servant or principal and agent does not exist between the licensee and the operator. *Dean* v. *Ketter*, 328 Ill. App. 208.

In such case the driver rents a taxicab with the owners license to operate it. This is in conflict with the intent and provisions of the Supplemental Taxicab Ordinance which is designed to prohibit traffiking in taxicab licenses. Such licenses are granted as personal privileges. Section 2 of the ordinance provides, in part, "Said licenses shall not be subject to assignment, lease or other voluntary or involuntary transfer except to permit replacement of a taxicab for that licensed." The same section permits the licensee to designate a qualified person to operate his taxicab as an authorized driver. Each of the foregoing provisions must be given effect so that there will be no conflict between them.

The Ordinance contemplates employment of a driver as the servant or agent of the licensee to whom the driver is responsible for all operations and accountable for fares. It does not permit a licensee to rent his taxicab for operation under his license.

METERS IN LIVERIES

(No. 11298—Public Vehicle License Commissioner—A. F. G.—May 5, 1950.)

Reference is made to your letter of April 3, 1950 in which you request our opinion regarding installation of taximeters in public passenger vehicles licensed as liveries. Correspondence attached to this request indicates that it was directed specifically to a public passenger vehicle driven by one Allen M. Levine.

In the case of *City of Chicago* v. *Allen M. Levine*, 49 M C 179012, the defendant was arrested while driving a licensed livery in which had been installed a taximeter. He was charged with violation of section 28-2 of the Municipal Code of Chicago which makes it unlawful for a public passenger vehicle to be operated or driven unless the vehicle is licensed in compliance with the provisions of the Code. A taxicab is defined in the Code as a public passenger vehicle which has capacity for not more than five adult passengers exclusive of the front seat and is equipped with a taximeter. Defendant Levine's vehicle, although licensed as a livery, came within these terms of taxicab classification and as such at the time of the arrest was being driven as a taxicab without benefit of a taxicab license as required by the Code. On May 4, 1950 Associate Judge George B. Weiss of the Municipal Court found the defendant guilty of violating section 28-2 and fined him $5 and charged him $1 costs.

Enclosed is the correspondence from the attorney representing Allen M. Levine in the above case, which was attached to your request for this opinion.

"STANDARD RATE CAB"

(No. 11304—Public Vehicle License Commissioner—P. H. C.—June 5, 1950.)

Your letter of May 22, 1950 requests our opinion regarding the use of the words "Standard Rate Cab" on taxicabs operated by members of the Standard Cab Owners Association.

Attached to this request is your correspondence of the same date addressed to the attorney for this association in which you indicate that all the members of the Association are individual taxicab licensees. The first paragraph of Section 28-19 of the Municipal Code of Chicago provides that every licensed taxicab shall have the name of the owner and the public passenger vehicle number in the center of the main panel of the rear door of the vehicle. The apparent purpose of this provision is to identify the corporation, person or persons who is or are responsible for the safety of the passenger and his baggage.

The words "Standard Rate Cab" if displayed on a taxicab might induce the public to believe that the owner of such vehicle is some corporation, person or persons other than an individual licensee and it might deceive or confuse the public if occasion should arise for a passenger to make any claim against the taxicab operator charged with a duty to him.

On this basis it is our opinion that you may refuse members of the Standard Cab Owners Association permission to use the words "Standard Rate Cab" on their vehicles.

RADIO DISPATCHED LIVERIES

(No. 11327—Commissioner of Police—P. H. C.—August 11, 1950.)

We have your letter of June 20, 1950 together with a memorandum from Michael J. Ahern, Chief of Traffic, requesting our opinion as to a certain method of operation used by owners and drivers of livery vehicles.

The type of operation described by the Chief of Traffic is used by the driver who receives information via radio communication from the office out of which he operates concerning the location of persons who have contacted the office for service. The driver, after receiving the information by radio, picks up persons who have contacted the office and transports them to their destination. Section 28-16 of the code states:

> "No person operating or driving a livery vehicle shall accept passengers for any trip without previous engagements for such trip through the garage or office from which said vehicle is operated."

This provision prohibits picking up passengers unless the engagement has been pre-arranged with the garage or office from which the liveries operate. There is nothing in this section, however, which prohibits the driver of a livery, upon receiving instructions for livery service via radio communication, from rendering service to passengers who have pre-arranged for this type of service.

This method of operation by livery owners and drivers, however, is restricted to the transportation of passenger who have contacted the office for livery service. It occurs to us that a person desiring transportation

by taxicab might call an advertised number for such taxicab service and be sent a livery vehicle operated by a driver who has been informed by radio by the office which has been contacted for taxicab service. When a number is called and taxicab service ordered, anyone ordering the service is entitled to transportation in a public passenger vehicle which is operated regularly, (section 28-18, Municipal Code of Chicago); which has the name of the owner and the vehicle number on the rear door, (section 28-19); which is equipped with a taximeter to record the fare, (section 28-21).

These and other sections of the public vehicle chapter of the code indicate the distinct difference between livery transportation and the services required by law to be supplied by taxicabs. A taxicab driver, for instance, has the duty to accept persons for transportation from and to any place within the city, section 28-20, and cannot collect fares different from the rates of compensation established by section 28-29 of the code. Owners and drivers of livery vehicles need not run regularly, may not have names or number on their vehicles, do not have to accept orders for transportation and the amount of compensation they may charge for transportation service is not regulated by law.

It is our opinion that a driver of a livery vehicle contacted by radio who picks up and transports passengers who have ordered taxicab service is in violation of section 28-16 of the code. In such case there is no previous engagement for livery service through the office or garage from which the vehicle operated.

LICENSEES IN MILITARY SERVICE

(No. 11331—Public Vehicle License Commissioner—P. H. C.—August 22, 1950.)

Reference is made to your letter of July 31, 1950 to which are attached letters from Radio Flash Corporation and from the attorneys representing American-United Cab Association, in which you request our advice on the status of owners of taxicab licenses issued under the Supplemental Taxicab Ordinance who are called to active military service. Our opinions on the problems suggested by your letter are as follows:

I.

AS TO SURRENDER OF LICENSE.

There is no provision in the Supplemental Taxicab Ordinance nor in the Public Vehicle Ordinance which requires surrender of a taxicab license upon the licensee's call to military service. As long as the licensee complies with the terms of the grant, and does nothing upon which suspension or revocation can be based, he is entitled to possession of his license.

We do not believe, however, that a licensee called to military service may suffer revocation of his license because of failure to operate his taxicab during the period of military service. Section 28-18 of the Municipal Code of Chicago is not applicable in such a case. This section provides:

> "Every taxicab shall be operated regularly to the extent reasonably necessary to meet the public demand for taxicab service. In the event that the service of any taxicab is discontinued excepting on account of strikes, acts of God or causes beyond the control of the licensee, the commissioner may give written notice to the licensee to restore such taxicab to service, and if the same is not so restored

within five days after such notice, the commissioner, in his discretion may recommend to the mayor that the license for such taxicab be revoked and the mayor, in his discretion, may revoke same."

It is our opinion that whenever operation of a taxicab is discontinued because of call to military service of the licensee, there exists a cause beyond the control of the licensee which renders him immune to the notice and subsequent revocation provisions of this section.

II.

AS TO SUSPENSION OF LICENSE.

There exists no authority to suspend a taxicab license merely because the owner enters military service. Section 28-12, however, of the Muncipal Code of Chicago states:

> "If any public passenger vehicle shall become unsafe for the transportation of passengers or shall become unclean or sightly in appearance or if the owner is not insured as required, the license shall be suspended by the commissioner until the vehicle and all its appurtenances shall be put in fit condition for public use to the satisfaction of the commissioner and the owner shall have complied with the law relating to insurance * * *."

If a licensee enters military service and fails to keep his vehicle insured as required by Section 28-4 of the Code, it is the duty of the Public Vehicle License Commissioner to suspend his license.

III.

AS TO OPERATION OF TAXICAB WHILE LICENSEE IS IN ACTIVE MILITARY SERVICE.

Taxicab licenses issued under the Supplemental Taxicab Ordinance of February 6, 1948 are purely personal privileges of the licensee for the annual period for which they are issued. The owner must personally operate his vehicle, but he may designate any licensed driver to operate it during that part of each day when he himself does not operate it. These licenses are not subject to assignment, lease or other transfer, except to permit replacement of a taxicab for that licensed. (Sec. 2, Chap. 196.1A, Municipal Code of Chicago.)

The requirement of personal operation by the licensee precludes operation by a designated driver during absence of the licensee. Operation by the owner's designated driver during such period of absence would obviously be a transfer of the license itself, which is prohibited by ordinance. These personal licenses cannot be used by anyone other than the licensee, and a taxicab cannot be operated by a designated driver during the absence of the licensee.

IV.

AS TO REISSUANCE OF LICENSE UPON RETURN OF LICENSEE.

Though a license may be voluntarily surrendered, there is no provision in the ordinance which guarantees automatic reissuance to the licensee upon his return from active military service. Section 1 of the Supplemental Taxicab Ordinance specifically states that there are no contractual or property rights whatsoever attached to these licenses.

V.

AS TO THE STATUS OF LICENSEES UNDER CONTEMPLATED ORDINANCE.

The Taxicab Contract Ordinance (Sec. 196A, Municipal Code of Chicago) expires by its own terms December 31, 1950. Although it is our

understanding that the City Council is studying the problem in contemplation of passage of a new ordinance, there is no way that we can anticipate the status of licensees under the Supplemental Taxicab Ordinance of 1948. They are, of course, eligible to be provided for in such a new ordinance, but there is nothing requiring such inclusion. The City Council has the power to decrease their number, and the licensee, which are issued for one year, contain no property or contractual rights which require recognition in any ordinance contemplated by the City Council.

LICENSE REVOCATION

(No. 11340—Office of the Mayor—P. H. C.—October 10, 1950.)

We have your memorandum of July 28, 1950 in which you request our opinion on the Public Vehicle License Commissioner's recommendations to the Mayor for revocation of city driver's licenses No. 5547 and No. 6364 and the Commissioner's recommendation to the Mayor that public passenger vehicle license No. 7607 be revoked. It is our opinion that the city driver's licenses may be revoked and that the public passenger vehicle license may be revoked.

The memorandum from the Chief of Traffic to the Commissioner of Police attached to the recommendation for revocation of city driver's license No. 6364, supplies the information that the licensee has violated Section 501 of the Criminal Code (Sec. 501, Chap. 38, Smith Hurd Ill. Rev. Stats. 1949). A similar memorandum attached to the recommendation for revocation of city driver's license No. 5547, shows that the licensee has been convicted of violating Section 439 of the Criminal Code (Sec. 439, Chap. 38, Smith Hurd Ill. Rev. Stats. 1949).

Revocation of these licenses may be based on Section 28-45 of the Municipal Code of Chicago which provides:

> "Any driver's license may be suspended by the commissioner for a period not to exceed thirty days or revoked at any time by the mayor, upon the recommendation of the commissioner, for the violation of any state law or city ordinance."

The owner of public passenger vehicle license No. 7607 is required to insure his vehicle for the sum of $5,000 for injuries to or death of any person and for the sum of $10,000 for any one accident and for the sum of $2,000 for property damage. (Section 28-4 Municipal Code of Chicago.) Failure to comply with these insurance requirements subjects the owner to suspension and revocation of his license. Section 28-12 of the code states:

> "If any public passenger vehicle shall become unsafe for the transportation of passengers or shall become unclean or unsightly in appearance or if the owner is not insured as required, the license shall be suspended by the commissioner until the vehicle and all its appurtenances shall be put in fit condition for public use to the satisfaction of the commissioner and the owner shall have complied with the law relating to insurance * * *."

The code also provides in Section 28-4:

> "* * * Whenever any public passenger vehicle is not insured in accordance with the provisions of this section the commissioner shall recommend to the mayor the revocation of the license for said vehicle and the mayor shall revoke the same. (Revised. Coun. J. 12-28-45, p. 4689; amend. 2-6-48, p. 1918; 3-1-48, p. 1983.)".

Whenever a licensee fails to comply with the insurance provisions of the code, the Public Vehicle License Commissioner must act in accordance with both of these provisions. Section 28-12 requires him to suspend a license if the owner is not insured as required. If, however, after a reasonable time following suspension the owner has not covered his vehicle with the requisite insurance, the Public Vehicle License Commissioner must invoke the provision of Section 28-4 and recommend to the Mayor the revocation of the license and the Mayor shall revoke the same.

The Public Vehicle License Commissioner informs us that he issued a suspension of public passenger vehicle license No. 7607 on July 14, 1950 and that this suspension was served on the licensee on July 15, 1950. To date the licensee has not acquired insurance, and it is our opinion that a reasonable time has elapsed since the license was suspended for failure to comply with the insurance provisions of the law regulating operation of public passenger vehicles on the streets of the City of Chicago, which justifies revocation of public passenger vehicle license No. 7607.

O'HARE FIELD TAXICAB SERVICE

(No. 11380—Alderman, 47th Ward—J. F. G.—April 19, 1951.)

We have your letter of April 6, 1951, requesting us to advise you what action the city council may take to secure taxicab service at reasonable rates of fare to and from O'Hare Field, Chicago International Airport.

The City does not have police power to regulate the operation of taxicabs outside the city limits. Provision for any transportation service between O'Hare Field and the City of Chicago would have to be made by contract or franchise ordinance. If and when the city council or its local transportation committee decides to consider a contract or franchise ordinance to govern taxicab operations within the city, the subject matter of affording taxicab service at fixed rates of fare between O'Hare Field and the city limits may be incorporated as one of the obligations of the licenses.

USE OF "BUS STOP" ZONES

(No. 11386—Commissioner of Police—C. P. H.—May 9, 1951.)

We have your letter of February 26, 1951, together with a memorandum from Michael J. Ahern, chief of traffic, requesting an opinion on whether taxicabs that stop in zones designated as "Bus Stops" or "Bus Loading Zones" for the purpose of loading or unloading passengers are in violation of Section 27-140 of the Revised Traffic Code for the City of Chicago, which Code was passed by the City Council of the City of Chicago on December 22, 1950, and has not yet been integrated into the Municipal Code of Chicago.

Section 27-140 provides as follows:

> "Restricted use of bus and taxicab stands. No person shall stop, stand, or park a vehicle other than a bus in a bus stop, bus stand or bus terminal, or other than a taxicab in a taxicab stand, when any

such stop or stand has been officially designated by appropriate signs, except that the driver of a passenger vehicle may temporarily stop therein for the purpose of and while actually engaged in loading or unloading passengers when such stopping does not interfere with any bus or taxicab waiting to enter or about to enter such zone."

It is obvious that the intent of section 27-140 is to grant to buses in bus stops, bus stands or bus terminals the exclusive right to stop, stand or park therein for their business purposes. This is in line with privileges granted to loading zones, etc., but since said bus stops etc. are part of the public highways the section allows the driver of a passenger vehicle to temporarily stop therein for the purpose of and while actually engaged in loading or unloading passengers when such stopping does not interfere with any bus waiting to enter or about to enter such zone. A taxicab is a passenger vehicle and unless its stopping in a bus stop etc. while actually engaged in loading or unloading passengers interferes with any bus waiting to enter or about to enter such zone it is not in violation of section 27-140.

JITNEY CAB OPERATIONS

(No. 11450—City Council—G. M. C.—J. F. G.—November 23, 1951.)

We have your request for an opinion as to the legality of certain amendments offered by Alderman Harvey to revised drafts of public passenger vehicle ordinances submitted for the consideration of your committee on October 20, 1951.

The taxicab business in Chicago is now governed by ordinances which are uniform in their application to all licensed taxicabs and to all persons requiring taxicab service in the city. The proposed revision of the ordinances does not affect the non-discriminatory character of the regulation of that business. The same traffic regulations, vehicle safety measures, security for payment of loss or damage to persons and property and rates of fare for transportation of passengers are provided to apply to all licensed taxicabs in Chicago.

The obvious purpose of Alderman Harvey's amendments is to legalize what is commonly known as "jitney cab" operations on the south side of the city. The special privileges inherent in "jitney cab" operations which distinguish them from other taxicab operations regulated by general ordinances are (1) that the jitneys are permitted to pick up and discharge passengers indiscriminately en-route while the cab is occupied by fares, so long as there is room for additional passengers, and (2) each passenger is charged a fare fixed by the jitney cab operator, not measured by a taximeter which is required equipment for taxicabs to conform with the rates of fare fixed by general ordinance.

To accomplish the desired purpose of permitting jitney cab operations, it is proposed to create a special class of public passenger vehicle to be known as a "zone operated taxicab" for hire at a prescribed uniform fare for each passenger. It is also proposed that the Public Vehicle License Commissioner shall establish one or more zones in the city, each comprising an area of not more than six square miles nor less than four square miles, where the population exceeds an average of 50,000 persons per square mile and a regularly licensed taxicab may be used for the transportation of any number of persons not to exceed five at one time. A third provision would exempt regularly licensed taxicabs when operated as a "zone taxicab" from the general provision requiring the driver to accept for transportation not more than five persons who apply for transportation as a group. A fourth provision would fix the zone fare at 15 cents per person.

By the foregoing provisions any taxicab displays a sign or legend bearing the word "zone" will be permitted to operate as a jitney, accepting and discharging passengers indiscriminately while en-route in the zone established by the Public Vehicle License Commissioner at a rate of fare of 15 cents per passenger. There are several legal obstacles to the Harvey amendments. There is considerable doubt whether the council may delegate to an administrative officer the power to define boundaries of an area for the purpose of fixing the compensation to be charged by public carriers for transportation of passengers within such area. That is a legislative power committed to the city council by the Revised Cities and Villages Act, Section 23-51. To authorize the Public Vehicle License Commissioner to establish a zone comprising an area of one mile by six, or two miles by three, or one mile by four, or two miles by two, or a zone varying in length and width containing from four to six square miles, as he sees fit, for jitney operations is, in our opinion, a delegation of the legislative power of the City Council. "If the law leaves to a ministeral officer the definition of the thing to which it shall apply, such definition not being commonly known, it is invalid as an unwarranted and void delegation of legislative power to an administrative officer." *People ex rel Duffy* v. *Hurley*, 402 Ill. 562, 567 (1949).

Another serious question arises as to the classification of a zone or zones for jitney operations depending upon the density of population in the defined zone. Population is customarily a proper basis for classification for many purposes. However, density of population as a controlling factor for a difference in the application of a governing rule must bear a reasonable relation to the purpose of object of the special rule under consideration, *Bessette* v. *People*, 193 Ill. 334, 347 (1901).

The segregation of an area or zone by authority of an ordinance to legalize jitney cab operations only in those parts of the city where the density of population is greatest does not seem to bear any reasonable relation to the purpose or object of regulating the taxicab business. In *Yellow Cab Co.* v. *City of Chicago*, 396 Ill. 388, the court said at p. 398, "It is well known and this court takes judicial notice of the facts that there are numerous congested areas in the city of Chicago and that the very nature of the taxicab business contributes to this traffic congestion." A zone or area where the population is sparse would bear a more direct relation to the necessity of permitting group riding in public passenger vehicles with limited seating capacity than would a zone where the population is dense and where the local transportation authorities may be compelled to render adequate service.

However there is, in our opinion, one legally insurmountable bar to the Harvey amendments. In December 1948, the Illinois Commerce Commission, after hearings, found that the jitney cabs were being operated in the same manner as common carriers subject to the jurisdiction of the Commission and ordered the respondent operators to refrain from operating motor vehicles as public utilities on South Parkway without authority from the Commission. The basis for that order of the Commission was the case of *Austin Brothers Transfer Co.* v. *Bloom*, 316 Ill. 435 (1925), which held that one who operates a taxicab for hire indiscriminately accepting and discharging passengers at all points along the route of its operation in competition with and at the same price charged by motor bus lines is operating a public utility and must comply with the Public Utilities Act as to obtaining a certificate of convenience and necessity.

The corporate authorities of the city have been stripped of the power to regulate the operation of public passenger vehicles as public utilities or to fix rates of fare for such operations by the Illinois Public Utilities Act. Those matters are within the exclusive control of the Illinois Commerce Commission (*City of Chicago* v. *O'Connel*, 278 Ill. 591 (1917); *Chicago Rys. Co.* v. *City of Chicago*, 292 Ill. 190 (1920); *The People* v. *City of Chicago*, 349 Ill. 304, 342 (1932); *City of Geneseo* v. *Ill. Northern Utilities Co.* 378 Ill. 506, 520-521 (1941).

PARKING IN METERED AREAS

(No. 11456—Commissioner of Police—L. A. W.—December 5, 1951.)

On November 26, 1951, you requested an opinion as to whether taxicabs can park in metered areas upon deposit of a coin.

Section 27-139 (d) of the Municipal Code of Chicago provides as follows:

> "The driver of any taxicab shall not stop, stand, or park such vehicle upon any business street, or in any block of any other street where a taxicab is already parked, at any place other than in a taxicab stand, except for the expeditious loading or unloading of passengers or when necessary to avoid conflict with other traffic or in compliance with the directions of a police officer or traffic sign or signal."

Section 27-1 of the Municipal Code defines business streets as follows:

> "The length of any street between street intersections, when more than 50% of the entire frontage at ground level of said street is in use for retail or wholesale business, by hotels, banks, or office buildings, by railway stations, or by public buildings excepting schools."

From the foregoing it is our opinion that taxicabs are not permitted to park in metered areas upon deposit of coin.

OUT OF TOWN COMPANIES

(No. 11460—Public Vehicle License Commissioner—L. A. W.—December 18, 1951.)

We have your request for an opinion on the legality of the Evanston Cab operations in the city of Chicago. It appears from the letter in your files from McMahon & Plunkett, attorneys for the cab company, that the company receives telephone calls in Evanston for transportation within the city of Chicago. The customers are charged the mileage rate from Evanston to the place of pick-up in addition to the regular fare to the customer's destination. The drivers are instructed not to solicit any calls for transportation while they are within the city limis of Chicago. There are several cases now pending in our courts involving arrests of Evanston taxicab drivers for violations of our ordinance.

Chapter 28-2 of the existing Municipal Code of Chicago provides:

> "It shall be unlawful for the owner of a public passenger vehicle to operate the same, or permit the same to be operated, or for any person to drive a public passenger vehicle on the public ways of the city unless such public passenger vehicle is licensed as hereinafter provided."

Chapter 28-2 of the proposed ordinance provides:

> "It is unlawful for any person other than a metropolitan transit authority or public utility to operate any vehicle, or for any such person who is the owner of any vehicle to permit to be operated, on any public way for the transportation of passengers for hire from place to place within the corporate limits of the city, unless it is licensed as a public passenger vehicle."

Chapter 28-50 of the existing Municipal Code of Chicago provides:

"Any person violating any of the provisions of this chapter shall be subject to a penalty of not less than five dollars nor more than one hundred dollars for each offense, and each day that such violation shall continue shall be deemed a separate and distinct offense."

Section 28-1-15 of the proposed ordinance provides:

"If any chauffeur violates any provision of Chapter 28 of this code or of this chapter for which a penalty is not otherwise provided, he shall be fined not less than $5.00 nor more than $100.00 for each offense and each day that such violation shall continue shall be deemed a separate and distinct offense."

It is the company's contention that neither the present nor the proposed ordinance intended to prohibit them from accepting telephone calls in Evanston for taxicab transportation within the city of Chicago. Mr. McMahon takes the position that his clients are exempt from the provisions of the above public passenger vehicle ordinances since the contract for the cabs are consummated in Evanston.

It is our position that the calls received in Evanston for taxicab transportation in Chicago are contracts for services to be performed upon the city streets of Chicago. The fact that the additional fare from Evanston to Chicago is added to the customer's fare is irrelevant since it is clear that the passenger's intent is to pay for transportation from one point in Chicago to another no matter how the compensaion is calculated.

Since the contract contemplates performance within the city limits, it can only contemplate performance in accordance with our ordinances. Our ordinances are designed to regulate the operation of vehicles used in transporting passengers for hire upon our city streets, regardless of where the contract is made. It is our opinion that when the Evanston Cabs operate on the streets of Chicago they fall within this provision.

We, therefore, believe that the present ordinance, as well as the proposed ordinances, prohibit the Evanston Cab companies from accepting passengers for transportattion within the city limits.

PREVIOUS ARMED ROBBERY CONVICTION

(No. 11470—Public Vehicle License Commissioner—L. A. W.—January 23, 1952.)

We have your letter of January 4, 1952, together with the application for a public vehicle driver's license. You ask if the certified copy of transcript of order entered in Case No. 37275, in the Circuit Court of Lake County indicates that the applicant is ineligible under the provisions of the Municipal Code.

An examination of a certified copy of the order entered in the Circuit Court of Lake County indicates that the applicant was found guilty in Cause No. 37275 as charged in the indictment. The caption and certification of the clerk indicate that the indictment charged the applicant with, among other offenses, robbery with a gun. This conviction, which occurred more than eight years ago, would be no bar to the issuance of a license for the other offenses listed in the order, *except robbery with a gun.* Under the provisions of Section 28.1-3 of the Municipal Code of Chicago it is clearly stated that

"* * * No such license shall be issued to any person at any time after conviction of a crime involving the use of a deadly weapon * * *"

While we have not been furnished with a certified copy of the indictment, it appears that the conviction of the crime of robbery "in the manner and form as charged in the indictment herein," related to robbery with a gun, as indicated in the caption as aforesaid, and hence made the applicant ineligible for a public vehicle driver's license. We are therefore of the opinion that, in the absence of further information, you may not issue the license.

LICENSE IN PARTNERSHIP NAME

(No. 11488—Public Vehicle License Commissioner—G. M. C.—February 27, 1952.)

We are in receipt of your letter of February 14, 1952 requesting our opinion as to whether it would be possible to issue 1952 taxicab licenses to a partnership. As we interpret your inquiry, together with the attached letter from Thomas J. Duffy, Esq., you are concerned with a situation in which an individual who held a 1951 taxicab license desires to form a partnership and have the 1952 license issued to the partnership.

Under the present ordinance licenses may only be renewed, and this limitation effectively prevents the issuance of a license to any person other than the 1951 licensee. Section 28-22.1 of the Municipal Code of Chicago provides that not more than 3,761 taxicab licenses, the number currently outstanding, may be issued without supplemental authorization by the Council after public hearings by the Public Vehicle License Commissioner. This effectively forecloses the treating of the application for issuance of a license to a partnership as an application for a new license.

The only ordinance provision for the issuance of 1952 licenses is Section 28-8 which provides that unrevoked licenses for 1951 may be *"renewed"* from year to year. In *Appeal of Stavolo*, 81 Conn. 454, 71 Atl. 549, the court held, pursuant to a statute which provided that liquor licenses in certain areas should not be issued except in renewal of existing licenses, that the issuance of a license to a different person for the same establishment was not a renewal within the meaning of the section. (cf. *Hartford Fire Insurance Company* v. *Walsh*, 54 Ill. 164; *Dyer* v. *Bray*, 208 N. C. 248, 180 S. E. 83). Under these cases the issuance of a 1952 license to any one other than the 1951 licensee would not be a renewal, the only type of license authorized at the present time.

Undoubtedly, some question has arisen as to whether the fact that the 1951 licensee became a member of the partnership would preserve sufficient identity of interest to avoid the foregoing principle. Such a contention is untenable in view of the provisions of the ordinances and the statutes and decisions of the State of Illinois.

A taxicab license under Chapter 28 is a personal privilege. Section 28-1 of the Municipal Code defines cabman as the "proprietor of one or more public passenger vehicles". Proprietor is defined as "one who has the legal right or exclusive title to anything, whether in possession or not; an owner," (*Webster's New International Dictionary*, 2nd Ed.). Moreover, Section 28-9 of the Municipal Code prohibits assignment or transfer of public passenger vehicle licenses, except in the event of a cabman's induction into the armed forces or his death. From this it can clearly be seen that the licensee must have the exclusive property right to the public passenger vehicle or vehicles licensed. Moreover, Section 28-9 further provides:

"It is unlawful for any cabman to lease or loan a licensed public passenger vehicle for operation by any person for transportation of passengers for hire within the city of Chicago. No person other than a chauffeur who is either the cabman or one hired by the cabman to drive such vehicle as his agent or employee, in the manner prescribed by the cabman, shall operate such vehicle for the transportation of passengers for hire within the city."

This section clearly indicates an intention that the cabman licensee shall have exclusive and complete control over the operation of his business. Since a renewal must be to the same person, it seems clear that there can be no change in the control over the operation of the licensed taxicab or in the property rights in the licensed vehicle in a valid renewal.

Under the laws of the State of Illinois a transfer to a partnership would result in a change in the control of the licensed vehicle. Section 9(1) of the Partnership Act (Ill. Rev. Stat., chap. 106½, Sec. 9) provides that every partner is the agent of the partnership for the purpose of its business, and that all of his acts bind the partnership. Section 18(e) (Ill. Rev. Stat. chap. 106½, Sec. 18) provides that all partners shall have equal right in the management and conduct of the partnership business.

Schumann-Heink v. *Folsom*, 328 Ill. 321, 325 (1927), indicates that control of the business by all participants is one of the distinguishing characteristics of a partnership. Under the 1951 license to an individual, such individual would have entire control of the taxicab licensed. The creation of a valid partnership automatically vests a co-extensive control in each of the partners. This would be sufficient to defeat any contention that a transfer from an individual to a partnership would be a renewal within the meaning of Section 28-8 of the Municipal Code.

Moreover, there is also a change in the property interest implicit in the transfer of property previously privately owned to a partnership. Sections 8(1) and 8(2) of the Partnership Act (Ill. Rev. Stat. chap 106½, Sec. 8) provide that all property brought into the partnership or subsequently acquired is partnership property as distinguished from individual property and Section 8 (a-c) of that Act clearly recognizes that partnership property is separate and distinct from individual property [See: *Cunningham* v. *Cunningham*, 303 Ill. 41; *People* v. *Zangain*, 301 Ill. 299, 301].

It seems clear that the property interest in the public passenger vehicle passes upon the formation of a partnership to a separate and distinct legal entity from each of the partners as individuals. This also negates any contention that the property interest is sufficiently unchanged to make the transaction above referred to a *"renewal."*

It is therefore our opinion that an individual holding a 1951 taxicab license may not apply for its renewal in 1952, or any subsequent year, in the name of a partnership of which he is a member. Such an application would amount to a transfer or assignment within the meaning of Section 28-9, which is permissible only if the cabman is recalled into the armed forces or in the event of his death. It cannot be a renewal under the provisions of Section 28-8.

WORKMEN'S COMPENSATION INSURANCE

(No. 11496—Public Vehicle License Commissioner—L. A. W.—March 7, 1952.)

We have your letter of February 14, 1952, together with the copy of a letter from Thomas J. Duffy, attorney for the American-United Cab

Association, requesting an opinion on workmen's compensation insurance provided under the new ordinance for cabmen.

We have examined Mr. Duffy's interpretation of Section 12 of Chapter 28 of the Municipal Code of Chicago, as amended, and are inclined to agree with him. The first paragraph of the above ordinance clearly states as follows:

> "Every cabman shall carry public liability and property damage insuarance and workmen's compensation insurance for his employees with solvent and responsible insurers approved by the commissioner, authorized to transact such insurance business in the State of Illinois, and qualified to assume the risk for the amounts hereinafter set forth under the laws of Illinois, to secure payment of any loss or damage resulting from any occurrence arising out of or caused by the operation or use of any of the cabman's public passenger vehicles."

Chapter 48, Section 141 of the Illinois Revised Statutes defines the term "employer" so far as it is relevant to this problem as follows:

> "Every person, firm, public or private corporation, including hospitals, public service, eleemosynary, religious or charitable corporations or assocations who has any person in service or under any contract for hire, express or implied, oral or written, * * *"

Since the cabman himself can in no way be considered an employee, we are of the opinion that a cabman who is self-employed, operating his own cab and does not employ anyone else to operate it does not have to carry workmen's compensation insurance under the public passenger vehicle ordinance.

SALE OF LICENSE BY ESTATE

(No. 11497—Public Vehicle License Commissioner—L. A. W.—March 11, 1952.)

We have your request dated February 25, 1952, for an opinion regarding the letter from Mrs. Kelly, attached thereto, reciting that she is the wife of Donald W. Kelly who died in service on June 28, 1951. Mr. Kelly held taxicab license No. 5890, which license has not been revoked. Mrs. Kelly inquires if there is some way in which the license could be maintained and sold by her as executrix of Mr. Kelly's estate.

In referring the matter to us, you requested an opinion regarding the application of Section 28-9 of the Municipal Code of Chicago to this situation. Section 28-9 provides that taxicab licenses shall be assignable only in the event of the cabman's death or induction or recall into the Armed Forces of the United States for active duty. These provisions were added to the ordinance on January 30, 1952, and the entire present ordinance was passed subsequent to the issuance of 1951 licenses. 1951 licence No. 5890, under the ordinances in effect at the time it was issued and during the year 1951, was not assignable or transferable. Section 28-9 has reference to licenses issued for the calendar year 1952 and subsequent years.

There is no provision for the issue of a license for the year 1952 except in renewal of a 1951 license. The death of the licensee in 1951 terminated license No. 5890 because it was not subject to voluntary assignment or transfer by operation of law in case of death.

Although we are very sympathetic to the request of Mrs. Kelly, we are sorry to say that we are of the opinion that no method exists under which Mrs. Kelly's request could be legally granted.

PARMELEE INSURANCE

(No. 11498—Public Vehicle License Commissioner—L. A. W.—March 12, 1952.)

In response to your oral request for an opinion concerning the liability insurance policy submitted by Parmelee Transportation Company, together with their letter of January 9th, we have examined this policy and find that it is the standard form used for liability insurance. This form of policy has been accepted by the State of Illinois under the Illinois Safety Responsibility Law, a copy of which is enclosed for your convenience.

We note, however, that on the face of the policy bodily injury liability is limited to $5,000 for each person and $10,000 for each accident. Section 28-12 of the Municipal Code of Chicago requires a limit of liability of not less than $50,000 for each person and $100,000 for each accident. Reference to the Parmelee Transportation Company's letter of January 9th indicates that they are obtaining a renewal certificate for insurance with the Zurich General Accident & Liability Insurance Co. in the execess amount of $45,000 per person and $85,000 per accident. If this policy is satisfactory, the coverage for bodily injury to one person will be adequate. We note, however, that the face of the policy submitted shows a $10,000 limit on each accident while the typwritten rider attached thereto shows a limit of $15,000 for each accident. If this discrepancy is corrected to show $15,000 on the face of the policy and the Zurich policy is satisfactory, the requisite coverage for any one person will be present. The limit of $5,000 for property damage liability complies with the ordinance requirements.

Section 28-12 of the Municipal Code of Chicago also provides:

> "No insurance or bond shall be subject to cancellation except upon thirty days' previous notice to the commissioner."

There is no provision for this notice in the policy submitted.

You will note that paragraph (d) of the section of the policy captioned "Exclusions" provides that no payments shall be under any workmen's compensation law; whereas, Section 28-12 requires the carrying of workmen's compensation insurance.

We therefore recommend:

1. That you do not accept this insurance until the excess insurance policy from Zurich has been received and examined by you.

2. That you require a correction to be made on the face of the policy to show a limit of $15,000 for bodily injury for each accident.

3. That you require an endorsement on the policy providing that the insurance company agrees not to cancel the policy without thirty days' previous notice to the Public Vehicle License Commissioner of the City of Chicago.

4. That you require the Parmelee Transportation Company to file a certificate of coverage under workmen's compensation as well as the personal injury and property damage policies herein discussed.

We enclose herewith the speciman policy and the letter of January 9th from the Parmelee Transportation Company.

SPEED INDICATOR LIGHTS

(No. 11527—Public Vehicle License Commissioner—L. A. W.—April 30, 1952.)

We acknowledge your request for an opinion as to the legality of using the speed indicating device on taxicabs described in the letter from Mr. Andrew R. Johnson to you.

It appears that Mr. Johnson devised a mechanical switch which he desires to attach to the transmission of taxicabs causing different color electric lights exposed on the front and rear of the taxicab to go on and off depending on the speed at which the automobile is traveling.

The only limitation in connection with this problem under Chapter 28 of the Municipal Code of Chicago is Section 28-20. This section deals with livery vehicles and provides as follows:

> "* * * No light fixtures or lights shall be attached to or exposed so as to be visible outside of any livery vehicle, except such as are required by the law of the State of Illinois regulating traffic by motor vehicles and one rear red light in addition to those required by said law. No name, number or advertisement of any kind, excepting official license emblems or plates, shall be painted or carried so as to be visible outside of any livery vehicle."

An examination of the Motor Vehicle Law (Ill. Rev. Stats. 1951, Chap. 95½, Par. 210) provides as follows:

> "§ 113. *Special restrictions on lamps.*
>
> (a) No person shall drive or move any vehicle or equipment upon any highway with any lamp or device thereon displaying a red light visible from directly in front thereof.
>
> (b) Flashing lights are prohibited on motor vehicles, except as a means for indicating a right or left turn or stop."

From the foregoing it is clear that the Motor Vehicle Act clearly prohibits the installation of lights on motor vehicles as proposed by Mr. Johnson.

"ROBERTS CAB ASSOCIATION"

(No. 11551—Public Vehicle License Commissioner—J. F. G.—June 20, 1952.)

Reference is made to your letter of May 7, 1952, enclosing letter from Mr. Charles R. Barrett, Attorney at Law, representing Herman Roberts, who is said to operate Roberts Cab Co., Parks, Inc. and Royal Cab Company and desires to place under the respective cab company's name the wording "Roberts Cab Association."

An association or corporation within the meaning of Section 28-23 of the Municipal Code of Chicago is a trade organization having officers or an attorney in fact elected or appointed by its members with power to bind all the members of the association or the corporation, as the case may be. It was not designed to authorize the addition of the name of a stockholder, holding corporation, or operating association or corporation with the name of the licensee of the taxicab.

If Section 28-23 in its present form does not clearly manifest that intent, it should be amended to limit the right of a licensee to add to his name the name of a trade association whose membership is limited to natural persons having one or more taxicab licenses.

In our opinion the corporations named by Mr. Barrett as licensees may not add the name and wording of "Roberts Cab Association" to the taxicabs operated by each of them. Mr. Herman Roberts has no license to operate taxicabs, and the fact that he owns or controls the stock of several corporations operating taxicabs does not permit him to nominate the companies which he operates as an association within the meaning of Section 28-23.

TRANSFER OF LICENSE

(No. 11552—Public Vehicle License Commissioner—G. M. C.—June 24, 1952.)

In compliance with your oral request of June 13, 1952, for an opinion regarding the proposed transfer of taxicab license No. 2926 by Rose Davis to Transit Cab Co., we have examined the documents submitted in connection therewith. Two problems are proposed: (1) May a license be transferred by affidavit pursuant to Section 324 of the Probate Act of the State of Illinois under the provisions of Section 28-9 of the Municipal Code of Chicago? (2) Is the Transit Cab Co. a proper assignee?

Section 28-9 of the Municipal Code provides that a taxicab license may be assigned upon the death of the holder thereof and further provides the manner of such assignment as follows:

> "In case of death the assignment shall be made by the legal representatives of his estate."

The question presented by this transfer is whether or not the person entitled to make the affidavit required by Section 324 is the "legal representative" of the deceased cabman's estate within the meaning of Section 28-9. It is clear that the heirs of a decedent may be the legal representatives of the decedent's estate. Section 247 of the Probate Act provides that where a person dies intestate letters of administration shall be issued unless court is satisfied that no taxes are due by reason of death, all claims are paid, all heirs of legal age and residents of this State and debts to settle the estate without administration. Under these circumstances, the courts have repeatedly held that administration is not necessary in the State of Illinois and the equitable interest in the estate vests immediately in the heir or heirs at law (*People* v. *Orendorff*, 262 Ill. 246; *People* v. *Strom's Estate*, 363 Ill. 241; *Robertson* v. *Yager*, 327 Ill. 346).

It has also been held that where administration is unnecessary, the heirs may maintain actions at law in their own name to recover the decedent's property (*Ludewick* v. *Ludewick*, 279 Ill. 26; *Moore* v. *Brandenburg*, 248 Ill. 232; *Wieland* v. *Wieland*, 297 Ill. App. 239).

Examining the language of Section 324 of the Probate Act (Ill. Rev. Stat. Chap. 3, Sec. 478), it is manifest that Section 324 is intended to provide another circumstance in which administration is unnecessary and in which the heirs therein provided become the personal representatives of the decedent's estate, since under that section they perform the same function. This section provides:

> "Upon receiving an affidavit that a resident of this state died leaving personal estate of not exceeding one thousand dollars in value, that no letters are then outstanding on the estate in this state, that no petition for letters on the estate is pending in this state, that all funeral expenses of the decedent have been paid, that thirty days have elapsed since the death of the decedent, and that the affiant has knowledge of the facts, any person or corporation indebted to or holding personal estate of the decedent may pay the indebtedness or deliver the personal estate to the following persons, respectively: (a) when the affidavit also states that a surviving spouse's or child's award is allowable under this Act, to the surviving spouse or child;"

Further provisions of the act authorize issuance or transfer of stocks, bonds or personally by any corporation having responsibility for such issuance or transfer. Examination of the affidavit of Mrs. Davis indicates that it fully meets the requirements of the foregoing provision, it being in fact prepared on Form 200 of the Probate Court of Cook County, which is used for that purpose. It seems clear, therefore, that Mrs. Davis is the legal representative of the estate of Mr. Davis within the meaning of Section 28-9 of the ordinance and entitled to make the assignment therein provided.

It further seems clear that such an assignment would release the public vehicle license commissioner from all further liability, and no one could afterwards obtain letters of administration and vitiate the assignment.

Section 324 of the Probate Act further provides:

> "Upon the payment, delivery, transfer or issuance pursuant to the affidavit, the person or corporation is released to the same extent as if the payment, delivery, transfer or issuance had been made to the legally qualified executor or administrator of the decedent."

Moreover, in *People* v. *Abbott*, 105 Ill. 588, it was held that where a personal estate was divided among the heirs of a decedent pursuant to agreement, no action could be brought by the administrator, particularly where the heirs had received actual possession of the property. We therefore conclude that the assignment is proper.

The remaining question is whether or not Transit Cab Co. is qualified as a licensee under Section 38-5 and 28-6. In our letter to you of December 18, 1951, concerning the assignment of license No. 3451 by Albert Weiner we held that a corporation could be a licensee under the provisions of the taxicab ordinance then in effect.

For the reasons therein stated we believe that there is no difference between that ordinance and the ordinance presently in force. In that opinion we further set forth the questions which determine the qualifications from a legal standpoint of the corporate licensee. Applying those questions to the present case it appears that Transit Cab Co. has complied with all of the requirements of the Illinois Business Corporation Act, and is therefore a recognized corporate entity authorized to do business in the State of Illinois. It further appears that its corporate purpose as set forth in Article IV of its articles of incorporation is adequate to authorize it to apply for the issuance of such license. The attached resolutions are valid evidence that Alfred W. Israelstam is the president of Transit Cab Co. and is authorized to apply for the transfer of this license, signing all necessary documents and furnishing all requisite information to your office therefor (Ill. Rev. Stat. Chap. 32, Sec. 157. 43).

In examining the papers submitted, however, we find the following defects and suggest that your approval of this transfer be conditioned upon their correction. No evidence of actual receipt of $1,000.00 in payment for the issuance of shares by the corporation is included. This is necessary for the corporation to transact business in Illinois under the Illinois Business Corporations Act (Ill. Rev. Stat. Chap. 32, Section 157.50). The assignment from Mrs. Davis is not properly signed by the assignee and should be executed on behalf of the corporation by Alfred W. Israelstam and attested along with the affixing of the corporate seal by the secretary, Paloma Tallitsch. When these defects are corrected, we see nothing from the corporate standpoint which would prohibit your approval of this transfer, provided that the corporation meets all requirements as to financial responsibility and insurance.

ASSIGNMENT OF LICENSE

(No. 11561—Public Vehicle License Commissioner—L. A. W.—July 10, 1952.)

We have your request of July 7, 1952, for an opinion regarding the transfer of a taxicab license from Robert T. Barnes to Michael Cab Co., an Illinois corporation. This request is made pursuant to Section 28-9 of the Municipal Code of Chicago which provides that a taxicab may be assigned when the licensee is inducted or recalled into the armed forces.

We have examined the documents submitted with your request and find that Robert T. Barnes operated a taxicab business in partnership with Oliver G. Anderson during the year 1951 under license No. 5661. This license was renewed in 1952.

A document in your file reveals that Robert T. Barnes was recalled by the United States Army on November 9, 1951. The application for the transfer of this license is dated June 1, 1952.

Section 28-9 of the Municipal Code of Chicago as amended January 30, 1952, provides as follows:

> "No public passenger vehicle license shall be subject to voluntary assignment or transfer by operation of law, execept in the event of the cabman's induction or recall into the armed forces of the United States for active duty or in the event of the cabman's death."

The limited assignment clause became effective in February 1952. During the year 1951, and thereafter until February, 1952, this license and the renewal thereof were not assignable, nor was any interest therein assignable. The 1952 license was issued only in the name of Robert T. Barnes who was then in service in the armed forces of the United States under power of attorney dated February 27, 1952 to Oliver Anderson, his partner under the license issued in 1951. The interest of Anderson was not assigned, nor is it assignable. It is obvious that the purpose of that transaction was to circumvent the provision in Section 28-9 relating to transfer of license because both Barnes and Anderson are not in the armed forces to permit assignment of a partnership license.

In any event, the right of assignment in Section 28-9 does not apply to any licensee inducted or recalled into the armed forces of the United States prior to the effective date of the amendatory ordinance of January 30, 1952.

POSSESSING NARCOTICS

(No. 11562—Public Vehicle License Commissioner—L. A. W.—July 14, 1952.)

We have your request for an opinion, dated June 20, 1952, regarding the renewal of taxicab license No. 5178.

An examination of your file reveals that on December 14, 1951, this licensee was arrested by special agents of the Federal Narcotics Bureau and charged with possessing, selling and concealing narcotics. The case is set for trial in the U. S. District Court, Northern District of Illinois, on October 7, 1952. The police report attached to your letter indicates that at the time of the arrest the licensee had in his possession a large quantity of marijuana.

Section 28-6 of the public passenger vehicle ordinance provides as follows:

> "Upon receipt of an application for a public passenger vehicle license the commissioner shall cause an investigation to be made of the character and reputation of the applicant as a law abiding citizen; the financial ability of the applicant to render safe and comfortable transportation service and to maintain or replace the equipment for such service; the financial responsibility of applicant to maintain insurance for the payment of personal injury, death and property damage claims; and any other pertinent facts which the commissioner may deem relevant to determine the fitness of the applicant to pursue the occupation of a cabman. If the commissioner shall find that the applicant is qualified and that the vehicle for which a license is applied is in safe and proper condition as provided in this chapter, the commissioner shall issue a public passenger vehicle license to the owner of the vehicle for the license period ending on the thirty-first day of December following the date of its issuance, subject to payment of the public passenger vehicle license fee for the current year and approval by the commissioner of the insurance to be furnished as hereinafter provided."

Since the police report indicates that the licensee had in his possession a large quantity of narcotics at the time of his arrest, it is apparent that he would not be a fit and proper person to operate a taxicab. On the basis of the information contained in your report your refusal to renew the taxicab license is proper.

ASSIGNMENT OF LICENSE

(No. 11598—Public Vehicle License Commissioner—L. A. W.—October 17, 1952.)

We have your request of October 14, 1952, for an opinion regarding the transfer of public passenger vehicle license No. 5324 from Joseph Damore to James W. Ronzio. This request is made pursuant to Section 28-9 of the Municipal Code of Chicago which provides that a taxicab license may be assigned when the licensee is inducted or recalled into the armed forces.

We have examined the documents submitted with your request and find that license No. 5324 was renewed by Joseph Damore on February 26, 1952. Your file reveals that on September 30, 1952, this licensee received orders from the Commandant of the Ninth Naval District to report to Great Lakes, Illinois, for a physical examination on October 3, 1952. The record further indicates that the licensee was found physically qualified, and was ordered to report for temporary active duty at the Naval Air Station at Grosse Ile, Michigan on November 1, 1952.

Section 28-9 of the Municipal Code of Chicago as amended January 30, 1952 provides as follows:

> "No public passenger vehicle license shall be subject to voluntary assignment or transfer by operation of law, except in the event of the cabman's induction or recall into the armed forces of the United States for active duty or in the event of the cabman's death."

Under the above provision of the Municipal Code of Chicago this licensee is qualified to assign his public passenger vehicle license because of his recall to active duty into the armed forces of the United States.

USE OF BUMPER SPACE FOR ADVERTISING

(No. 11622—Public Vehicle License Commissioner—L. A. W.—November 26, 1952.)

We have examined a letter directed to you by Mr. William E. Ogilvie of the International Live Stock Exposition. It appears that they desire to advertise their show by placing signs on taxicab bumpers in order to attract a larger attendance.

Section 28-23 of the Municipal Code of Chicago provides:

> "Every taxicab shall have the cabman's name, telephone number and the public passenger vehicle license number painted in plain Gothic letters and figures of three-eighth inch stroke and at least two inches in height in the center of the main panel of the rear doors of said vehicle. In lieu of the cabman's telephone number the name and telephone number of any corporation or association with which the cabman is affiliated may be painted in the same manner, provided such corporation or association shall have assumed equal liability with the cabman for any loss or damage resulting from any occurrance arising out of or caused by the operation or use of any of the cabman's taxicabs and shall carry and furnish to the commissioner public liability and property damage insurance to secure payment of such loss or damage as provided in section 28-12. The public vehicle license number assigned to any taxicab shall be assigned to the same vehicle or to any vehicle substituted therefor upon annual renewal of the license. *No other name, number, or advertisement of any kind, excepting signs required by this chapter official license emblems or plates and a trade emblem, in a manner approved by the commissioner, shall be painted or carried so as to be visible on the outside of any taxicab.*"

In view of the foregoing provision in our Municipal Code you have no choice in the matter.

FAILURE TO PAY DEBTS

(No. 11625—Public Vehicle License Commissioner—L. A. W.—December 12, 1952.)

We have your request for an opinion regarding public vehicle license No. 5708. The letter attached to your request from attorney Harry A. Quinn states that he represents a liquidating trustee of a creditor of this licensee. The attorney further states that this licensee purchased a taxicab from Sky View Taxicabs in 1949. At the time of the purchase the licensee executed a chattel mortgage in the amount of $2,000.00 on this taxicab, and as additional security for the payment of the mortgage he assigned taxicab license No. 5708 issued in his name. As a result of non-payment of this indebtedness a judgment was confessed in the Municipal Court of Chicago on July 30, 1952 against the licensee in the amount of $2,047.49 and costs. This attorney now requests your cooperation in the collection of this indebtedness and asks that you take appropriate action against the licensee in order to compel him to satisfy the judgment.

Section 28-6 of the Municipal Code of Chicago provides as follows:

> "Upon receipt of an application for a public passenger vehicle license the commissioner shall cause an investigation to be made of the character and reputation of the applicant as a law abiding citizen; *The financial ability of the applicant to render safe and comfortable transportation service and to maintain or replace the equipment for such service; the financial responsibility of the applicant to maintain insurance for the payment of personal injury, death and property damage claims;* and any other pertinent facts which the commissioner may deem relevant to determine the fitness of the applicant to pursue the occupation of a cabman. If the commissioner shall find that the applicant is qualified and that the vehicle for which a license is applied for is in safe and proper condition as provided in this chapter, the commissioner shall issue a public passenger vehicle license to the owner of the vehicle for the license period ending on the thirty-first day of December following the date of its issuance, subject to payment of the public passenger vehicle license fee for the current year and approval by the commissioner of the insurance to be furnished as hereinafter provided."

Section 28-13 of the Municipal Code of Chicago provides as follows:

> "All judgments and awards rendered by any court or commission of competent jurisdiction for loss or damage in the operation or use of any public passenger vehicle shall be paid by the cabman within ninety (90) days after they shall become final and not stayed by supersedeas. This obligation is absolute and not contingent upon the collection of any idemnity from insurance."

Section 28-15 of the Municipal Code of Chicago provides in part as follows:

> "If any summons or subpoena issued by a court or commission cannot be served upon the cabman at his last Chicago address recorded in the office of the commissioner within sixty days after such process is delivered to the person authorized to serve it, and the cabman fails to appear in answer to such process for want of service, or if any cabman shall refuse or fail to pay any judgment or award as provided in section 28-13, or shall lease or loan any of his licensed public passenger vehicles for operation by any person for hire or shall be convicted of a felony or any criminal offense involving moral turpitude, the mayor shall revoke all public vehicle licenses held by him."

From the sections of the ordinance recited above it is apparent that this license cannot be suspended for failure to satisfy judgment obtained for breach of contract of purchase of a motor vehicle licensed as a public passenger vehicle.

There is nothing in the Municipal Code to indicate that the Public Vehicle License Commissioner may use his office to coerce any licensee to pay his debts unless it interfers with his obligation to render safe and comfortable transportation service. The judgment creditor has it within his power to levy upon the licensed vehicle, which would automatically terminate the license to operate the vehicle for the transportation of passengers for hire. When this licensee applies for renewal of his taxicab license in 1953, you may then determine whether he has "financial ability to render safe and comfortable transportation service" to warrant renewal of his license.

STATION WAGONS AS LIVERIES

(No. 11666—Public Vehicle License Commissioner—L. A. W.—March 23, 1953.)

We have your letter dated March 16, 1953, requesting an opinion whether station wagons can be licensed as liveries.

Section 28-4 of the Municipal Code of Chicago provides as follows:

> "No vehicle shall be licensed as a public passenger vehicle unless it has two doors on each side or fixed aisle space for passage to doors and until it has been inspected under the direction of the commissioner and found to be in safe operating condition and to have adequate body and seating facilities which are clean and in good repair for the comfort and convenience of passengers."

Section 28-19 of the Municipal Code of Chicago provides, in part, as follows:

> "Not more than six passengers shall be accepted for transportation in a livery vehicle on any trip."

From the sections quoted above it is clear that any station wagons which are equipped with two doors on each side, pass your inspection and comply with all other requirements of Chapter 28 of the Municipal Code of Chicago may be licensed as liveries.

CERTIFICATES OF TITLE

(No. 11671—Public Vehicle License Commissioner—L. A. W.—March 25, 1953.)

We have your oral request for an opinion regarding the validity of certificates of title issued by the Secretary of State for public vehicles of Commercial Taxicab Company.

You state that the corporation's minutes submitted for your examination reveal that Walter Travka is no longer connected with this company, and that his name appears on the certificates of title as president of the Commercial Taxicab Company.

It is our opinion that inasmuch as the certificates of title to the vehicles licensed by the City are in the name of the Commercial Taxicab Company, it is not necessary to change these certificates of title in order to designate the current officers.

NEW CORPORATION

(No. 11685—Public Vehicle License Commissioner—L. A. W.—April 20, 1953.)

We have your oral request for an opinion regarding the issuance of a livery license to the Bridgeport Livery Car, Inc. An examination of your file reveals that for the year 1952 your office issued a livery license to Bridgeport Livery Cab, Inc.

Section 28-20 of the Municipal Code of Chicago provides as follows:

> "It is unlawful for the cabman of any livery vehicle, or the station from which it is operated to use the word 'taxi,' 'taxicab' or '*cab*' in connection with or as part of the name of the cabman or his trade name."

When Bridgeport Livery Cab, Inc. applied for renewal of their 1952 license you called their attention to the above provision of the ordinance and requested that they discontinue using the word "cab" in the operation of their livery business. The licensee endeavored to eliminate the word "cab" by forming a new corporation. A charter was then obtained in the name of Bridgeport Livery *Car*, Inc. On March 20, 1953, you were furnished with an affidavit signed by Paul Romano, President of the Bridgeport Livery Car, Inc., stating that he is the president of this company; that in compliance with your request to delete the word "cab" this new company was formed with the same persons who owned the Bridgeport Livery Cab, Inc. You are now confronted with the problem as to whether or not a livery license can be issued to the newly formed corporation.

In *News Publishing Co.* v. *Blair*, 29 Fed. 2nd 955 (1928) it was held that:

> "Where a corporation is reincorporated, the fact that it retains the old officers, directors and stockholders, does not make it the same corporation. It is nevertheless an entirely new and distinct corporation.

Section 28-19 of the Municipal Code of Chicago provides, in part as follows:

> "*No license for any livery vehicle shall be issued except in the annual renewal of such license* or upon transfer to permit replacement of a vehicle for that licensed unless, after a public hearing, the commissioner shall determine that public convenience and necessity require additional livery service and shall recommend to the council the maximum number of such licenses to be authorized by ordinance."

Inasmuch as the Bridgeport Livery Car, Inc. is a separate and distinct corporation from the Bridgeport Livery Cab, Inc., no license can be issued to the newly formed corporation.

SURRENDER OF LICENSE UPON ENTERING MILITARY SERVICE

(No. 11691—Public Vehicle License Commissioner—L. A. W.—May 20, 1953.)

We examined a letter dated April 21, 1953 addressed to you from Calvin H. Williams requesting the issuance of a livery license to him for the current year. Mr. Williams states that he was the owner of a livery license during 1950, when he was drafted into the Army. He states that he served overseas from March, 1951 until June, 1952. After receiving an honorable discharge, he applied for a livery license in December, 1952, and was informed that he could not have such a license because of a "freeze" as of December 31, 1951. He is now again applying for a livery license, claiming he is entitled to one because he voluntarily surrendered such a license when he was called into the armed service.

You now request our opinion whether a livery license can be issued to this applicant.

Section 28-19 of the Municipal Code of Chicago provides:

> "No license for any livery vehicle shall be issued except in the annual renewal of such license or upon transfer to permit replacement of a vehicle for that licensed unless, after a public hearing, the commissioner shall determine that public convenience and necessity require additional livery service and shall recommend to the council the maximum number of such licenses to be authorized by ordinance."

The validity of this section was tested in *Jones* v. *City of Chicago*, 348 Ill. App., p. 310 (1952). The court in that case on p. 318 held:

> "The City of Chicago, having the right to license and regulate persons engaged in the business of carrying passengers for hire upon the public streets, and having the right to regulate traffic and parking and to provide for the general policing of the City, may properly determine, in the exercise of the powers conferred upon it by the legislature, the number of taxicabs or other like vehicles which it will permit to be operated in the city. See *People ex rel. Johns* v. *Thompson*, 341 Ill. 166; and *Yellow Cab Co.* v. *City of Chicago*, 396 Ill. 388. We agree with defendants that there can be no sound argument against the validity of the application of the same limitations in the licensing and regulation of livery vehicles."

Inasmuch as Calvin H. Williams did not possess a livery license on December 31, 1951 when this Ordinance went into effect, it is our opinion that you are precluded from issuing a livery license to this applicant in spite of his excellent war record.

POWER TO REGULATE TAXICABS

(No. 11723—P. W. D.—July 31, 1953.)

We are in receipt of your letter of July 28, 1953 in which you inquire whether the power to regulate taxicabs within the City of Chicago is vested in the corporate authorities or in the Illinois Public Utilities Commission.

By Sections 23-10, 23-51 and 23-105 the City of Chicago is given the power to license and regulate persons engaged in the business of carrying passengers for hire upon the public streets and the right to regulate traffic and parking and to provide for the general policing of the city. This power was not taken from the City of Chicago by the enactment of the Illinois Public Utilities Act. In the leading case of *People ex rel. Johns* v. *Thompson,* 341 Ill. 166, the Supreme Court of Illinois held, p. 168:

> "The Public Utilities act does not take from cities and villages the previously conferred power to regulate taxicabs. The taxicab business, as a general rule, does not include the operation of a conveyance or vehicle over specified routes, under a regular schedule as to time or between definite points, and hence, within the meaning of the Public Utilities act, a taxicab is not ordinarily a public utility."

An interesting example of the distinction between the powers of the City of Chicago and the Illinois Commerce Commission occurred in 1951 when the city was contemplating the adoption of a revised public passenger vehicle ordinance. Amendments were submitted to legalize jitney operations within the City of Chicago. At that time this office held such amendments to be an infringement upon the powers of the Illinois Commerce Commission. This was based upon a 1948 finding of the Illinois Commerce Commission that jitney cabs were being operated in the same manner as common carriers subject to the jurisdiction of the Commission and upon the case of *Austin Brothers Transfer Co.* v. *Bloom,* 316 Ill. 435, which held that one who operates a taxicab for hire indiscriminately accepting and discharging passengers at all points along the route of its operation, in competition with and at the same price charged by motor bus lines, is operating a public utility and must comply with the Public Utilities Act. In all other respects the power of the City of Chicago to regulate the service and fares and limit the number of taxicabs operating within the City of Chicago is only limited by the rules of reason and non-discriminatory classification, (*Jones* v. *City of Chicago,* 348 Ill. App. 310).

SCHOOL BUS STATION WAGONS

(No. 11774—Chairman, Chicago Street Traffic Commission—M. I. W. —December 2, 1953.)

At the November 5 meeting of the Street Traffic Commission the Corporation Counsel was requested to advise the Commission as to the right of the City to impose regulations upon station wagons and buses engaged in transporting children to and from schools, day nurseries, and play groups.

Section 28-1 of the Municipal Code of Chicago defines a "public passenger vehicle" as:

> ". . . a motor vehicle as defined in the Motor Vehicle Law of the State of Illinois, which is used for the transportation of passengers for hire within the city excepting motor vehicles used as part of and in connection with the operation of a street railway system or public utility in the city."

A livery vehicle is defined in the same section as

> "Any public passenger vehicle other than a taxicab or sightseeing vehicle."

Section 28-2 makes it unlawful for the owner of a public passenger vehicle to operate same without a license therefor.

Section 28-34 and the sections following set out the requirements for licensing of public passenger vehicle drivers.

In an opinion dated July 6, 1948, 22 Ops. Corp. Coun. 351 (No. 11063) we held that school buses, station wagons and other buses which carry children to schools and play groups come under Chapter 28 and are subject to license by the Public Vehicle Lincense Commissioner.

We quote the following language from the opinion since the situation appears identical with that which you describe.

> "We have examined copy of a letter from the Play Clubs of Chicago, transmitted by you with the request for an opinion covering this specific case.
>
> The letter states that the Play Clubs of Chicago is an organization which operates a fleet of station wagons and a school bus for its members as an incident to the operation of a children's recreational program under the direction of counsellors, supervisors and directors; that the organization selects its membership and does not offer its transportation service to the general public. It is contended that the transportation service of the Play Clubs of Chicago is not that of a public or common carrier; that its station wagons and buses are not public conveyances and, therefore, not public passenger vehicles subject to license; that motor vehicles used merely as an incident in the conduct of a business enterprise where no specific charge is made for the transportation is not engaged in the business of transportation of passengers for hire.
>
> It does not clearly appear from the letter or from any information in your communication that the organization furnishing the transportation facilities is engaged in the conduct of the business of providing facilities for play or recreation of the children. From all that appears in this correspondence it may be that the Play Clubs of Chicago is a voluntary association or partnership for profit to provide transportation only for groups of children under the supervision of independent counsellors, supervisors or directors each of whom have their own groups of children and are paid by the parents for supervising the children's recreation which include the charges of the Play Clubs of Chicago for the children's transportation from their homes to their respective places of recreation; that the relation between these supervisors and the Play Clubs of Chicago is contractual even though the supervisors and each group of children under the direction of each supervisor are members of the organization. Under these circumstances, the case laws cited by Mr. Cusack in his letter are inapplicable to a determination of the questions submitted.
>
> In any event, the term "public passenger vehicle" is defined to mean any motor vehicle used for the transportation of passengers for hire within the City excepting those operated as a public utility. Persons operating public passenger vehicles as defined in Chapter 28 are not necessarily public or common carriers, nor are their vehicles necessarily public conveyances. As defined in Chapter 28 a "public passenger vehicle" subject to license may be a motor vehicle that is hired by agreement for transportation of passengers, subject to the choice or whim of the owners of the vehicle as to the classes, groups or times when such vehicle shall be furnished for transportation service. A livery vehicle is one class of public passenger vehicles, subject to regulation and license for public safety and to compensate the city for the use of its streets for the transportation of persons for hire or profit. Livery vehicles are not "public conveyances" and their operation is not that of a public or common carrier. Livery vehicle operators may choose their passengers, refuse employment and charge for their services as they please."

It is therefore our opinion that such groups are subject to licensing and regulation of their vehicles as public passenger vehicles and that drivers of such vehicles are likewise subject to present provisions of the code.

If there is some further regulation considered desirable applicable only to vehicles used for such purposes, we stand ready to consider the propriety of such regulations and to assist you in preparing those which in our opinion may be validly enacted into proper form.

F. REFUND OF LICENSE AND PERMIT FEES

ELECTRIC PERMITS AT CHICAGO FAIR

(No. 11325—City Comptroller—C. P. H.—August 3, 1950.)

We have your letter of July 20, 1950, wherein you request our opinion as to whether or not you should refund the fee of $43.60 paid by Hecker & Company for permit to install electrical equipment in the Chicago Fair of 1950 situated on property owned by the Chicago Park District, at 23rd Street and the Lake Front.

The Chicago Park District Act Provides that the District shall have power to acquire, lay out, establish, construct and maintain parks, driveways and boulevards in the District, and to govern such parks, driveways, and boulevards and the use thereof. The Act further provides that the commissioners of the District shall constitute the corporate authorities and shall have full power to manage and control all the property of the District. (Ill. Rev. Stat. 1949, chap. 105, par. 333.7) The jurisdiction of the park commissioners within the territory that they control for the purposes for which they were created are paramount and exclusive. *West Chicago Park Commissioners* v. *City of Chicago*, 152 Ill. 392, 402.

The Chicago Park District has no police power over the installation of electrical equipment. The City of Chicago, however, has police power to regulate the installation of electrical equipment and may exercise this power in territory under the jurisdiction of the District.

Section 37-2 of the Revised Cities and Villages Act provides that any municipality by ordinance may regulate the installation, alteration and use of all electrical equipment, and may establish an electrical inspection department for this purpose. (Ill. Rev. Stat. 1949, chap. 24, par. 37-2.) Pursuant to this statutory authority the city council enacted an ordinance providing regulations and standards for electrical installation. (Municipal Code of Chicago, sections 86-1 to 88-105.)

Section 86-27 of the Code provides that no electrical equipment shall be installed or altered without first obtaining a permit.

In *County of Cook* v. *City of Chicago*, 311 Ill. 234, an injunction was sought to restrain the City from enforcing its ordinances against the County in erecting a County jail. The court held that the City had jurisdiction over all buildings erected within the City including those of the County or other municipalities located within the City.

In an opinion to the Acting Commissioner of Streets and Electricity under date of December 2, 1937, we stated that in the installation of electrical equipment in buildings in the Chicago Park District the ordinances of the City of Chicago are enforceable. (Ops. of Corp. Coun., Vol. XIX, pp. 73, 76.) We have also held that the City's ordinances relating to health, to the sale of alcoholic liquor, to the licensing of stationary engineers and to the inspection of weighing machines may be enforced in territory controlled by the Chicago Park District within the limits of the City. (Ops. of Corp. Coun., Vol. XVIII, pp. 35, 39-40.)

We are, therefore of the opinion that installation of electrical equipment at the Chicago Fair of 1950 located on property owned by the Chicago Park District must be in conformity with the ordinances of the City of Chicago and that the permit fee of $43.60 referred to in your letter should not be refunded.

WHOLESALE FLORISTS

(No. 11332—City Council—A. M.—August 23, 1950.)

We have your letter of July 21, 1950 transmitting your file in the above numbered claim wherein refund is sought of $1,700.00 in annual license fees paid by certain wholesale florists for the years 1948, 1949 and 1950 under the provisions of Chapter 128 of the Municipal Code of Chicago.

This claim for refund arises out of an action brought by Roy S. Youngquist and Carl G. Danielson, doing business as Youngquist's Greenhouses, against the City of Chicago and certain of its officials, in the Superior Court of Cook County, No. 48-S-8151, to enjoin the enforcement of the Wholesale Florists Ordinance (Chapter 128 of the Municipal Code of Chicago) against them on various grounds. The suit was a representative suit which brought in other persons similarly situated to the plaintiffs had been arrested and charged by the City of Chicago with operating a wholesale florist business without having first obtained a license, and the injunction suit was brought to restrain the further prosecution of the quasi-criminal action as well as to otherwise prevent enforcement of the ordinance against them. It appears from the facts submitted that the plaintiffs and the other persons claiming refunds had paid the annual license fees of one hundred dollars each by check payable to the order of the City Collector of the City of Chicago, each of such checks bearing the following endorsement on the reverse side thereof: "Paid under protest and without prejudice to maker's rights under suit No. 48-S-8151." A photostatic copy of one of these checks has been submitted to us by the attorneys for the claimants, which photostat bears the above quoted endorsement, and we have been advised that all of the checks for such annual license payments bore identical endorsements.

The Superior Court of Cook County found in favor of the City of Chicago in the injunction suit, but on appeal to the Supreme Court of Illinois, that court reversed the judgment of the Superior Court and remanded the cause with directions to grant to plaintiffs and others similarly situated the relief prayed. The Supreme Court held that plaintiffs and others similarly situated were exempt from the provisions of Chapter 128 requiring wholesale florists to obtain licenses from the City on the ground that Section 91 of Chapter 5 of the Illinois Revised Statutes granted them this exemption because, according to the undisputed facts, they themselves grew and produced the flowers, plants and other floral products which they sold at wholesale. The opinion of the Supreme Court was rendered on

March 22, 1950 and may be found at page 21 of volume 405 of the Illinois Supreme Court Reports. In the light of this decision, it must be concluded that the claimants were not obligated to pay these license fees, and the questions presented are (1) whether they are entitled to a refund of these license fees paid by them under protest, and (2) whether the City Council has the power to and properly should order such a refund to be made.

It is well settled that taxes or license fees demanded and paid under a mistaken interpretation of a statute or ordinance may not be recovered back if paid voluntarily and not under protest (*Richardson Lubricating Co.* v. *Kinney*, 337 Ill. 122 (1929); *Standard Oil Co.* v. *Bollinger*, 337 Ill. 353 (1929)). It is equally well established, however, that where such payments are made under a mistaken interpretation of an ordinance, but under protest and duress, the persons making such payments are entitled to recover them in an appropriate action (*Benzoline Motor Fuel Co.* v. *Bollinger*, 353 Ill. 600 (1933); *Rath* v. *City of Chicago*, 207 Ill. App. 117 (1917); *City of Chicago* v. *Waukesha Imperial Spring Brewing Co.*, 97 Ill. App. 583 (1900)).

Here it must be concluded that the payments were made under protest and under duress in view of the arrests and pending prosecutions for failure to obtain the licenses, and in view of the form of the endorsements on the checks evidencing such license payments. This department has heretofore held that license fees paid under such circumstances may be refunded by the City (XVIII Op. Corp. Coun. P. 468; No. 6849, March 20, 1931).

It is our opinion, therefore, that the claimants in the above numbered claim are entitled to a return of the license fees involved in said claim, and that the City Council has the power to and may properly order such a refund.

G. OTHER LICENSES AND PERMITS

WATER SERVICE CONNECTION

(No. 11101—Commissioner, Public Works—J. F. G.—May 17, 1946.)

Reference is made to our opinion to you of January 29, 1946 relating to your right to deny a permit to master plumbers for the installation of a service pipe to connect with the Chicago water distribution pipe in Monroe street and to terminate at the Borland Building wall on said street. The reason assigned for your action was that no permit could be issued for any pipe installation carrying water for personal or domestic use unless and until such permit was requested for the complete installation of the water supply piping system in the building, although the master plumbers explained that the service pipe was to supply water for cooling purposes in connection with the installation of a refrigerating unit for the building, and the master plumbers' contract covered only the service pipe to the building wall with an opening for steamfitters to install water piping connecting with the service pipe to a refrigerator or steamfitters fixture.

The steamfitters local union of the United Association of Journeyman Plumbers and Steamfitters claims that by agreement between the steamfitters local union and the plumbers local union the installation of

water supply pipes within a building for steamfitters fixtures, which includes refrigerating units belongs to the steamfitters craft, and that under the State Plumbing License Laws, as well as the Municipal Code of Chicago relating to plumbing and the installation of water pipes, only the work of installation and repair of piping, fixtures, etc. for a supply of water for personal and domestic purposes belongs exclusively to licensed plumbers; that piping for supplying water exclusively for cooling or refrigerating units or for sprinkler systems or for industrial purposes is not within the meaning of "domestic and personal purposes" and is not necessarily a licensed plumbers work under the law and the ordinances. The refusal to issue a permit to the master plumbers for the installation of the water service pipe terminating at the building was therefore considered bv the steamfitters as an arbitrary act on the nart of the Commissioner of Public Works injurious to the steamfitters craft.

Our opinion to you quoted the provisions of the municipal code appertaining to the subject of your inquiry and we concluded

(1) that in refusing to grant the requested permit for the installation of the service pipe until plans had been filed showing the installation of the complete water supply piping system from the service to the fixtures and appliances to which such water supply piping system is connected was justified by section 83-8 of the code.

(2) that the jurisdictional agreement between the steamfitters and plumbers is not binding on the city and the Commissioner of Public Works must be governed only by the ordinances of the city.

Upon release of our opinion the parties interested inferred that the Commissioner of Public Works could not and would not permit anyone except a licensed plumber to install the water pipes within the building to the refrigerating appliances and accordingly the steamfitters called a strike of their craft on certain public works in progress.

At the request of the Mayor we have reviewed the subject for the purpose of determining the extent of the exclusive right of licensed plumbers to perform the work involved. To that end we conferred with representatives of and attorneys for the steamfitters, the plumbers, the United Association of Journeyman Plumbers and Steamfitters and representatives from your department. We have received and examined numerous statements, briefs and arguments submitted by those representatives and attorneys. At your request we witnessed a demonstration by experts in your department at the city plumbing laboratory on Cabrini Place, Chicago, for a better understanding of the physical problems in safeguarding drinking water from contamination on account of faulty design or workmanship in the installation and connection of private water supply pipes with the city's distribution system. We were impressed by this demonstration, as well as by the report of the National Institute of Health on the Chicago outbreak of epidemic amebic dysentery in 1933, which was furnished to us, of the ever present danger to the public health from improper cross connections between pipes and appliances supplying drinking water and those carrying process, waste or contaminated water or from back siphonage of nonpotable water due to improper connections with tanks and the installation of inefficient valves and vacuum breakers.

We are satisfied that your sole interest in this subject matter is to protect the city water supply from contamination and that you are of the opinion that the greatest part of the danger therefrom can be avoided by permitting only competent licensed plumbers to do all work except minor repairs upon any water pipes which are continuously connected with the city water supply system. That means that in the interest of the public health you are unwilling to permit anyone to do any substantial work upon any water pipes, fixtures or appliances unless there is an effective device such as a vacuum breaker or an open break with

sufficient distance between the water pipes continuously connected with the city water supply system and the fixtures, appliances and water pipes containing or carrying water for other than domestic or personal use.

At the outset we desire to say that after a careful study of the provisions of our municipal code relating to plumbing and the water supply and distribution systems (Chaps. 82 and 83) we find no reason to depart from the conclusions in our letter of opinion to you dated January 29, 1946. However, the inference drawn therefrom both by your department and the steamfitters, i.e., that all water piping from the city water supply system to a break as herein described is plumbing which must be installed by a license plumber, is not justified by the State law or by the city code.

The demonstration at the plumbing laboratory and the report of the National Institute of Health on the Chicago epidemic of amebic dysentery in 1933, indicating the danger of contamination of the city's water supply is persuasive for the adoption of a "break off" rule for the division between plumbing and other trades in connection with water pipe installations, but such evidence and arguments should be addressed to the lawmaking bodies. The code is replete with provisions and specifications for the installation of water pipes, fixtures and appliances applicable to plumbing and other trades for the protection of drinking water. Chapter 82 deals with plumbing and drainage. Chapter 83 deals with all water pipes or systems of water piping which receives or is intended to receive its service from the Chicago waterworks system and is not confined to "plumbing" as defined by the plumbing license law and by section 82-2 of the code. Section 83-8 of the code referred to in our opinion of January 29, 1946 and relied upon for your refusal to issue a permit to master plumbers for a direct connection from the city main to the Borland Building until a plan for the complete water supply piping from the service to the plumbing fixtures and *other appliances* to which such water supply system is connected, applies to steam fittings, sprinkler appliances and industrial appliances as well as plumbing. It is significant that some of the sections in chapter 83 specifically prohibit *any* person from making installations of *any* pipe except by permission (83-6; 83-8) while others specify "plumbers" and "plumbing work" (83-7; 83-9).

"Plumbing" and "plumbing work" are defined both by the State plumbing license law and the code (Section 82-2) to mean all piping, fixtures, appurtenances and appliances for a supply of water *for all personal and domestic purposes* and for a sanitary drainage, etc., and all work upon or (in) connection with such piping, etc. The word "in" shown here in parentheses is used in the code definition but omitted from the State plumbing license law, but the meaning is the same. It does not apply to the work of connecting piping of another kind with piping for personal and domestic purposes. Nowhere can we find a provision distinguishing plumbing from other piping and appliances at the "break off" point. Assuming that a "break off" is necessary at some point to prevent contamination of the city water supply it would seem that those responsible for the law as written deemed it sufficient if the point of "break off" be where the water is actually used for other than personal or domestic purposes and not necessarily where the piping for personal and domestic purposes is connected with the piping for other purposes and that so much of the piping which carries potable water for other than personal and domestic purposes exclusively is not plumbing.

If the public health and safety require that plumbing and plumbing work be divided from other piping, fixtures and appliances and the work thereon by a "break off" it is within the power of the proper legislative authority to enact a law or amend existing laws to make such a division effective. There is no merit in the contention of representatives of the steamfitters that such a law or rule will deprive them of their constitutional right to employment in their legitimate field of labor.

We can only follow the law as written. It is clear and unambiguous. The criterion for determining whether any piping, fixtures or appliances are "plumbing" and whether work thereon must be performed only by a licensed plumber is the use to which such facilities can be put. If not for "personal or domestic purposes" you are not warranted in withholding your approval for their installation merely because the work is not to be done by a licensed plumber. It is within your power and it is your duty to require observance of all the ordinances relating to the presentation of plans showing the installation of the complete water supply piping system including that part which is not intended for personal or domestic use before you approve, or issue a permit for, any part of such installation and it is your right and duty to require compliance with all specifications in the ordinances affecting any work by whomsoever undertaken which may expose the city water supply to danger from contamination.

SCAVENGER'S LICENSE FOR RENDERING COMPANY

(No. 11114—City Collector—M. H. F.—January 12, 1949.)

Your communication of recent date forwards a letter from a Chicago attorney representing the Globe Rendering Company, which states that a driver of one of the company's trucks is being prosecuted in the Municipal Court for failure to have a scavenger's license required by chapter 167 of the Municipal Code of Chicago.

The attorney states that his client operates a dead animal rendering plant outside the city limits of Chicago, near Lansing, Illinois; that the company collects dead animals from the Union Stock Yards under contract; that its subsidiary, Canal Melting Company, collects the animals from the streets and alleys of the city of Chicago under contract with the city; and that the company uses five trucks in its work. He contends that the company is not subject to the ordinance and required to be licensed under it for the conduct of its business in Chicago, which is the hauling of dead animals. A typewritten brief is transmitted with the letter in support of the attorney's views.

You request our opinion as to whether or not the Globe Rendering Company is subject to an Offal Scavengers license.

Chapter 167 of the Code is entitled "Scavengers." It contains general provisions relating to the duties of scavengers (section 167-1) and enforcement of the chapter (section 167-2), and specific sections pertaining to (1) Private Scavengers (sections 167-3 to 167-9), (2) Offal Scavengers (sections 167.10 to 167-17), (3) Sewer and Catch-Basin Cleaners (sections 167-18 to 167-24), and (4) Night Soil Scavengers (sections 167-25 to 167-37).

Section 167-10, which defines offal scavenger, reads as follows:

> "The term 'offal scavenger' is hereby defined to mean any person engaged in the business of collecting, gathering, or transporting butchers' offal, calfskins, hotel or restaurant bones, grease, glues, stock, or or kindred refuse, by wagon, cart, or otherwise, or to drive any wagon or vehicle for such purpose through the public ways of the city."

Other sections of the offal scavengers portion of the chapter are entitled "License required," "Application," "License fee," "Emblems for vehicles," "Method of conveyance," "Disposition of contents," and "Hours of removal."

From the facts supplied us our opinion is that the Globe Rendering Company is not engaged in the business of collecting or transporting butchers' offal, calfskins, hotel or restaurant bones, grease, glue, stock, or kindred refuse, and therefore in our opinion is not subject to license as an offal scavenger. We understand the meaning of the word "offal" to be the parts of a butchered animal removed in dressing it, especially the inedible parts; anything thrown away as worthless; carrion; refuse; rubbish; garbage.

As the attorney's brief discusses the question whether the Globe Rendering Company is subject to license as a private scavenger, we have checked with his office and also the ordinance enforcement division of this department and learn that the pending prosecution is based upon section 167-4, failure to procure a private scavenger's license. Hence, we have considered and hereby give you our views with reference to the question whether or not the Globe Rendering Company is subject to license as a private scavenger.

Webster defines the word "scavenger" to mean a person who collects or disposes of filth, waste products, etc.; especially a street cleaner, garbage collector, etc. Funk and Wagnalls' New Standard Dictionary defines the term as one whose business is to gather and remove dirt from streets and vaults.

Section 167-3 of the Code reads as follows:

> "The term 'private scavenger' is hereby defined to mean any person engaged in the removal and disposal of table refuse or animal and vegetable matter usually known as garbage, from hotels, restaurants, cafes, boarding houses, and other places not otherwise provided for by the city; or the removal and disposal of ashes and cinders; or the removal and disposal of manure, swill, or any anmial or vegetable refuse and wastes, including decaying animal matter and fish from commission houses and other places where such decaying animal matter and fish may accumulate."

Section 167-4, the license required section, reads as follows:

> "No person shall engage in the business of private scavenger, or shall be permitted to remove and dispose of swill, offal, table refuse usually known as garbage, or any other matter enumerated in the preceding section, without first having obtained a license so to do; provided, however, that no license shall be required of any person for the removal of manure from his own premises; and provided further, that any person desiring to gather, remove, or dispose of garbage, decaying animal matter, and fish, swill, or other animal or vegetable refuse and wastes from his own premises without the aid of a licensed private scavenger may do so only upon the written permission of the commissioner of buildings, and then only in the manner specified in such permit.
>
> Any person violating this section shall be subject to a fine of not less than twenty-five dollars for each offense."

Other sections of the private scavengers portion of the chapter cover the application for license, the license fee, emblems for vehicles, dispoal, and removal by the city.

Obviously the Globe Rendering Company is not engaged in the removal and disposal of table refuse or animal and vegetable matter usually known as garbage, from hotels, restaurants, cafes, boarding houses, or the removal and disposal of ashes and cinders, or the removal and disposal of manure, swill, or other animal or vegetable refuse and wastes. It is noted that while the term "animal matter" is used the words "dead animal" are not employed in sections 167-3, 167-4, or elsewhere in the private scavengers ordinance. It seems fair to assume that had the city council

intended to subject to license haulers of dead animals it would have included in sections 167-3 and 167-4 the words "dead animal" or "animal carcass."

In the case *Avery* v. *City of Chicago*, 345 Ill. 640, there was involved the legality of a five year contract made between the city and the Midwest Trading and Security Corporation for the removal and diposal of dead animals from the streets and other public places of the city. It was contended that the word "garbage" used in the statute authorizing cities to make contracts for a period exceeding one year relating to the collection and disposal of garbage was sufficiently comprehensive to include dead animals. After quoting definitions and court authorities relating to the meaning of the word "garbage" the court held that none of the definitions was sufficiently comprehensive to include dead animals and therefore reached the conclusion that the five year contract was voidable. Beginning on page 648 of its opinion the court said:

> "The appellants argue that the legislature used the word "garbage" in this act in its most comprehensive import and intended it to include dead animals. Statutes granting powers to a municipal corporation are strictly construed and a reasonable doubt concerning the extent of the power conferred or an ambiguity arising out of the grant is resolved against the municipality which claims to exercise the power. *Forest Preserve District* v. *Jirsa*, 336 Ill. 624; *Washburn* v. *Forest Preserve District*, 327 *id.* 479). Garbage has been defined as any worthless, offensive matter in *St. Louis* v. *Robinson*, 135 Mo. 460; as refuse organic matter in general in *State* v. *Flanigan*, 111. Md. 481; as refuse parts of flesh in the case of *In re Lowe*, 54 Kan. 757, and as the refuse animal and vegetable matter from a kitchen in *Dupont* v. *District of Columbia*, 20 App. (D. C.) 477. Webster's definition of the word is "Offal, as the entrails of an animal or fish; refuse animal or vegetable matter from a kitchen, market, or store; often, loosely, waste material from a house, market or store, consisting of offal mixed with other refuse, as ashes, paper, tin cans, etc.; hence anything worthless or filthy; refuse." None of these definitions is sufficiently comprehensive to include dead animals. If the legislature had intended to confer upon a city of the prescribed population the power to make contracts for the removal and disposition of such bodies for a periods longer than one year and not exceeding five years, it would undoubtedly have expressed that intention. The rule of strict construction which governs statutes granting powers to municipal corporations forbids an interpretation of the statute upon which the appellants rely to comprehend dead animals."

From the *Avery* decision and our study of other court authorities defining the term "garbage" and the term "animal matter" it seems apparent to us that when the city council in sections 167-3 and 167-4 used the words "decaying animal matter" and "other animal matter or vegetable refuse" it did not intend to include within the term "private scavenger" haulers of dead animals. A dead animal is not a nuisance per se as is the accumulation of garbage. Furthermore an animal does not cease to be property by its death and its carcass is often valuable. *Dupont* v. *District of Columbia*, 20 App. D. C. 447, 485; *Pantlind* v. *Grand Rapids*, 210 Mich. 18, 177 N. W. 302; *River Rendering Co.* v. *Behr*, 77 Mo. 91, 46 Am. Rep. 6.

The conclusion reached herein is fortified by section 167-9 of the Municipal Code which states that nothing in chapter 167 shall be construed to conflict with any existing or future provisions of the code concerning the removal and disposal of dirt, filth, litter, garbage, ashes, manure, offal, swill, dead animals, and other material from public ways by the city through its contractors or otherwise. Futhermore the Municipal Code of Chicago contains a separate chapter entitled "Animals," section 98-8 of which covers the matter of removal of dead animals and authorizes the commissioner of public works to contract for such removal. The

section specifically states that the contract shall provide that dead animals shall be removed only in closed and covered vehicles and that no animal taken up and removed shall be skinned or rendered at any place within the city or within three miles of the limits thereof. A reading of chapter 98 would seem to indicate that dead animal haulers were not considered to be within the category of private scavengers and subject to license under the Private Scavengers ordinance.

It is also proper to state that by an act entitled "An Act in relation to the use and disposition of dead animals," approved July 16, 1941, paragraphs 149 to 167 inclusive, chapter 8, Illinois Revised Statutes, 1947, persons engaged in the business of disposing of bodies of dead animals are licensed and regulated by the State.

Our opinion therefore is that the Globe Rendering Company is not subject to license as a private scavenger under the city's Private Scavengers ordinance.

PHOTOGRAPHER'S LICENSE FOR BLUEPRINTERS

(No. 11146—City Collector—M. H. F.—May 18, 1949.)

By your letter of May 10, 1949 you transmit a communication from the secretary of the Blue-print Institute of Chicago, in which the contention is advanced that blueprint and allied production concerns are different from photographers and therefore should not be classified as photographers or considered subject to license under the Photographers ordinance, Chapter 161 of the Municipal Code of Chicago.

The secretary states that blueprints and allied reproductions are considered separate and apart from photography, both by local and national associations and also by the federal government. It is said that photographers use film negatives and an entirely different type of paper from that used in the blueprint industry, and to demonstrate the difference the secretary attaches to his communication samples of the products turned out by the blueprint industry. These samples consist of (1) an original tracing and a copy of the blueprint made from it, and (2) a so-called photocopy negative from which additional prints are made. Apparently from the tracing and photocopy negative copies are produced by means of machines on sensitized blueprint paper. How the photocopy negative is produced from which additional prints are made is not shown.

Section 161-1, the definition section, of the Photographers ordinance, reads as follows:

> "The word 'photographer' is hereby defined to mean any person operating, managing, or maintaining a photographic studio, a postcard studio, tin-type or ferrotype studio, a bromide enlarging plant, an amateur finishing or developing plant, or a portrait-copying house, or engaging in the business of photography, including commercial, portrait, and home portrait photography or the business of a lantern slide maker, or of an itinerant or transient photographer, or the business of photography, for any purpose whatsoever."

Other sections of the ordinance provide that no person shall engage in the business of photographer without first having obtained a license therefor (161-2), exacting an annual fee based upon the number of persons engaged in the business (161-4), require licensees and employes using flashlight powder or taking flashlight pictures to procure certificates of fitness showing that they understand the hazards of flashlight photography

(161-6), require metal cabinets for the storage of chemicals used in fixing or developing of films or film negatives and for the storage thereof (161-7), prescribe sanitary measures designed to safeguard the lives and health of persons employed in the licensed establishment, including appliances and devices to prevent the emission of noxious fumes, odors or dust (161-8), and general compliance with the fire regulations of the Municipal Code applicable to the business.

Obviously those engaged in the blueprint business are not engaged in all of the different phases or enumerated activities of photography mentioned in the definition section above quoted. However, it is not seen that they can consider themselves outside the scope of the ordinance when they employ the photographic processes of making photocopy negatives of documents and photographic reproductions generally. It is noted that the definition section covers "the business of photography for any purpose whatsoever."

As defined by lexicographers photography is the art or process of producing images on sensitized surfaces by chemical or actinic action of light; a photographer is one who practices or is skilled in photography. A blueprint is defined as a blue photograph, a cyanotype. The dictionary definition of cyanotype is a method of producing photographic prints, usually blue, by the use of paper, linen, or the like, coated with a compound of cyanogen and iron; a blueprint. A photoprint is defined as any print made by a photo-mechanical process.

Our opinion is that while those engaged in the business of making blueprints, photoprints, photostats and the like, may not be carrying on a full line of photographic business, they are not in a position to put themselves outside the purview of the ordinance and its license and regulatory provisions, merely because they specialize in one kind or branch of photography.

The secretary's letter with enclosures is returned herewith.

LICENSES FOR INDIVIDUAL TANNERY BUILDINGS

(No. 11152—City Collector—M. H. F.—June 3, 1949.)

From J. Greenebaum Tanning Co., 3057 North Rockwell Street, Chicago, we have received a communication dated May 31, 1949, reading as follows:

> "Recently an inspector from the License Enforcement Division appeared at our office and stated that we should have two license to operate our business instead of the one license covering all of our operations.
>
> Our plant is located on both sides of North Rockwell Street in the thirty hundred block in Chicago, the buildings on the west side of North Rockwell Street having an entrance around the corner at 2612 Nelson Street. Our office is located in a two-story building, which has its address at 3057 North Rockwell Street, but which adjoins a number of buildings on the east side of Rockwell Street. Directly across Rockwell Street from the office is another set of buildings in which we operate one of our departments, but none of the products are completely manufactured in any one of the buildings, and such products go back and forth between the two sets of buildings several times daily for the complete operation.

The management of the business, the books of the business, and all of the supervision, together with the hiring and dismissing of employees is conducted from the office at 3057 North Rockwell Street, and as far as the public is concerned no business whatsoever is transacted from the buildings on the west side of Rockwell Street. Bills for purchases, including all power used in all of these buildings, are billed to the office at 3057 North Rockwell Street. The operation is one operation, and from inception of those buildings, we have only been called upon to take out one license and pay one license fee. The license is termed 'Tannery or Wool Pulling Establishment,' and, as you know, the basis for determining the fee is the number of persons engaged in the business. Since there is no differentiation made in the number of personnel in any one of the plant buildings, but they are all included under the personnel of J. Greenebaum Tanning Co., Chicago Plant, and since the maximum fee is paid, we can see no basis whatsoever for having a second license issued merely because one of the buildings is situated across the street and bears a different address.

We are writing you at the suggestion of the License Enforcement Division, and would appreciate your advising that Division that there is no need for the issuance of an additional license.

Thanking you for your consideration, we remain"

The city's ordinance licensing tanneries provides in section 176-1, the license required section, as follows:

"No person shall engage in the business of tanning or wool-pulling within the city or within one mile of the limits thereof, without first obtaining a license for each tannery or wool-pulling establishment conducted or operated by such person."

The fee section (176-3) provides that "the annual license fee for tanneries and wool-pulling establishments shall be graded upon the basis of the total number of persons engaged in such establishments." The minimum fee is $75.00. The maximum fee is $850.00 for over 350 persons engaged.

Basing our views upon the facts as stated in the company's communication, which we assume you have or will check the accuracy of, our opinion is that the establishment, though located in plural buildings on both sides of North Rockwell Street, and with a separate entrance and street address to the buildings on the west side known as 2612 Nelson Street, is but one complete tanning establishment, for which a single license would suffice.

HOTEL LAUNDERIES

(No. 11155—City Collector—H. H. P.—June 23, 1949.)

In your letter dated June 13, 1949, you inquire whether hotels that operate laundries on their premises for the sole purpose of laundering their towels, table linens, etc. should be required to obtain a license under chapter 145 of the Municipal Code of Chicago.

First, we refer you to Opinions of the Corporation Counsel, v. 18, p. 530, No. 7792. "Commissioner of Health's Power over Laundries—Laundry License to Hotel." Held: Issuance of a laundry license to a hotel doing work for the guests therein is within the jurisdiction of the Commissioner of Health." Code '31:3534-35.

Sections 3534-35 were part of Article XVIII, entitled "Laundries." Section 3507, par. 2, of said Art. XVIII, was worded exactly as the present par. 3 of section 145-1, which provides:

> "The word *'laundry'* as used in this chapter, shall also be held to include any private laundry maintained or operated in connection with any hotel, restaurant or private institution, except a hospital or charitable institution where no charge is made for laundry services."

In *Moy* v. *City of Chicago,* 309 Ill. 242 (1923), it was held that the City has authority to regulate the establishment and operation of laundries and to provide a license fee to care for the additional expense incurred by the City in properly enforcing such regulation.

In *Ruban* v. *City of Chicago,* 330 Ill. 97 (1928), the regulation of the laundry business by ordinance was upheld. The Court said (p. 101):

> "It is plain that unsanitary conditions affect, or may affect, not only those engaged in the business but those for whom the service of laundry work, in any of its aspects is performed.—The process of laundering is done to cleanse clothing, bed linens and every other known article of like character. The danger to health and public safety renders the business a proper one for municipal regulation."

In *City of Chicago* v. *Arbuckle Bros.,* 344 Ill. 597 (1931), which involved an ordinance regulating wholesale food establishments, the Court said (p. 604):

> "If there is a reasonable connection between any business or occupation and danger to the public, a reasonable ground for regulation is presented. Insanitary conditions in the production, keeping, handling and sale of food may result in unwholesome food and affect the health of the persons who purchase it. The probability of the existence of these conditions renders the business of the sale of food a proper one for municipal regulation, and the city council is the judge of the expediency of regulation. (*Ruban* v. *City of Chicago,* 330 Ill. 97.) Under the police power, things which are injurious to the public may be suppressed or prohibited. Other things which may or may not be injurious to the public, according to the way in which they are managed, conducted or regulated, may be licensed for the purpose of regulations."

In *Fr. Basil's Lodge* v. *City of Chicago,* 393 Ill. 246, 256, 254 (1946), it was held that the City has power to license and regulate laundries without relying upon the express power given municipalities to regulate laundries, under section 23-81 of the Revised Cities and Villages Act (Ill. Rev. Stat. 1947, ch. 24, par. 23-81) which grants to municipalities the power to do all acts and make all regulations which may be necessary or expedient for the promotion of health or the suppression of disease. This is a delegation of the police power.

The express power to regulate laundries is given to municipalities by section 23-87 of the Revised Cities and Villages Act (Ill. Rev. Stat. 1947, ch. 24, par. 23-87) which provides:

> "To locate and regulate the use of and construction of—laundries—."

It can be seen from the foregoing that the City's authority to regulate and license laundries is derived from two sources. First, the police powers granted under section 23-81, and, secondly, the express powers delegated under section 23-87 of the Revised Cities and Villages Act.

Since the purpose of the statute and the ordinance is the securing of public health and safety, and since hotels deal with the public generally, it was the intention of par. 3 of section 145-1 to bring them within the

ordinance so that they may be inspected. The laundry license is to defray the expenses incurred by the City in inspecting and regulating laundries that come under the ordinance and is not a tax for revenue purposes only.

GREENHOUSE OPERATORS OUTSIDE CITY

(No. 11156—City Collector—M. H. F.—June 28, 1949.)

This department is in receipt of a letter from the Holton and Hunkel Company, 797 North Milwaukee Street, Milwaukee 1, Wisconsin, dated June 18, 1949, reading as follows:

> "We note on examining the Journal of the Proceedings of the City Council of the city of Chicago, Illinois, dated December 29, 1948, that on page 3539, the Committee on License requested that the Council pass an amendment to an ordinance passed on May 25, 1948.
>
> "The Section that we question is Section 1. This has reference to the second sentence of Section 128-1 of the Municipal code of Chicago, which was to be amended by adding—
>
> > 'The terms shall also include any person not operating from a fixed location in the city, who shall deal, sell, offer for sale, or deliver at wholesale within the city from any vehicle, flowers, bouquets, funeral floral designs or growing plants.'
>
> "We question the wording 'or deliver at wholesale within the city.' Does that imply that greenhouse growers or wholesalers operating out of the city of Chicago must have a license to do business in the city of Chicago? Are we not right in supposing that this would then be a restraint of trade in that people operating outside the corporate limits of the city of Chicago would then have to have a license to do business within your corporate limits?
>
> "We make deliveries into the city of Chicago at frequent intervals and certainly do not want to violate any city ordinance nor do we want to be restrained from doing business in your city.
>
> "A prompt explanatory note on this matter will be greatly appreciated."

We have replied to the Holton and Hunkel Company as per copy of letter herewith enclosed.

By the amendment made December 29, 1948 certain changes were made to sections 128-1, 128-2, 128-3, 128-5, 128-7 and 128-8 of the ordinance. That made to section 128-1 was by adding to the second sentence the sentence underscored, so that said section now reads as follows:

> "The term 'retail florist' means any person engaged in the business of selling, offering for sale, or keeping with the intention of selling at retail flowers, bridal bouquets, funeral designs, or growing plants. The term 'wholesale florist' means any person engaged in the business of selling, offering for sale, or keeping with the intention of selling at wholesale, flowers, bouquets, funeral floral designs or growing plants. *The term shall also include any person not operating from a fixed location in the city, who shall deal, sell, offer for sale, or deliver at wholesale within the city from any vehicle, flowers, bouquets, funeral floral designs or growing plants.*"

It is believed that what the Holton and Hunkel Company is interested in is the proper interpretation of the words "or deliver at wholesale within the city," contained in the added sentence.

From our study of the amendment it seems apparent to us that it was the intention of the city council to subject to license persons not operating from a fixed location in the city, who deal, sell, or offer for sale at wholesale within the city from any vehicle, flowers, bouquets, funeral floral designs or growing plants, but not to make subject to license other nonresidents selling at wholesale said articles in interstate commerce and who merely make deliveries from their vehicles within the city upon orders placed with them at their places of business located outside the city. If the Holton and Hunkel Company's business is limited to that last described, our opinion is that it is not subject to license as a wholesale florist. If, however, its business should consist of raising flowers, or growing plants and selling and offering for sale from its vehicles in the city, traveling from place to place within the city, flowers, bouquets, funeral floral designs or growing plants, then it should be required to procure an itinerant wholesale florists license or licenses under the sections of the ordinance relating to itinerant wholesale florist. It is not an unlawful restraint of trade or a violation of any constitutional right for the City of Chicago to subject to license nonresident wholesale florists, along with resident wholesale florists. By so doing it is not attempting to exercise extra-territorial jurisdiction, or in the instant case attempting to license the Milwaukee greenhouses of the Holton and Hunkel Company. In fact were the ordinance to be construed to exempt nonresidents it might then be subject to attack on the ground of unlawful discrimination. *American Baking Co.* v. *Wilmington*, (1939), 370 Ill. 400; *Higgins* v. *City of Galesburg*, (1948), 401 Ill. 87.

LICENSING PAINT MANUFACTURERS

(No. 11158—City Collector—M. H. F.—July 8, 1949.)

Your letter of July 5, 1949 transmits a letter received by you from the Chicago Paint, Varnish and Lacquer Association, 120 S. La Salle Street, dated June 30, 1949, in which it is said that questions regarding the enforcement of the Drug, Chemical or Paint Factories ordinance, sections 150-5 *et seq.* of the Municipal Code of Chicago and the Drug, Chemical, or Paint Stores (Wholesale) ordinance, chapter 120 of the Municipal Code, have been asked it concerning which rulings are requested. The questions propounded are as follows:

(1) "If a paint factory has its general office, sales office, warehouse and factory all located at one place, are all of the employees at that place, including the general office employees, sales force, warehouse employees and factory employees, included in the number of persons 'engaged,' so far as Sections 150-8 and 120-4 are concerned? These sections, as you know, specify the amount of the annual license fees which are predicated upon the number of persons 'engaged.'

(2) "If a paint company has its office, let us say, in the loop, and its factory in an outlying district within the City of Chicago, would the company have to include the employees working in the downtown office in the number of persons 'engaged' at the factory, when applying for a license for the factory?

(3) "If a paint company has its general and sales offices, let us say a block away and on the other side of the street from its factory,

would the company have to include the employees working in the general office and sales office in the number of persons 'engaged' at the factory, when applying for a license for the factory?

(4) "Assume that a paint company has its factory on the west side of the street, and its general offices and sales offices on the east side of the street, and that no drugs, chemicals or paints are made, manufactured, mixed, compounded, purified, prepared, stored or kept with the intention of selling in the buildings on the east side of the street. Would the company have to include any of the employees in the building on the east side of the street in the number of persons engaged in the factory on the west side of the street, when applying for a license for the factory?"

It will be noted that the above questions are hypothetical in form and that they are propounded by a trade association. It is always dangerous for you or this department to make blanket replies to hypothetical questions formulated by trade associations. It is generally necessary to decide each case in accordance with its own facts and circumstances and you should make this known to the association.

Our understanding is that when interpreting the ordinances involved in this inquiry, no attempt has been made to exact licenses from those concerns maintaining within the city general and sales offices merely, that is from those concerns who do not operate drug, chemical or paint factories or drug, chemical or paint stores. The license fees exacted are based upon the number of persons engaged in the factory or store. We assume, therefore, that the probable answer to question (1) would be "yes" and that "no" should be the answer to questions (2), (3), and (4).

PET SHOP LICENSES

(No. 11179—City Collector—M. H. F.—September 27, 1949.)

We have received from the Judy Publishing Company, 3323 Michigan Boulevard, Chicago, publishers of the "Dog World," a communication reading as follows:

"Would you check on Section 105-1, City Ordinances?

"This reads as follows: 'No person shall engage in the business of buying, selling, or dealing in birds, dogs, or other small animals used as household pets or used for domestic purposes, without first obtaining a license.'

"Can we not have an interpretation from your office that this refers to regular, established retail business or pet shops, basically carried on as such.

"Several dog breeders, who breed a bitch occasionally and sell puppies as a hobby and minor income matter, have complained that the city officials are insisting that they take out a pet shop license.

"These people usually have other employment and the breeding of dogs or showing of dogs is carried on as a hobby or avocation. In almost all instances there is no special building, room or storeroom used. Usually there are no signs to indicate any commercial business.

"An expression from your office will be appreciated as we have had a number of inquiries from our Dog World subscribers."

While there are authorities holding that the making of a single or merely occasional transaction does not constitute engaging in business, where a person breeds dogs and sells the puppies, and offers the puppies for sale through the medium of advertisements placed in the Dog World, our opinion is that such person would probably be amenable to license under section 105-1 of the Municipal Code of Chicago.

At all events it is not seen that either your office or this department could furnish the Judy Publishing Company an opinion which would cover the inquiries of subscribers to the Dog World for the reason that the facts and circumstances of each particular case would require examination and be controlling.

ICE MANUFACTURE AND SALE

(No. 11182—City Collector—R. N.—October 4, 1949.)

In connection with your letter of September 12, 1949 re suit against Stineway Drug Company for operating an ice station without the required license, we have had under consideration the ordinance licensing and regulating ice manufacturers and dealers (Chapter 140 of the Municipal Code of Chicago).

You state that the establishments in question either:

(1) Purchase ice cubes, preserve them in so-called deep freezers and resell them at retail in various quantities to consumers or

(2) Maintain on their premises machines which manufacture or produce ice cubes and sell such ice cubes to the consumer.

We have carefully gone over the provisions of Chapter 140. After reciting that "no person shall engage in the business of a manufacturer of ice or deal in ice without first having obtained a license therefor" (Section 140-1) the following sections set out the requirements for an application for a license, the license fee, require frontage consents in connection with the establishment of any ice making house or building used for the storing of ice in residential neighborhoods, and provide sanitary regulations for the manufacture of the product itself. Section 140-3, the section which sets out the license fee, breaks up into three classifications all businesses licensed under this chapter. The first group is composed of persons engaged in the business of manufacturing and selling ice. The annual license fee for this group is one hundered dollars *for each and every plant operated.* The second group is composed of persons engaged in the business of selling or receiving shipments of natural or manufactured ice, either wholesale or retail. The annual license fee for this group is seventy-five dollars *for each station or depot.* The third group is composed of persons engaged in the business of selling ice at wholesale or retail. The annual license fee for this group is fifteen dollars *for each wagon, truck or vehicle operated.*

All of the provisions which relate both to the licensing and the regulation of ice manufacturers and dealers have been in effect for many years prior to the enactment of the present code. They appear in almost identical form in both the 1931 code and the 1922 code. Certainly at the time of their passage the business of manufacturing and dealing in ice was not one which had in contemplation the activity now carried on by the Stineway Drug Company and similar dealers who have taken on as a sideline for the accommodation of customers the handling of refrigerants for home drink consumption in order to augment the sales of their beverages. The wording

of each provision indicates that the business contemplated as coming within the regulations was the business of manufacturing and dealing in ice as such. The frontage provision alone is strong testimony. The language used in classifying the three groups for the purpose of setting the license fee is also strongly indicative. We are of the opinion that the ordinance in its present form was not designed to cover the manufacture and sale of ice under the conditions in which it is carried on by the Stineway Drug Company and others similarly engaged.

It is true, however, that the health regulations found in the chapter are necessary safeguards. We feel that the present development in the industry, although not covered by the present ordinance, is one which might properly be licensed and regulated by the city and that this is a matter for consideration by the city council.

TUNNEL PERMIT FEE

(No. 11207—Commissioner of Streets and Electricity—E. L. W.—November 15, 1949.)

Your letter of recent date informs us that the Clinton Realty Company has applied for a permit to install a tunnel between Clinton Street and Jefferson Street contending it owns the fee in Congress Street and, therefore, is not required to pay compensation for the use of the subsurface space.

The case of *Farwell vs. The City of Chicago*, 247 Ill. p. 235, holds that the dedication of this street at the point where the tunnel is to be installed was a common law dedication.

The law is well settled that where a common law dedication is made, the title of the street remains in the adjoining property owners subject only to an easement for public use. (See *Tacoma Safety Deuosit Company* vs. *Chicago*, 247 Ill. p. 196 and Corporation Counsel Opinions, Volume 21, p. 193.)

The property of the applicant being located in the School Section Addition where the fee to the subsurface is in the adjoining property owners, the contention of the Clinton Realty Company is correct and a permit should be issued without compensation.

APPLICATIONS—CIVIL RIGHTS QUERY

(No. 11227—Commission on Human Relations—A. M.—December 21, 1949.)

We have your letter of April 21, 1949, addressed to this Department, attaching a copy of the recommendations adopted at a plenary session of the conference on civic unity sponsored by the Commission on Human Relations, and held in the fall of 1948, in which letter you request our opinion on the following two propositions:

(1) In all business establishments to which the Illinois Civil Rights Act applies, where city ordinances now require a license for their operation, would the appropriate City Department have authority under existing law to require, as part of the application for such license or renewal thereof, answers under oath: (a) as to the applicant's familiarity with the provisions of the Illinois Civil Rights Act, (b) as to whether the applicant has instructed all his employees and agents to comply with the provisions of said Act, and (c) as to whether, during the preceding year, the applicant had been complained or proceeded against for a violation of any such laws, giving the dates, names, circumstances and disposition, as to each such instance, if any?

(2) If no such authority exists under present ordinances, does the city have the power to enact an ordinance imposing upon applicants for licenses the requirement to furnish such information?

A third problem, which is necessarily presented by the other two, is that assuming that such power now exists or is obtainable by new legislation, is it feasible or advisable to exercise it under all the circumstances?

We shall endeavor to answer each question separately but, before doing so, should like to present some preliminary considerations which we deem material.

(1) *Powers and Functions of the Commission on Human Relations as Bearing on the Problems Involved.*

The Commission on Human Relations was created and established pursuant to Sections 49 to 52 of Chapter 21, Municipal Code of Chicago, for the declared purposes of (a) eliminating prejudice and discrimination against any individual or group because of race, color, creed, national origin, or ancestry, and (b) promoting tolerance and good will toward all people.

Section 49 of the ordinance states the need for the creation and establishment of a Commission on Human Relations, "through which the citizens of Chicago may be kept informed of developments in human relations, the officers and departments of the city may obtain expert advice and assistance in ameliorative practices to keep peace and good order and private persons and groups may be officially encouraged to promote tolerance and good will toward all people."

Section 50 of the ordinance provides (a) that the Commission "shall cooperate with the mayor, city council, city departments, agencies and officials" in assuring and securing fair and equal treatment under the law to all citizens in the matter of civil rights; (b) that the services of all city deaprtments and agencies shall be made available by their respective heads to the Commission on Human Relations at its request, and information in the hands of any department or agency shall be furnished to the Commission on Human Relations; and (c) that the Commission "shall advise and consult with the mayor and city council on all matters involving racial, religious or ethnic prejudice or discrimination and recommend such legislative action as it may deem appropriate to effectuate the policy of this ordinance."

Section 51 of the ordinance provides that the Commission may engage in various community activities to sponsor progress to promote tolerance and good will, and confers upon the Commission authority to cooperate with State and Federal agencies whenever it deems such action appropriate in effectuating the policy of the ordinance.

Finally, by Section 52, the Commission is empowered (a) to receive and investigate complaints or to initiate its own investigations of tensions, practices of discrimination and acts of prejudice against any person or group because of race, religion or ethnic origin; (b) to carry on re-

search, obtain factual data, and conduct public hearings to ascertain the status and treatment of racial, religious and ethnic groups in the city and the best means of improving human relations in the city; and (c) to issue such publications and such reports of its investigations and public hearings, and to make such recommendations to the mayor and to the city council, as in the Commission's judgment will effectuate the policy of the ordinance.

The purpose of this recital of the duties and functions of the Commission, with which you are so fully conversant, is to emphasize that the Commission possesses broad powers under existing law to reduce or eliminate discriminative practices by education and by the initiation of investigations. This raises the question whether the city can or should single out for special treatment those businesses to which the Illinois Civil Rights Act applies, and to compel the applicant's disclosure of information as to his compliance with civil rights legislation as a condition of his right to be granted a license or renewal thereof.

Stated in another form, the problem presented is whether the city can or should stress or accentuate one legal requirement over many others to which operators of licensed businesses are made subject. A restaurant, for example, must comply with laws, both city and state, relating to civil rights, health, sanitation, safety, and local and state revenue, to mention but a few. It may well be asked whether it is proper or advisable for the city to compel the disclosure of information by an applicant for license as to his compliance status with respect to one of these laws, without making a similar request as to such other laws. Might not silence as to other legal requirements give rise to the implication that compliance therewith is not considered to be of actual importance?

We can put to one side the issue whether requiring the furnishing of such information in license applications would be subject to the constitutional objection against self-incrimination. It seems to be fairly well settled that laws requiring the making of reports, or the disclosure of particular facts, as regulatory of particular occupations or businesses or as a condition of obtaining licenses therefor, will not be considered as compelling self-incrimination in violation of constitutional guaranties (Vol. 70, Corpus Juris, Witnesses, Sec. 876, pp. 722-723). The fact that an election not to disclose will result in a revocation of the license or a forfeiture of the right to pursue the licensed occupation has been held not to render the provision for disclosure invalid.

(2) *Under existing ordinances, there is no power to require the furnishing of such information in license applications.*

Under present ordinances, there is no requirement that information as to compliance with civil rights laws be included in the application for license or renewal thereof. None of the sections governing the licensing of the occupations and businesses subject to the Civil Rights law contains provision for the furnishing of any such information by the applicant.

This is true also with respect to the General Licensing Ordinance, applicable to all licensing procedure, which is Chapter 101, Municipal Code of Chicago.

Section 4 of Chapter 101 prescribes the contents of all applications for license, as follows:

> "Every application for a license shall contain the name of the person desiring the same and the place of business of such applicant. If the applicant is a partnership or firm, the application shall contain the names and residence addresses of each of its members; if a limited partnership, the names and residence addresses of each

general partner thereof; and if a corporation, the application shall contain the names and residences of its principal officers. In addition to such statements, there shall be set forth in said application the location of the place of business, or proposed location thereof, for which the license is sought, and such other information as may be required by the city collector in conformity with the provisions of this code proscribing the requirements of such license."

Section 5 of Chapter 101 provides for the investigation and inspection, by the appropriate city department, of the character and fitness of the applicant as to certain businesses, and further provides for the issuance of the license under satisfactory proof of such character and fitness.

The provision of Section 5 with respect to satisfactory proof on this point reads as follows:

"Upon receiving satisfactory proof from the city collector that the applicant or each of the principal officers, if the applicant is a corporation, is a fit and proper person to be granted such license, and that all laws and provisions of this code regulating the business or occupation for which such license is applied for, have been complied with, the mayor may authorize the issuance of the said license by the city clerk."

It will be noted that the proof required prior to issuance of a license is that the applicant has complied with all laws and provisions "of this code" regulating the business or occupation for which such license is applied for. Moreover, this proof is not required to be made available by compulsory self-disclosure.

Section 6 of Chapter 101 provides that all applicants may be required to swear to any statement made in any application for license. To the extent, therefore, that any information is presently required in license applications, information under oath may be demanded.

There is no provision in the Municipal Code of Chicago prohibiting racial discrimination or requiring the furnishing of equal facilities and accommodations such as is contained in the Illinois Civil Rights Act. Hence, the requirement of proof of compliance with all laws and provisions "of this code" would not include proof of compliance with civil rights laws, at least not by self-disclosure.

However, Section 27 of Chapter 101 specifically provides for the revocation of any license if the licensee has violated "any of the provisions of this code or any of the statutes of the state in the conduct of his business." The language is as follows:

"The mayor shall have power to revoke any license issued under the provisions of this code for good and sufficient cause. If at any time after the granting of any license, any licensee shall have violated any of the provisions of this code or any of the statutes of the state in the conduct of his business, the mayor may revoke the license therefor."

License revocation proceedings are thus available to discipline licensees violating the Illinois Civil Rights Act.

There is no power, however, either in the special licensing ordinance or in the general licensing ordinance above referred to requiring an applicant for a license, or a renewal thereof, to give any information respecting his knowledge of or familiarity with the Civil Rights Law, or any information as to his giving or failure to give instructions to his employees or agents to comply with such law, or as to the licensee's history of compliance or non-compliance with the provisions of such laws.

(3) *Is there power to enact an ordinance requiring the furnishing of such information in license applications?*

It would seem that since the city has the power to impose reasonable restrictions and conditions upon the issuance of licenses, it would have the power to require applicants to furnish information as to their state of compliance with provisions of the statutes and of the Municipal code. The question arises, however, as to whether the city has the power to impose such requirements as to certain businesses, (namely those to which the Civil Rights Act is applicable), without imposing the same requirement with respect to other businesses subject to licensing by the city. This raises not so much a question of the existence of such power, as of the legitimate and proper exercise thereof. A constitutional requirement of all regulatory legislation, whether by the state or city, is that there must be a reasonable relation between the means adopted and the objects sought to be attained. Still other constitutional requirements are that the law be uniform in its application, and that the classification as between those subjected to the requirement and those excluded from it be reasonable.

Tested by these rules, a serious question arises as to whether it would be reasonable to impose the requirement of self-disclosure upon licensed businesses subject to the Civil Rights statute and to exempt licensed businesses to which the Civil Rights statute does not apply. It could be argued with great force that there is as much reason to secure compliance with health, safety, and sanitation laws as to discourage violation of the Civil Rights laws.

Moreover, any legislation enacted for the avowed purpose of eliminating discrimination should not itself be vulnerable to the criticism that it is discriminatory. Consequently, it is seriously to be questioned whether the enactment of ordinances making such information necessary to be furnished in the particular businesses subject to the Civil Rights statute is either feasible or appropriate, apart from the question of power.

A feasible alternative might be to amend the General Licensing Ordinance so as to require all applicants for licenses or renewals thereof to state in their applications whether any complaint had ever been filed against them, or whether they had ever been proceeded against, for a violation of any law, statute or ordinance, or any rule or regulation promulgated thereunder, compliance wherewith is required by persons engaged in the particular occupation or business for which the application for license or renewal thereof is being made. Such a provision extending to all licensed businesses would, in our opinion, tend to discourage violations of the laws, statutes, ordinances, rules and regulations governing all licensed business, including businesses subject to the civil rights laws, and would be free from the serious objection that it constitutes special or discriminatory legislation.

LICENSING SECOND-HAND STORES

(No. 11271—Commissioner of Police—A. F. G.—March 21, 1950.)

By letter of March 10, 1950 you referred to this office for our information and whatever consideration we might deem necessary, a report from the Director, Bureau of Criminal Information and Statistics, pointing out the necessity for legislation to compel re-sale stores to register such items as typewriters, business machines, etc. The report contends that such registration will enable his department to identify and recover such stolen items.

We have carefully studied the said report and agree with the writer thereof that legislation which would authorize the license and regulation

of dealers in second-hand articles would be of inestimable value to your department in the recovery of stolen articles. However, the city is without power to enact ordinances "governing the regulation of all re-sale firms."

A municipality has only such power as has been expressly granted to it by the legislature or such power as may reasonably be implied from the powers expressly granted.

The power granted to cities to license and regulate second-hand dealers is found in section 23-94 of the Revised Cities and Villages Act, which reads in part as follows:

> "To license, tax, locate and regulate all places of business of dealers in junk, rags, and any second-hand articles whatsoever."

An ordinance of the City of Chicago licensing and regulating second-hand dealers in automobile parts, tires, etc. was before our Supreme Court in *Bullman* v. *City of Chicago*, 367 Ill. 217, (1937). In holding the ordinance invalid under the power granted by the section referred to above the Court said:

> "It has been repeatedly held by this and other courts, that where general words follow particular and specific words in a statute the general words must be construed to include only things of the same kind as those indicated by the particular and specific words; (citing cases) and this rule is enforced in the construction of a statute unless there is something in the statute, or its context, which shows that the doctrine of *ejusdem generis* should not be applied. (Cases cited).
>
> It is apparent from a reading of the statute under consideration that the general words 'any second-hand article whatsoever' follow particular and specific words 'junk, rags,' and under the doctrine of *'ejusdem generis'* they must be construed to include only things of the same kind as those indicated by the preceding particular and specific words."

Since the decision in the Bullman case the city council has vainly endeavored to have the General Assembly grant broader powers to the city in the matter of regulating second-hand dealers. At the last session of the General Assembly, Mayor Kennelly, with the approval of the city council sponsored a bill granting to the City of Chicago power to license and regulate all businesses, but it failed of passage.

Until such legislation is enacted your department will have to work with the inadequate tools now available.

MOTOR VEHICLE REPAIR SHOP LICENSE

(No. 11272—City Council—L. L. K.—March 22, 1950.)

The defendants in ten prosecutions pending in the Municipal Court for failure to have a motor vehicle repair shop license have challenged the validity of Sections 156-6 to 156-10, inclusive, of the Municipal Code.

We have made a study of these provisions of the Code and are of the opinion that there is no statutory authority for their existence. The legislature has nowhere granted to the municipality the power to license, tax, or regulate motor vehicle repair shops. The general rule is well settled in Illinois that a municipal corporation's powers are derived solely from legislative grant. *Potson* v. *City of Chicago*, 304 Ill. 222 (1922); *Aberdeen* v. *City of Chicago*, 315 Ill. 99 (1925); *Barnard & Miller* v. *City of Chicago*, 316 Ill. 519 (1925).

A municipal ordinance to be valid must pass three tests: (1) it must fall within one of the enumerated powers designated in the Revised Cities and Villages Act, or be necessarily implied thereby; (2) it must not be unreasonable or arbitrary; (3) it must not be in conflict with state regulation of the same subject matter.

The legislature has not granted express authority to enact an ordinance requiring motor vehicle repair shops to obtain a license, nor is there any grant of power from which such authority may be necessarily implied.

In *Nature's Rival Co.* v. *City of Chicago*, 324 Ill. 566 (1927), an ordinance licensing all wearing apparel shops was held invalid because the City had no express authority to enact it. That ordinance was similar to the motor vehicle repair shop ordinance in that it provided for certain health regulations and the license fee was based on the number of employees. The City tried to sustain the ordinance on the ground that it was designed to regulate, control and license sweat-shops. The court rejected this contention and said (p. 568):

> "A municipal ordinance of a regulatory nature in contravention of the natural rights of individuals, enacted under general charter powers, is not only required to be constitutional but it must be reasonable as well. The court before which it is brought must be able to see that it will tend to promote the public health, morals, safety or welfare and that the means adopted are adapted to that end and not unduly oppressive upon individuals (*Elie* v. *Adams Express Co.*, 300 Ill. 340.) —No express power is conferred upon cities by the legislature to license or regulate wearing apparel shops. The passage of this ordinance is not merely the exercise of a power, as contended by appellant, to regulate, control and license sweat-shops, but by its terms it would require every seamstress in Chicago who in her own room may alter or repair any wearing apparel or the component parts thereof, for sale or compensation, to pay a license fee of two dollars. There can be no reasonable connection between such requirement and the alleged purpose of this ordinance."

It is our opinion that this ordinance is invalid and cannot be sustained. We propose to dismiss the suits when they come up in court and we recommend the repeal of these sections of the ordinance.

LICENSING "AUTO SHOOT" GAME

(No. 11341—City Collector—C. P. H.—October 17, 1950.)

We have your letter of October 2, 1950 transmitting a communication from Joseph Bernstein, attorney at law, in which he states that his client, The Marlin Electric Company, desires to procure a license to operate a target practice device known as "Auto-Shoot." You request our opinion as to how the operation of the device should be licensed.

In his letter Mr. Bernstein explains the operation of the device, and submits two photographs showing the machine enclosed in a cabinet. He states that the device is operated by the insertion of a coin in a slot, whereupon three loaded cartridges are ejected into a cup. The cartridges are then placed into a rifle fastened to the cabinet so that it may be fired only at the target located inside the machine. He claims that no prizes of any kind are awarded by the device. The company proposes to install these devices in hotels, restaurants, taverns and other places of business.

Mr. Bernstein contends that the device should be licensed as an automatic amusement machine. This contention is without merit. The provisions of the Municipal Code of Chicago licensing such machines, are as follows:

> "104-1. * * * The term 'automatic amusement machines' means any mechanical amusement machine or device, the operation of which is governed or controlled by the deposit of a coin or token including, without being limited thereto, any such coin controlled instrument or device capable of producing or reproducing any vocal or instrumental sounds. (Passed. Coun. J. 11-6-47, p. 1168; amend. 4-15-48, p. 2183.)"

> "104-4. An annual license tax of twenty-five dollars is imposed upon each automatic amusement machine used within the city for gain or profit from operation. (Passed. Coun. J. 11-6-47, p. 1168.)"

It is an elementary rule that ordinances must be construed to ascertain and give effect to the intention of the law-making body. (*Dean Milk Company* v. *City of Chicago*, 385 Ill. 565.) In adopting the above provisions of the Code the city council had in mind the licensing of coin operated devices that produce all classes of amusement not prohibited by law. Certainly it was not intended to license coin operated devices the operation of which would be in violation of law, such as slot machines and devices that present immoral or indecent exhibitions. In an opinion of this department dated February 11, 1946 it was held that a coin operated amusement device having all the elements of a bagatelle or pigeonhole game, could not be properly licensed as an automatic machine as such games are prohibited by section 193-6 of the Code. (Ops. of Corp. Coun. Vol. XXII, p. 39.)

The device under consideration here contains a rifle that discharges loaded cartridges. The provisions of the Code relating to the discharging of firearms are as follows:

> "193-29. No person shall fire or discharge any gun, pistol, or other firearm within the city, except upon premises used by a duly licensed shooting gallery, gun club, or rifle club, or in accordance with the provisions of section 193-32 of this code. * * *
>
> "The provisions of this section shall not apply to sheriffs, coroners, constables, members of the police force, or other peace officers engaged in the discharge of their official duties, or to any person summoned by any of such officers to assist in making arrests or preserving the peace while such person so summoned is engaged in assisting such officer."
>
> "193-32. Any person licensed to hunt under the provisions of an act of the general assembly, entitled 'Game Code of Illinois,' approved July 8, 1937, may hunt or kill game birds in the open season as provided by the laws of the state * * *."

The above sections of the Code prohibit persons from discharging firearms except on premises licensed as a shooting gallery, gun club or rifle club; and the only persons exempt from this prohibition are peace officers, persons assisting such officers in the discharge of their official duties, and persons licensed to hunt under the Game Code of Illinois. In an opinion dated February 17, 1938 this department passed upon the proper classification of a similar target practice device, though not coin operated, in which a rifle was discharged and it was there held that the operator of the device would be required to have a shooting gallery license. It was further stated that plural cabinets might be used by the operator of each separate establishment upon the payment of one license fee without paying a separate fee for each cabinet. (Ops. of Corp. Coun. Vol. XX, p. 160.)

Section 170-1 of the Code provides as follows:

"No person shall conduct or operate any shooting gallery, rifle range, gun club, or other place where firearms are discharged, in the city, without first being licensed so to do."

Admittedly the device in question contains a rifle wherein explosive ammunition may be discharged. It is apparent that the device cannot be licensed as an automatic amusement machine; and that the only place of business where it may be operated is on premises licensed as a shooting gallery. It is therefore our opinion that the owner or proprietor of each separate place or location where the device, referred to in Mr. Bernstein's letter, is used would be required to have a shooting gallery license under the provisions of the above quoted section 170-1 of the Code.

GASOLINE TESTING LABORATORY

(No. 11434—City Collector—C. P. H.—October 19, 1951.)

We have your letter of October 11, 1951 relative to the communication you received from Mr. Rolland A. Franzen, attorney at law, Arlington Heights, Illinois, wherein he states that one of his clients, who maintains a research laboratory in the city of Chicago in which tests and analysis of oil, gasoline and related products are conducted, desires to establish a mobile laboratory unit in a trailer for the purpose of making such tests and analysis at the plants of his customers. Mr. Franzen, however, has not disclosed the name of his client nor the location of his business. You request our opinion as to whether or not a license may be granted to operate such a mobile laboratory unit under the provisions of chapter 144 of the Municipal Code of Chicago.

Section 144-2 of the chapter provides that "no person shall conduct or operate any laboratory or laboratory agency for a fee without first having obtained a license therefor." By these provisions it is expressly made unlawful for any person to operate a laboratory without first obtaining a license. In order for an applicant to obtain a license the premises for which the license is sought must conform to the requirements of section 144-3 which provide that the premises must be fit and suitable for the conduct of such business from a sanitary standpoint and must comply with the state laws and provisions of the code regulating health, safety, and sanitation so as to safeguard property, the lives and health of the employees engaged on the premises. Section 144-3 further provides that the board of health shall also investigate the accuracy and reliability of the work done in such laboratory and as to whether the person in charge of such laboratory is of good reputation and experience and qualified to do or supervise the work for which such laboratory is maintained.

By providing for these requirements and regulations the city council manifestly intended that such laboratories be operated and maintained only from a fixed location so that inspections and investigations may be made from time to time to determine whether or not the premises and the tests and analyses conducted in the laboratory conform with the requirements of the Code. Admittedly the proposed mobile laboratory unit would not be operated at any fixed location but would conduct laboratory tests at various plants throughout the city.

It is therefore our opinion that no license may be issued for the operation of the proposed mobile laboratory unit and that its operation without a license is prohibited by section 144-2 of the Code referred to above.

STREET CLEANING BUSINESS

(No. 11435—A. F. G.—October 19, 1951.)

This will acknowledge receipt of your letter of September 28, 1951 requesting information concerning your plan to install a street cleaning business.

Your plans as stated in your letter are to clean streets block by block, the cost of the same to be paid by the property owners abutting such streets.

You inquire if a license is necessary and if so, what type and amount of the fee?

We find nothing in the Municipal Code of Chicago requiring a license for the proposed business. We discussed your plan with Mr. L. M. Johnson, commissioner of streets and electricity, who informed us that two other organizations are now doing the type of work you propose. The Citizens Clean Street Bureau, operating in the down town district and another organization operating on the near north side.

He advises us that their work is very satisfactory and they cooperate fully with his department. His recollection is that they are given an annual permit to carry on their work.

If you contact Mr. Johnson, outline your mode of procedure and meet the requirements of his department, we feel sure your plan will receive his favorable consideration.

LUMBER YARDS

(No. 11449—City Collector—C. P. H.—November 21, 1951.)

We have your letter of November 8, 1951 relative to a communication you received from the Rietz Lumber Company, 1802 N. Central Park Avenue under date of November 7, 1951 wherein it is stated that August J. Lockafeer, License Inspector, requested the Company to obtain licenses to operate a lumber yard at each of the following locations:

1755-1759 N. Monticello Avenue
1756-1758 N. Monticello Avenue

From your communication and information that we obtained orally from Mr. Lockefeer, it appears that the Company obtained a license for the year 1951 to operate and maintain a lumber yard at 1802 Central Park Avenue. After this license was issued the Company acquired and is now maintaining lumber yards at the above designated locations. The lumber yard located at 1802 N. Central Park Avenue, for which a license has been issued, is separated from the two new locations by the right-of-way of the Chicago. Milwaukee, St. Paul & Pacific Railway. The newly acquired lumber yards are separated by Monticello Avenue, one being on the east side and the other being on the west side of the street. In other words, each of the three lumber yards is a separate and distinct parcel of property.

Section 149-1 of the Municipal Code of Chicago provides as follows:

"No person shall conduct or operate a lumber yard or lumber storehouse without first having obtained a license therefor.

Included hereunder, but not limited hereby, shall be all lumber yards, lumber storehouses, and other places where new, used, finished or unfinished lumber, timber wood (except firewood), wooden boxes, wooden barrels, veneers, ply woods, flex woods and the like, in excess of five thousand board feet, are kept, placed, stored, or piled for sale or use, other than lumber for use in the repair, erection, or construction of buildings or improvements incident to the land on the premises where so kept, placed, stored or piled on the premises immediately adjacent thereto."

In an opinion of this office addressed to the City Collector under date of March 15, 1915 it was stated that lumber yards separated by a public street or streets must be considered as separate and distinct lumber yards and that a separate license is required for each lumber yard. (Ops. of Corp. Coun., Vol. 8, p. 365.) It has been shown that the three lumber yards referred to herein are separate and distinct parcels of property, each being separated from the other by a public street or private property of a railroad company.

It is therefore our opinion that the Rietz Lumber Company is required to obtain two additional licenses, one for the lumber yard located at 1755-1759 N. Monticello Avenue, and the other for the lumber yard located at 1756-1758 N. Monticello Avenue.

TELEGRAPH INSTRUMENTS

(No. 11454—City Collector—C. P. H.—November 27, 1951.)

We have your letter of November 9, 1951 transmitting the communication dated November 7, 1951 which you received from Messrs. Eckhart, McSwane & Campbell, 38 S. Dearborn Street, Chicago, attorneys for the Western Union Telegraph Company, wherein they contend that the Company is not required to obtain licenses to operate and maintain tickers on the ground that the City has not been granted power by the legislature to adopt an ordinance to license and regulate such instruments.

The ordinance licensing and regulating tickers is set forth in chapter 177 of the Municipal Code of Chicago. This chapter, in so far as it is pertinent here, provides as follows:

"Section 177-1. The word 'ticker' is hereby defined to mean any device or instrument for the receiving and recording or registering by electrical transmission of printed news, intelligence, or other information of any kind or character whatsoever.

"Section 177-2. It shall be unlawful for any person to operate, use, or maintain any ticker without first having obtained a license for each separate ticker so operated, used, or maintained. * * *

"Section 177-6. No person shall operate, use, or maintain any ticker between the hours of twelve o'clock midnight and eight o'clock a.m.; provided, however, that the mayor may, in his discretion, designate times when tickers may be used and operated at night."

The principles governing the power of cities, including the power to license and regulate, and the source and exercise of such powers have been enumerated and fully discussed in recent decisions of the Supreme Court of Illinois, *City of Bloomington* v. *Warrick*, 381 Ill. 347; *Arnold* v. *City of Chicago*, 387 Ill. 532; *Fr. Basil's Lodge* v. *City of Chicago*, 393 Ill. 246.) Since the power of the City to adopt this ordinance has been challenged, these principles must be taken into consideration.

It has long been the established rule in Illinois that municipalities may only exercise the powers delegated to them by the General Assembly. All legislative power is vested in the General Assembly by the constitution. That body may exercise the power directly or it may create municipalities and delegate to them, for the purpose of local government, such portion of the power as it sees fit to grant. Municipal corporations owe their existence to, and their powers are derived solely from, the General Assembly. They have no inherent power. In order to legislate upon, or with reference to, a particular subject, they must be able to point to the statute which gives them the authority to exercise the power which they claim the right to exercise. Statutes granting powers to municipal corporations are strictly construed. Any fair or reasonable doubt of the existence of the power is resolved against the municipality which claims the right to exercise it. The implied powers which a municipal corporation possesses and can exercise, are only those necessarily incident to the powers expressly granted. Inasmuch as a city has no power, except by delegation from the General Assembly, in order to enable it to impose any tax or license fee, the power must be expressly granted or be necessarily implied in, or incident to, the powers expressly delegated. *People ex rel. Lapice* v. *Wolper*, 350 Ill. 461; *City of Rockford* v. *Nolan*, 316 Ill. 60, *Arms* v. *City of Chicago*, 314 Ill. 316; *Potson* v. *City of Chicago*, 304 Ill. 222; *City of Chicago* v. *Pettibone & Co.*, 267 Ill. 573; *City of Chicago* v. *Mandel Bros.*, 264 Ill. 206; *People ex rel. Friend* v. *City of Chicago*, 261 Ill. 16; *City of Chicago* v. *Ross*, 257 Ill. 76; *City of Chicago* v. *M. & M. Hotel Co.*, 248 Ill. 264; *Wilkie* v. *City of Chicago*, 188 Ill. 444.

Subsection 1 of section 23 of the Revised Cities and Villages Act provides that the city council in cities shall have and may exercise the powers enumerated in subsections 2 to 107, inclusive, of that section. This express enumeration of the powers conferred upon municipalities, is an exclusion of all other powers not expressly delegated to them, and which are not necessarily implied in those expressly delegated. *(People* v. *City of Chicago*, 261 Ill. 16; *Potson* v. *City of Chicago*, 304 Ill. 222.) It is also the rule that a city may derive its power to legislate upon a given subject, from one item or from two or more items enumerated in this section. *Consumers Co.* v. *City of Chicago*, 313 Ill. 408; *Goodrich* v. *Busse*, 247 Ill. 366; *Spiegler* v. *City of Chicago*, 216 Ill. 114; *Gundling* v. *City of Chicago*, 176 Ill. 340; *Potson* v. *City of Chicago*, 304 Ill. 222.

With these general rules in mind, it becomes necessary to determine whether power to adopt the above ordinance has been delegated to the City. The express powers of the City to license and regulate are enumerated in the following subsections of section 23 of the Revised Cities and Villages Act:

> "Section 23-5. To fix the amount, terms, and manner of issuing and revoking licenses. * * *
>
> "Section 23-22. To license street advertising by means of billboards, sign boards, and signs; and to regulate the character and control the location of billboards, sign boards, and signs upon vacant property and upon buildings. * * *
>
> "Section 23-51. To license, tax, and regulate hackmen, draymen, omnibus drivers, carters, cabmen, porters, expressmen, and all others pursuing like occupations, and to prescribe their compensation.
>
> "Section 23-52. To license, tax, regulate, and prohibit runners for cabs, buses, railroads, ships, hotels, public houses, and other similar businesses. * * *
>
> "Section 23-54. To license, tax, regulate, or prohibit hawkers, peddlers, pawnbrokers, itinerant merchants, transient vendors of merchandise, theatricals and other exhibitions, shows, and amusements; to license, tax, and regulate all places for eating or amusement.

"Section 23-55. To license, tax, and regulate all athletic contests and exhibitions carried on for gain. * * *.

"Section 23-56. To license, tax, regulate, or prohibit pin, ball, or bowling alleys, billiard, bagatelle, pigeon-hole, pool, or any other tables or implements kept for a similar purpose in any place of public resort. * * *

"Section 23-72. To prevent the dangerous construction and condition of chimneys, fireplaces, hearths, stoves, furnaces, pipes, ovens, boilers, and any other fire or heating apparatus used in and about any building; and, if they are in a dangerous condition, to cause them to be removed or placed in a safe condition; to cause all buildings and enclosures which are in a dangerous fire condition to be put in a safe fire condition; to regulate and prevent the carrying on of factories that are dangerous in causing or promoting fires; and to prevent the deposit of ashes in places that create a fire hazard. * * *

"Section 23-75. To regulate and prevent the storage of turpentine, tar, pitch, resin, hemp, cotton, gunpowder, nitroglycerine, petroleum, or any of their products, and other similar combustible or explosive material.

"To regulate and prevent the use of lights and combustible liquids in buildings, and the building of bonfires.

"To regulate and prevent the use of firecrackers, torpedoes, and all sorts of fireworks. * * *

"Section 23-81. To do all acts and make all regulations, which may be necessary or expedient for the promotion of health or the suppression of disease.

"Section 23-91. To license, tax and regulate auctioneers, private detectives, money changers, bankers, brokers, barbers, and the keepers or owners of lumber yards, lumber storehouses, livery stables, public scales, ice cream parlors, coffee houses, florists, detective agencies, and barber shops.

"Section 23-92. To regulate and prohibit the keeping of any lumber or coal yard, or the placing, piling, or selling of any lumber, timber, wood, coal, or other combustible material within the fire limits of the municipality. * * *

"Section 23-94. To license, tax, locate, and regulate all places of business of dealers in junk, rags, and any second-hand article whatsoever. * * *

"Section 23-105. To pass and enforce all necessary police ordinances".

The above enumerated grants give the City express power to either license and regulate or to regulate only. The power to regulate has been held to include the power to license (*City of Chicago* v. *R. & X. Restaurant*, 369 Ill. 69). Hence by these grants of express police power the City has authority to license and regulate any occupation and any particular subject set forth in the above quoted provisions of the act, for the purpose of protecting the public health and the public safety.

The ordinance under consideration here licenses and regulates the operation and maintenance of tickers. It seems obvious that no single power or combination of powers enumerated above delegate to the City express authority to license and regulate such instruments. Furthermore, the regulatory provisions of the ordinance relating to the time when the instruments may not be operated do not tend to promote the public health and public safety. Neither a municipal corporation nor the legislature may interfere, under the guise of a police regulation, with the liberty of a citi-

zen in the conduct of his business, legitimate and harmless in its essential character, beyond a point reasonably required for the protection of the public *(Lowenthal* v. *City of Chicago,* 313 Ill. 190). It appears that the ordinance is solely a revenue measure. Under the police power license fees may not be imposed wholly for the raising of revenue *(City of Chicago* v. *R. & X. Restaurant,* 369 Ill. 69).

Subsection 23-105 cannot be relied upon to sustain the City's power to adopt the ordinance. It is well established that this section which gives municipalities power "to pass and enforce all necessary police ordinances" relates solely to the enforcement or ordinances and regulations passed under powers conferred by other provisions of the act, and it confers no additional powers and cannot be invoked as an independent source of legislative power, *City of Bloomington* v. *Warrick,* 381 Ill. 347. In an opinion of this office addressed to the Chairman of the Committee on Finance under date of June 29, 1923 it was stated that the City's authority to license tickers was very doubtful (Ops. of Corp. Coun., Vol. XII, p. 270).

Inasmuch as we are unable to point to any power which gives the City expressed or implied authority to license and regulate tickers, it is our opinion that the ticker licensing ordinance appearing in chapter 177 of the Code is invalid and should not be enforced. With the view we have taken it is unnecessary to discuss or pass upon the other points raised in the communication attached to your letter.

INCREASE IN SEWER PERMIT FEES

(No. 11477—Alderman, 38th Ward—February 15, 1952.)

In your letter of January 11, 1951 you call attention to greatly increased fees being charged by the department of public works, bureau of sewers, for permits, inspection and drainlayers licenses, these advances being as much as forty to fifty per cent, as indicated by letter of November 1, 1951 from the bureau to plumbing contractors.

You want to know by what authority the bureau arbitrarily increases its fees for permits, inspection and drainlayers licenses. You ask if any ordinance has been passed giving this authority. You question the validity of such an ordinance if it were passed.

You ask our opinion whether the bureau of sewers has the legal right to impose exorbitant fees and whether an ordinance authorizing these charges would be valid.

The bureau advises us that section 31-2 of the Municipal Code of Chicago is their authority for the increase in permit and inspection fees which went into effect January 1, 1952. They admit the increase in the license fee for drainlayers was not justified by the said section or any other provision of the code. At the time this increase was made section 119-3 of the code fixed the annual license fee for drainlayers at thirty-five dollars. On January 16, 1952, C. J. p. 1785, this section was amended, making the fee for such license fifty dollars and is now in effect.

Section 31-2 reads as follows:

> "No sewers or drains shall be laid in any public way and no connection shall be made with any public sewer or drain without the written permission of commissioner of public works; nor shall any person drain from any point within the limits of the city into the Chicago river or any of its branches, or into any slip connecting there-

with, or into any canal or canals constructed under the authority of said city, without first obtaining a permit for such drainage from the commissioner of public works; and said commissioner is hereby authorized to grant such permits and to exact a permit fee therefor to be fixed by said commissioner, which said permit fee shall be equal to an amount sufficient to defray the expense imposed upon the city in consequence of granting such permission. The said permit fee, however, shall not be less than ten dollars for each connection.

Any person violating the provisions of this section or any regulation pertaining thereto prescribed by said commissioner, shall be fined not less than fifty dollars for each offense and a further fine of twenty-five dollars for each and every day such violation shall continue."

By this section the commissioner of public works has been authorized by the corporate authorities to fix the amount of the permit fees for sewers, at an amount equivalent to an amount sufficient to defray the expense imposed upon the City as a result of granting such permits.

The department advises us that the cost to the City of making sewer inspection has been greatly in excess of the revenue from the permit and inspection fees heretofore in effect. They say the increase in permit and inspection fees is just about sufficient to meet the mounting costs of inspection service furnished by the City.

While it is true that statutes and ordinances which grant to ministerial officers discretionary power without any standard, rule or regulation to restrain the unrestricted exercise of such discretion have been held invalid, *Welton* v. *Hamilton*, 344 Ill. 82, we are of the opinion the section here in question does not violate such rule.

Here the ordinance fixes a definite standard to guide the commissioner of public works in determining the amount of permit fees, namely an amount commensurate with the cost of inspection services imposed on the City by reason of the issuance of such permits.

Unless it can be shown that the fees fixed by the commissioner are unreasonably in excess of such costs, we are of the opinion the section cannot successfully be attacked.

MACHINE SHOP LICENSE

(No. 11479—City Collector—C. P. H.—February 19, 1952.)

We have your letter of February 11, 1952 relative to the communication you received from Mr. Walter Laugal, 7924 Cressett Drive, Elmwood Park, Illinois, under date of February 7, 1952. It appears that he contemplates going into the business of making circular form tools for Brown and Sharpe screw machines of all types at some location in the City of Chicago where this type of business is permitted under the zoning ordinance. The tools produced will be sold to manufacturers of screw machine products that use the Borwn and Sharpe screw machines in connection with the operation of their business. The proposed establishment will contain two Brown and Sharpe tool grinders, metal lathe, hand service grinder, metal circular hand saw, and J. & L. comparator. These machines and equipment will be used to process the circular form tools from pieces of high speed tool steel.

You request our opinion as to whether or not the business described is subject to the provisions of sections 150-18 to 150-26 of the Municipal Code of Chicago licensing and regulating machine shops.

By sections 23-1 and 23-87 of article 23 of chapter 24 of the Revised Cities and Villages Act, the City has been granted express power to locate and regulate the use and construction of machine shops (Ill. Rev. Stats., pars. 23-1 and 23-87, Chap. 24). The courts have repeatedly held that the power to regulate includes the power to license (*City of Chicago* v. *R. & X. Restaurant,* 369 Ill. 65 (1938); *City of Chicago* v. *Waters,* 363 Ill. 125 (1936), aff'd 299 U. S. 387 (1936); *City of Chicago* v. *Arbuckle Bros.,* 344 Ill. 597 [1931]).

Pursuant to this statutory power the City adopted an ordinance licensing and regulating machine shops which ordinance appears in sections 150-18 to 150-26 of the code. Section 150-18 provides as follows:

> "The term 'machine shop' is hereby defined to mean a workshop in which machines are made or metal parts thereof are repaired, or where parts of machines, or tools, implements, gears, dies, screws, or other metal articles are cut, filed, shaped, punched, stamped, or repaired by means of a lathe or other machinery."

In the case of *City of Chicago* v. *Ingersoll Steel Corp.,* 371 Ill. 183 (1939), the court had the above quoted provisions of the code under consideration. The court held that the City has no authority to license and regulate factories generally, such power being reserved by the State, and that in conferring upon cities the power to regulate machine shops the General Assembly must be held to have intended this power to be exercised with respect to separate places of business known as machine shops and not with respect to shops which are incidental to manufacturing establishments and do no work for the public. We followed this decision in an opinion addressed to the City Collector under date of March 12, 1948 wherein it was held that a manufacturing establishment which operated a machine shop or tool and die room incidental to its main business, and that did no machine shop work for the public, was not required to obtain a machine ship license.

The *Ingersoll* decision, however, is not applicable to the instant case since it is proposed to sell the circular form tools to any person using Brown and Sharpe screw machines for the manufacture of screw machine products. The proposed establishment will not be operated solely as an integral part of and incidental to a manufacturing plant but will be conducted as a separate place of business. Furthermore, Mr. Laugal admits in his communication that the circular form tools will be cut and shaped on a lathe and on grinders. Section 150-18 defines a "machine shop" as any workshop in which tools are cut and shaped on a lathe or other machinery. It is therefore our opinion that the business described in your letter is a machine shop business and that if Mr. Laugal operates and conducts the business in the City he must comply in all respects with the provisions of sections 150-18 to 150-26 of the code licensing and regulating machine shops.

MILITARY SERVICE BY FORMER LICENSEE

(No. 11528—A. F. G.—April 30, 1952.)

To your letter of April 1, 1952 was attached a copy of an ordinance adopted July 14, 1943, appearing in council proceeding of that date at page 409. The first section of that ordinance is as follows:

"Section 1. Notwithstanding any provision of the Municipal Code of Chicago which requires the re-examination of any licensee before the renewal of his license, any licensee whose license has expired while he has been engaged (1) in federal service on active duty with the Army of the United States, the United States Navy, the Marine Corps, the Coast Guard, or the State Militia called into the service or training of the United States of America, or (2) in training or education under the supervision of the United States preliminary to induction into Military Service, may have his license renewed within one year after termination of such service, training or education, other than by dishonorable discharge, without again being examined, excepting as to his physical qualifications when required, provided he has not in the meantime been guilty of any offense which would be cause for the revocation of such license. With his application for such renewal the applicant shall furnish the department head, commission or examining board concerned, with evidence of such facts as are necessary to establish his right under this ordinance."

Section 2 of the ordinance struck out the second paragraph of Section 162-7 of the code which referred to plumbers licenses. Section 3 of the ordinance struck out the proviso in the last paragraph of section 181-2 of the code which referred to the licenses of motion picture operators.

The matter stricken in sections 2 and 3 of the ordinance was the same as that contained in section 1 of the ordinance and had been added to sections 162-7 and 181-2 respectively on May 13, 1942, C. J. p. 7066 and on March 25, 1942, C. J. p. 6788. Section 1 of the ordinance of July 14, 1943 quoted above applies to all licensees and so the same provision applying to specific licensees was unnecessary and were stricken in sections 2 and 3 of that ordinance. You ask:

"1. Is this authority still in effect?

2. Has this been limited to any period of service, such as World War II, or is it effective for any period of service in the armed forces, including the present Korean action?"

A diligent search of the council proceedings in the office of the City Clerk does not disclose that the ordinance has ever been repealed and in our opinion is still in effect.

In reply to your second query it is our opinion that the provision is not limited to World War II, the Korean action or to any particular military engagement of the United States and was intended to apply to any case in which a licensee has been engaged in federal service on active duty in any of the branches of the armed service of the United States named in the ordinance regardless of the time or place where the service was engaged in.

FEE EXEMPTIONS FOR HOSPITALS

(No. 11558—City Collector—E. R. H.—July 8, 1952.)

We acknowledge your letter of July 1, 1953, in which you direct our attention to an ordinance passed by the City Council May 21, 1952 authorizing the issuance of licenses and permits under certain conditions free of charge to Michael Reese Hospital and affiliates, under which ordinance Mr. Louis Balaban, Comptroller of Michael Reese Hospital, claims exemption for the hospital from payment of the cigarette dealers' license.

The ordinance referred to (p. 2467 Journal Proceedings of the City Council, May 21, 1952) provides in part:

> "That the Commissioner of Buildings, the Commissioner of Public Works, the Commissioner of Streets and Electricity, the President of the Board of Health, and the City Collector be and they are hereby directed to issue all necessary permits and licenses, free of charge, notwithstanding other ordinances of the City of Chicago to the contrary, to Michael Reese Hospital of Chicago, an Illinois corporation not for pecuniary profit, and its affiliates, The Michael Reese Hospital Post-graduate School, an Illinois corporation not for pecuniary profit, and Michael Reese Research Foundation, an Illinois corporation not for pecuniary profit, for the erection and maintenance of hospital buildings and other necessary buildings connected with the activities of Michael Reese Hospital of Chicago, an Illinois corporation not for pecuniary profit, the Michael Reese Hospital Post-graduate School, an Illinois corporation not for pecuniary profit, and Michael Reese Research Foundation, an Illinois corporation not for pecuniary profit, in the area bounded by E. 26th Street on the north, the right of way of the Illinois Central Railroad on the east, E. 31st Street on the south, and S. South Park Way on the west. * * * "

It is our opinion that the only permits and licenses which can be issued free of charge to Michael Reese Hospital and its affiliates are those "necessary permits and licenses * * * for the erection and maintenance of hospital buildings and other necessary buildings connected with the activities of Michael Reese Hospital of Chicago" and its affiliates. Clearly, the cigarette dealers' license fee is not incuded in the ordinance, and Michael Reese Hospital is obligated to pay this fee if it intends to continue the sale of cigarettes.

MASTER PLUMBERS—RECIPROCITY

(No. 11581—Board of Examiners of Plumbers—L. L. K.—September 12, 1952.)

This will acknowledge receipt of your letter of August 27, 1952, transmitting application of E. J. Biggs for Master Plumber certificate, together with application attached thereto on a state form for a Master Plumber's license, on the basis of reciprocity, with check dated July 26, 1952, in the sum of $25.00.

You request an opinion as to the legality of this application and the right of your board to issue a certificate on the basis of reciprocity.

The Illinois Plumbing License Law (chap. 111½, Ill. Rev. Stats. 1951) provides in paragraph 116.19 as follows:

> "Any person who shall present evidence satisfactory to the Director that such person has been the holder for a period of at least two years next preceding the date of his application, of a Master Plumber's license or a Journeyman Plumber's license or the equivalent thereof, issued by some other State of the United States, may apply for, and in the discretion of the Director receive, a corresponding license under this Act without examination.
>
> Any person who has been engaged as a Master Plumber or Journeyman Plumber in any State of the United States which has no law for examination of plumbers or licensing thereof, and who presents satisfactory evidence to the Director that he has worked as a Master Plumber in such other State for a period of at least five (5)

years may in the discretion of the Director be granted a temporary permit to work as a Master Plumber in the State of Illinois until the next examination for license in this State; * * *"

Pursuant to paragraph 116.8 of this statute which authorizes municipalities of 500,000 or more to provide by an ordinance containing provisions substantially the same as contained in the statute for a Board of Plumbing Examiners in the municipality, the City of Chicago on June 11, 1952 (C. J. p. 2548) adopted an ordinance regulating plumbers. Section 162-14 is practically identical with paragraph 116.19 of the statute.

The application filed by Biggs discloses that he claims a certificate on the ground of reciprocity based upon a Master Plumber's license issued by the town of Delphi, Indiana, on October 1, 1946, which is still in force. The Indiana statute authorizes city councils to enact ordinances to regulate, examine and license plumbers. (Burns Indiana Statutes 1940, par. 48-7402). The question which we must then consider is whether the issuance of a Master Plumber's license by an Indiana municipality is a compliance with the requirement of our statute and ordinance that the Master Plumber's license be "issued by some other State of the United States." The State of Indiana has no statutory provision providing for examination of plumbers by the State. The rules of statutory construction require that effect be given to the plain language of the statute and words need not be construed or interpreted unless they are ambiguous. The language of the Illinois Plumbing License Law and the Plumbing Ordinance are clear and unambiguous and provide for reciprocity only where the applicant holds a license "issued by some other State of the United States."

Biggs has no license issued by some other State of the United States and is therefore not entitled to a Master Plumber's certificate on the basis of reciprocity.

It will be noted that the second paragraph in the quoted portion from paragraph 116.19 of our statute provides for a temporary permit, pending the next examination for license to

> "any person who has been engaged as a Master Plumber or Journeyman Plumber in any State of the United States which has no law for examination of plumbers or licensing thereof, and who presents satisfactory evidence to the Director that he has worked as a Master Plumber in such other state for a period of at least five (5) years * * *".

The second paragraph of section 162-14 is identical and vests in the board the discretion of granting such temporary permit. It is for your board to determine whether the evidence in the application submitted by Biggs is satisfactory evidence that he has been engaged as a Master Plumber in any state of the United States for a period of at least five (5) years next preceding the date of his application and whether, on the basis of such evidence, you believe that he should be granted a temporary permit until the next examination for Master Plumber's license.

The application also shows that he is a licensed professional engineer in Illinois, holding Certificate No. 450. As such, he qualifies to plan and design plumbing installations under paragraph 116.4 of the statute and section 162-5 of the ordinance.

NEW PLUMBER'S FEES

(No. 11586—Board of Examiners of Plumbers—E. R. H.—September 23, 1952.)

We acknowledge your letter of September 16, 1953 in which you state that previous to July 5, 1952, the date of the amended ordinance governing

the Board of Examiners of Plumbers, your office had on hand twenty applications which were accompanied by a $5.00 filing fee and, if successful, these candidates would be required to pay $27.50 for the certificate. You further state that, effective July 5, 1952, the filing fee was increased by ordinance to $15.00 and the certificate was reduced to $5.00, and you ask that we advise you whether you are entitled to the $27.50 for the certificate on applicttions filed prior to July 5, 1953, or $5.00 for the certificate, plus a new filing fee.

April 28, 1952 we rendered an opinion to Mr. Lake in which we advised in effect that an Act of the General Assembly (filed July 28, 1951) repealed the Act authorizing the City Council to create your board and that your board had no longer any legal existence.

We also advised you that the General Assembly passed a new plumbing act, which provided:

> "Sec. 8 (1) Any City. village or incorporated town having a population of 500,000 or more, may, by ordinance, containing provisions substantially the same as those in this Act provide for a board of plumbing examiners to conduct examinations for Journeyman Plumbers and Master Plumbers, and to issue, suspend and revoke plumbers' licenses within such city, village or incorporated town. The provisions of this Act except as otherwise herein provided shall not apply within any such city, village or incorporated town which enacts such an ordinance."

We pointed out in our opinion that the power granted to the City Council by the section quoted above is more limited than that granted by the repealed statute under which your board was created by the City Council and that the new statute requires any ordinance to contain provisions substantially the same as those of the statute.

Pursuant to the new statute, the City Council passed an ordinance amending certain sections of Chap. 20 and Chap. 162 of the Municipal Code of Chicago (Council Journal, June 11, 1952, p. 2547) re-creating the Board of Examiners of Plumbers and establishing fees for plumbers' examinations, applications and certificates. Between the date of the General Assembly's repeal above referred to (July 26, 1951) and your qualification under the present code provisions as amended (Council Journal, June 11, 1953, p. 2547) the Board of Examiners of Plumbers was legally nonexistent.

The fees now provided for in the amended code are the same as those provided for in the new statute and it is our opinion that you are entitled to an application fee of $15.00 and a certificate fee of $5.00 as provided by the amended ordinance and limited by the statute.

UNIVERSITY OF ILLINOIS INSPECTION FEE EXEMPTION

(No. 11593—City Comptroller—A. F. G.—October 2, 1952.)

We have your letter of September 23, 1952 in which you say:

> "We are in receipt of a communication dated September 23, 1952, from Mr. H. A. Hazelton, Business Manager, Chicago Colleges and Divisions, University of Illinois, wherein he contends that the City of Chicago Municipal Code provides that a State University is not subject to the various inspections and subsequent fees provided for in the Code."

and ask our opinion as to the legality of this contention.

Mr. Hazelton's letter was prompted by the receipt of two warrants for collection, each for $5.00, for the annual inspection of low pressure boilers in buildings belonging to the University of Illinois, at 820 and 826-28 S. Wolcott street.

Section 84-6 of the Municipal Code of Chicago requires the annual inspection of steam boilers or other apparatus used for generating or transmitting steam under pressure for heating or steaming purposes.

Section 84-9.2 fixes the fee for the annual inspection for each low pressure boiler at $5.00.

Section 84-9.3 of the said code provides as follows:

> "84-9.3. The chief inspector of steam boilers, unfired pressure vessels, and cooling plants may, and he is hereby directed to remit all inspection fees charged, or that may hereafter be charged against any charitable, religious, and educational institution, when the boiler or other apparatus inspected is located in or upon premises used or occupied exclusively by such charitable, religious, or educational institution; provided, however, that such charitable, religious or educational institution is not conducted or carried on for private gain or profit."

In view of the express exemption of educational institutions from the payment of fees for the annual inspection of steam boilers, provided in the foregoing section, we are of the opinion the contention of Mr. Hazelton is correct and the warrants for collection should be cancelled.

TRANSFER OF MOTION PICTURE PERMITS

(No. 11605—Commissioner of Police—W. J. K.—October 29, 1952.)

We have your communication of recent date transmitting photostat copies of letters received from Leonard Lenit, 500 S. State Street and Patrick Honan, 426 S. State Street, requesting approval of the purchase and transfer of certain moving picture permits No. 60901 to 60912, inclusive, and 60915, 60916, 60926 and 60927 from Perry Santos of 512 S. State Street.

You request our advice as to the legality of these purchases and transfers hereinabove referred to. Section 155-7 of the Municipal Code of Chicago provides the following:

> "When a permit to show a picture or series of pictures is once granted to an exhibitor, the picture or series of pictures may be shown by any other exhibitor; provided, that the written permit is actually delivered to such other exhibitor and that a written notice of the transfer or lease to such other exhibitor is first duly mailed by the transferee or lessee to the commissioner of police. Any number of transfers of leases of the same picture or series of pictures may be made, provided always that the permit is actually delivered to the transferee or lessee and that such written notice be first mailed to the commissioner of police.
>
> Said written notice shall contain the name and a brief description of the picture or series of pictures, the number of the permit, and the location of the building or place where the transferee or lessee proposes to exhibit such picture or series of pictures. The ex-

hibition by any transferee or lessee of any permitted picture or series of pictures without first mailing such notice shall be considered a violation of this chapter, and a separate offense shall be regarded as having been committed for each day's exhibition by a transferee or lessee of each picture or series of pictures without the mailing of such notice.

In case a permit shall be refused for any such motion picture plates, films, rolls, or other like articles or apparatus from which a series of pictures for public exhibition can be produced, it shall be unlawful for any person to lease or transfer the same to any exhibitor of motion pictures or otherwise put the same into circulation for purposes of exhibition within the city."

It will be noted that the section above quoted among other things states, "provided always that the permit is actually delivered to the transferee or lessee and that such written notice be first mailed to the commissioner of police."

The ordinance further provides:

"155-6. The written permit provided for in this chapter shall be posted at or near the entrance of the theater, hall, room, or place where any permitted picture or series of pictures is being exhibited, at such a place and in such a position that it may easily be read by any person entering such theater, hall, room, or place at any time when any such permitted picture or series of pictures is being exhibited whether in the day time or in the night time."

If the assignee has complied with all the provisions of Section 155-7 such transfer is valid. We have carefully examined a letter from Leonard Lenit covering permits 60901, 60909, 60912, 60926 and 60927 and the letter of Patrick Honan covering permits 60896, 60897, 60899, 60902 to 60911, inclusive, 60915 and 60916 and find that the notices advising your office of such transfers comply with the provisions of Section 155-7 of the Municipal Code of Chicago.

It is, therefore, our opinion that said transfers are valid, providing the permits are displayed as required by Section 155-6 of the Municipal Code of Chicago, above quoted.

DURATION OF DRIVEWAY PERMIT ORDER

(No. 11609—Chief Street Inspector—A. F. G.—November 4, 1952.)

In your letter of October 29, 1952 you ask how long after the city council has passed an order authorizing the issuance of a permit for a driveway, may the permit be issued? In other words is there a time limit on a council order?

We do not think there is. When the council duly passes an order, without limiting the duration of its effect, that order is in effect until its purpose is accomplished or until it is reconsidered, rescinded or repealed.

The form of orders for driveways are as follows:

ORDERED, that the Commissioner of Streets and Electricity be and he is hereby authorized and directed to issue a permit to

to construct and maintain .....driveway
across the sidewalk, ...feet wide,
in front of the premises known as No. .....;

said permit to be issued and the work therein authorized to be done in accordance with the ordinances of the City of Chicago governing the construction and maintenance of driveways.

It will be noted that the order does not fix the time in which the commissioner of streets and electricity is authorized to issue such permit. Before he can issue the permit the person named in the order must in compliance with the driveway ordinance make application to the commissioner, giving the name of the applicant, the location and dimensions of the proposed driveway, and must file plans and specifications of the driveway with the commissioner and must file a personal bond executed by the grantee, running to the City in the penal sum of ten thousand dollars conditioned upon the faithful observance of each condition and provision of said permit, and conditioned further to keep and save harmless the City against all liabilities, judgments, costs, damages and expense which may in any wise come against the City in consequence of the granting of such permit.

There is no provision in the ordinance requiring the permittee to begin construction of the driveway within any fixed time. Other provisions of the code do require permittee to begin construction under their permits within a fixed time in certain cases. A permit to erect a building requires construction to commence within six months of the date of the issuance of the permit. Permits for the installation of tanks for gasoline filling sations require work to be commenced within ninety days. This office has held this to be a valid limitation, particularly in view of the fact that the ordinance requires frontage consents and that the ownership of property may change from time to time (Opinions Corporation Counsel, Vol. 14, p. 37).

If the city council had intended that driveway permits should be limited in time, as was done in the foregoing cases, it would have so provided, not having done so we must assume it did not intend to do so.

It is our opinion, therefore, that where an applicant for a driveway permit can point to an order of the city council directing its issuance it is your duty to issue the permit as directed.

REMOVAL OF SIDEWALK CANOPY

(No. 11611—City Comptroller—C. P. B.—November 7, 1952.)

We acknowledge receipt of your letter dated October 15, 1952 enclosing a copy of a letter dated October 9, 1952 from The Glens Falls Indemnity Company, together with a copy of your letter directed to Reverend R. J. Bozeman, Pastor, First Baptist Church.

In your letter you ask our opinion regarding a proper course of action which you may pursue in re a canopy extending over a sidewalk at 4338 S. Wentworth Avenue, said canopy having been authorized by permit issued to Saul Lockwood d/b/a Emmett Theatre (C. J. November 8, 1945, p. 4380). You state that the grantee, Saul Lockwood, has left the state; that the compensation is in default; and, that the premises to which the canopy is attached is now occupied by the First Baptist Church.

Under provisions of Chapter 34-18 of the Municipal Code the Superintendent of Compensation may revoke any canopy permit previously issued, in event of default in payment of compensation fee. After the revocation of the permit, the City may order the grantee to remove the canopy without cost to the City; and, if the grantee does not comply the City may, without consent of the grantee, remove the canopy and hold grantee liable for any costs or expenses incurred by the City in so doing.

The bond filed December 31, 1945 by The Glens Falls Indemnity Company indemnifies and saves harmless the City of Chicago from all liabilities, costs and expenses incurred by the City by reason or on account of the issuance of said permit or by reason or on account of any act or thing done by Saul Lockwood d/b/a Emmett Theatre, the City can without notice to or the consent of the grantee remove the canopy and hold The Glens Falls Indemnity Company liable for any and all costs sustained by the City in said removal.

We are informed by your office that the First Baptist Church, here involved, has agreed to the removal of the canopy. The contractor who will remove the canopy must comply with the applicable ordinances of the Municipal Code of the City.

MAINTENANCE OF PRE-EXISTING DRIVEWAY BY NEW OWNER

(No. 11612—Chief Street Inspector—A. F. G.—November 12, 1952.)

Some time ago you wrote to the owner or lessee of the premises 242 to 258 E. Ontario street, directing him to make certain repairs in the sidewalks surrounding these premises. You also called attention to a 10 foot driveway being maintained without a council order and without bond.

You directed that the walks be rebuilt to legal grade and a council order be secured and a bond filed for the driveway now being used and maintained.

It appears that the building and the driveway over the sidewalk were constructed in 1910. The ordinance in force at that time required a permit from the department of public works to change the grade of a sidewalk. (Code of 1905 section 2088). The present driveway ordinance was enacted in 1913.

Your letter was answered by an attorney who represents the present owner of the premises. He stated that the repairs of the sidewalks as directed by your department would be complied with, but said:

> "I find that when the building and driveway were constructed in 1910 there was no city ordinance requiring a council order or bond for the construction of a driveway and no such ordinance being required at that time the ordinance cannot be applied retrospectively so as to require such action now."

The general principle of law invoked above is: Statutes and ordinances operate in the future only, and are never to be given a retrospective effect if susceptible of any other construction. An intention that a statute or ordinance shall have a retrospective operation is not to be presumed but must be manifested by clear and unequivocal language, and in case of doubt the statute or ordinance must be construed to have a prospective effect only. (43 Corpus Juris, Section 921). We do not believe this principle is applicable in this case.

This office has held that permits for the construction and maintenance of driveways are personal privileges and do not run with the land. The successor in ownership of property upon which a driveway exists is not permitted to maintain the driveway, unless he secures a new permit. (Vol. 22 Opinions of the Corporation Counsel p. 309).

In an early opinion of this office with reference to the City's power to control the use of its streets, we said:

> "It has been held that under the power of exclusive control over its streets, which is given to the City by its charter, the City may allow any use of the streets which is consistent with the public purpose for which they are held. But the occupation of the street by private persons for private business or benefit, with signs or other things, is not, in any case, of right. When such occupation is by municipal authority, such permission is a mere license. It creates no right to, or easement in the streets as against the City; and is therefore subject to revocation." (Vol. 1 Opinions of the Corporation Counsel p. 162).

When the owner of the property in 1910 was given permission to construct a driveway over the sidewalk abutting his premises he only received a personal privilege which he could not assign or convey to successive owners, and which, being a mere license is always subject to revocation.

The maintenance of the driveway by the present owners of the property without a bond indemnifying the City, makes the City subject to continuing liability for any damage accruing thereat.

It is our opinion, therefore, that you should reiterate your demand for an order, bond and permit and upon failer of the owner to respond you should take the proper steps to revoke the permit and remove the driveway.

PAWN BROKERS LICENSE

(No. 11652—Commissioner of Police—C. P. H.—February 23, 1953.)

We have your letter of February 9, 1953, relative to the application for transfer of pawn broker's license from the present holder thereof to her father. It appears that the applicant was convicted on several occasions of violations of the alcoholic liquor laws and the internal revenue laws of the United States. Following these convictions, the President of the United States, on December 24, 1952, granted to the applicant a full and unconditional pardon. The photostatic copy of the presidential pardon, transmitted with your communication, sets forth all of the convictions referred to above.

You request our opinion as to whether or not the applicant is now eligible for a pawn broker's license by reason of the granting of the presidential pardon.

In considering the effect of a full pardon upon the condition and rights of its recipient, the Supreme Court of the United States in the case of *Knote* v. *United States*, 95 U. S. 149 (1877) said at page 153:

> "A pardon is an act of grace by which an offender is released from the consequences of his offense, so far as such release is practicable and within control of the pardoning power, or of officers under its direction. It releases the offender from all disabilities imposed by the offense, and restores to him all his civil rights. In contemplation

of law, it so far blots out the offense, that afterwards it cannot be imputed to him to prevent the assertion of his legal rights. It gives to him a new credit and capacity, and rehabilitates him to that extent in his former position."

The above language was quoted and the holding adopted by the Appellate Court of Illinois for the First District in the case of *People ex rel. Stine* v. *City of Chicago*, 222 Ill. App. 100, (1921), whereby the court restored a police officer of the City of Chicago to his rights under the Pension law after he had been convicted of a felony.

In *People ex rel. Richardson* v. *Sackett*, 17 Misc. (N. Y.) 405 (1896), the Supreme Court of New York held that a person who was convicted of a felony but had received a pardon was not a convict under the ban of the law and should not be refused a liquor license for that reason.

In an opinion addressed to the deputy liquor control commissioner of the City of Chicago under date of August 18, 1937 (Opinions Corporation Counsel Vol. 19, p. 122) we held that a retail liquor dealer's license may be issued to a person who, although convicted of a felony, had been pardoned.

Basing our conclusion upon the above authorities, which hold that a pardon in legal effect blots out the offenses for which the pardon is granted, our opinion is that the applicant should not be denied a pawn broker's license on the ground that he was convicted of the federal offenses referred to herein. However, he must be otherwise qualified to receive such license.

We have taken into consideration the case wherein the defendant, who is the applicant here, was charged with collecting on the licensed premises, on December 29, 1952 and January 29, 1953, sums greater than 3% per month on a cash loan made to the complainant in the case, one Nicholas Sutka, in violation of the provisions of Section 159-6 of the Municipal Code of Chicago. This case came on for hearing before Judge Mason Sullivan on February 6, 1953, and after a full and complete hearing the court discharged the defendant. In the case of *People ex rel. Anderson* v. *City of Chicago*, 312 Ill. App. 187 (1941) the court held that the fact that employees of a massage parlor operator were discharged in the Municipal Court of Chicago for violations of the massage parlor license ordinance did not militate against the Mayor's use of his discretionary power to refuse to grant a massage parlor license to the owner of the premises. There the court pointed out that it is a well recognized principle of law that the Mayor of the City of Chicago is vested with broad discretionary power which he may reasonably exercise in granting or refusing a license.

It is, therefore, our further opinion that, in the instant case, if the arresting officers have evidence to establish that the applicant who proposes to operate the establishment as owner thereof, did in fact charge interest on the loan described above in excess of the amount permitted by section 159-6 of the Code, you may properly recommend that the Mayor, in the reasonable exercise of his discretionary power, refuse to grant the application for a pawn broker's license on the ground that he violated section 159-6 of the Code.

PERMITS FOR STRUCTURES ON CITY PROPERTY

(No. 11659—P. W. D.—March 10, 1953.)

In a letter of January 15, 1953 addressed to the Mayor, you inquired under what terms and conditions the City of Chicago permits the construction, maintenance and use of pipes, tunnels, spur tracks, bridges and other

miscellaneous structures over, across and under the streets of the City for the private use of owners or lessees of property served and connected by such structures.

Two provisions of the Municipal Code of Chicago generally regulate private use of the public way. Section 34-1 says:

> "No person shall construct or maintain any bay window, bridge, wire, pipe, or other structure or device over any public way or other public place; or any clock or post at the curb, or any clock attached outside the face of any building; or any loading platform, switch track or push car track upon any public way or other public place; or any tunnel or vault underneath the surface of any public way or public place; or install or maintain any wire, pipe or conduit underneath the surface of any public way or other public place without first having obtained specific authority by ordinance passed by the City Council authorizing such special privileges."

Section 7-11.3 requires that applications for all of the aforementioned permits be made to the Bureau of Compensation.

Numerous particular provisions of the Code establish conditions, fees and regulations for the various types of permits.

Section 34-5 authorizes the issuance of permits effective for 60 days for the erection of cloth signs over sidewalk space upon the payment of a single $2.00 fee; such permits may be renewed without charge subject to the inspection and approval of the Superintendant of Compensation. This same section allows the construction of barber poles upon the payment of a single charge of $10.00. Both types of permits are subject to revocation at any time by the Superintendant of Compensation.

Section 34-8 to 13 of the Code imposes certain regulations upon the use of the public way for newsstands. However, no fee or charge is exacted for this privilege. Such a permit is revocable at will by the Mayor.

Section 34-14 to 20 of the Code requires that authority from the City Council and a permit from the Superintendant of Compensation are necessary to construct or maintain a canopy or marquee in the public way. A $10,000.00 bond must be posted, and an annual fee of $50.00 for the first 25 feet and $1.00 for each additional foot must be paid. These permits are revocable at will by the Mayor and the City Council and for cause by the Commissioner of Public Works. An inspection charge of $10.00 is imposed upon the erection or alteration of each canopy or marquee (Section 43-26 Mun. Code).

Under Section 34-20.1 and 34-20.2, awnings may be constructed over the public way upon the payment of a single fee of $1.00, so long as those awnings are a certain height above the sidewalk and are kept in a good and safe condition. These regulations went into effect November 10, 1944.

Authority from the City Council and a permit from the Superintendant of Compensation are required by Section 34-28 to 35 of the Code in order to gain a permit to construct a vehicle weighing scale. A $10,000.00 bond must be filed. A $37.50 annual fee must be paid and a sum sufficient to defray the cost of removal of such scales, and the cost of repairing the the area where the scale was located must be deposited. These permits may be revoked at the will of the Mayor or the City Council, and for default in payment of fees, for violation of the Ordinance, and by the Commissioner of Public Works in his discretion.

Section 34-24 provides that the Commissioner of Streets and Electricity may install a device on street lamps for the purpose of diverting direct rays of light which interfere with the comfort and health of any person residing near such a lamp. Anyone making such a request must pay an initial fee of $2.00 and $1.00 fee for each year beyond the first year that

such device is maintained. These permits may be revoked when the Commissioner of Streets and Electricity finds that such devices interfere with the proper lighting of the streets.

Section 34-36 to 49 sets out many rules and regulations governing the use of sub-sidewalk space. A bond of $10,000.00 must be filed with the Commissioner of Compensation in order to obtain a permit to construct a vault, except where there will be no openings in the sidewalk and the vault under the sidewalk does not exceed 18 feet in depth. No fee is charged where the vault space does not exceed 3000 feet, and where there is no opening in the sidewalk. In all other cases a fee of $5.00 for the first 4000 cubic feet and $1.00 for each additional 1000 cubic feet must be paid. A $5.00 fee must be paid upon transfer of this permit. Permittee is required to maintain the sidwalk and all openings in good condition. These permits are revocable at the will of the City Council and by the Commissioner of Public Works in the exercise of his discretion. The estimatd cost of inspection, supervision and installation of the sidewalk must be deposited with the City Collector (Section 33-1 to 5, Mun. Code).

Section 86-99 of the Code authorizes the issuance of a permit after the inspection by the Commissioner of Streets and Electricity, for the erection, construction and maintenance of any pole, line and wire underground conductor or electric conductor on, over, or under any public way or public place in the City. A schedule of inspection fees are set out in Section 86-107 to 116, a copy of which is hereto attached and marked Enclosure A. These permits may be revoked at the will of the City Council.

Section 31-2 provides that no sewers or drains may be laid in any public way and no connection may be made with any public sewer or drain without a permit from the Commissioner of Public Works, nor may anyone drain from any point of the City and the Chicago River or its branches without a permit. The Commissioner of Public Works may fix a permit fee, which shall not be less than $10.00.

Section 58.1 regulates the construction and maintenance of electric signs or sign boards over public and private property. Council authority must be gained for projecting electric signs over the public property when the face of such sign exceeds 75 sq. feet, or any such sign is to be located on a roof or on the ground over 50 feet in height. A $25,000.00 bond is required. Individual annual $15,000.00 bond is necessary for each sign over 18 feet above the level of the adjoining street or for each sign requiring a roof structure. A schedule of fees for the construction and maintenance of electric sign and sign boards is set out in Section 58.1-12. A copy of this schedule is hereto attached and marked Enclosure B. All permits may be revoked by the Commissioner of Buildings for failure to comply with the numerous construction specifications set out in Section 58. This section was adopted by the City Council on January 10, 1947.

A permit may be gained under the provisions of 86-91 to construct and maintain festons and decorative street lighting equipment. On payment of an original installation fee of $2.00 and a fee of $1.50 annually thereafter. A bond of $100.00 is required for each feston or branch circuit. These permits are revocable at will of the Mayor and City Council.

Under Section 33-15, driveways for residential use, which do not alter any curb, may be constructed upon gaining a permit from the Commissioner of Streets and Electricity; so long as such driveways are not over 16 feet, a permit fee of $2.50 is required. Council authority is necessary to construct all non-residential driveways or all driveways which alter any street curb. A 10,000.00 bond must be filed and an initial fee of $10.00 must be paid, except in the case of a residential driveway not over 16 feet which does not alter the grade of the curb. A subsequent annual fee of $5.00 for the first 16 feet and $1.00 for each additional 16 feet must

be paid in all cases. All permits may be revoked at will by the Mayor or the City Council with the approval of the Mayor. Expense of the removal must be borne by the permittee.

Section 33-12 requires that a permit be gained in order to lay a pavement by private contract in any public way. The Commissioner of Streets and Electricity shall make inspection of all such work, and charge the costs thereof to the permittee.

By Section 156-24, any person using an alley as a driveway for ingress or egress to a public garage must first obtain a permit and post a bond in the sub of $10,000.00. No fee is required.

Section 86-80 allows the construction of commercial electric lamps upon the posting of a $100.00 bond, and the payment of an original inspection fee of $2.00 for each lamp. After the first year an annual fee of $1.50 must be paid.

Under the authority of Section 185-48, authority may be given to use any space in any water pipe tunnel owned by the City for the purpose of installing a pipe conduit, cable or other construction. A $10,000.00 bond must be posted. An annual fee per lineal foot must be paid at the following rate:

20c up to 12 inches in diameter.

60c up to 18 inches in diameter.

$1.40 up to 24 inches in diameter.

All permits may be revoked by the Commissioner of Public Works when, in the exercise of his discretion, he deems it proper.

Thus, on these terms, the City of Chicago grants privileges in the public way to owners and lessees of property. All of these provisions, unless otherwise specified, were adopted by the City Council prior to August 30, 1939 when the entire City Code was revised. It should be borne in mind that there are various other franchises and privileges given to public utilities in the City of Chicago which are not here discussed.

PERMIT TO MOVE A HOUSE

(No. 11683—Chief Street Inspector—M. I. W.—April 16, 1953.)

We have your request for an opinion as to whether "under the new building code . . . signatures for consent (are) still necessary" to secure a permit to move a house.

Section 43-17 of the Municipal Code provides as follows:

> "No person shall be permitted to move any building which has been damaged to an extent greater than fifty per cent of its value by fire, decay, or otherwise; nor shall it be permissible to move any frame building of such character as is prohibited to be constructed within the fire limits to any point within the fire limits; nor shall it be permissible to move any building to a location at which the uses for which such building is designed are prohibited by this code. Permits for the moving of frame buildings, other than those the moving of which is herein prohibited, shall be granted upon the payment of a fee of ten cents for each one thousand cubic feet of volume, or fractional part thereof of such building, and upon securing and filing the written consent of two-thirds of the property owners according

to frontage on both sides of the street in the block in which such building is to be moved. No permit shall be issued to move any building used or designed to be used for purposes for which frontage consents are required until frontage consents in the block to which such building is to be moved have also been secured and filed as required by the provisions of this code relating to such use.

No building used for residence or multiple dwelling purposes shall be moved from one lot to another or from one location to another upon the same lot unless the space to be occupied on such lot shall comply with the provisions of chapter 52 of this code."

This section has not been amended since 1949, hence the "new building code" has not changed the provisions of the ordinance. Frontage consents are still required as heretofore, as spelled out above.

WHOLESALE DRUG LICENSE FOR PERFUME COMPANY

(No. 11687—City Collector—M. I. W.—April 23, 1953.)

We have your communication of April 13, in which you transmit a copy of a letter from Johnson, Cass and Bateman, attorneys representing Dana Perfumes, Inc. now located at 65 East South Water Street in which they state that for a number of years a license tax has been collected from the above company covering said premises. They state and your investigation shows that no stock is kept at this location, and that there is no manufacturing, packaging, or distributing done on the premises. The office is said to be used for sales, account and administrative purposes only. The stock is shipped from other premises for which a Wholesale Drug, Chemical or Paint Store license has been duly obtained.

Our opinion is requested as to whether under the circumstances this company is required to procure a Wholesale Drug, Chemical or Paint Store license for their office at 65 East South Water Street.

Section 120-1 of the Municipal Code defines a wholesale drug, chemical, or paint store as meaning "any . . . establishment where any chemicals, paints, and oils, as enumerated in Section 150-5 of this Code . . . are sold, offered for sale, or kept with the intention of selling at wholesale, in the city."

The problem presented is whether the acts performed on these premises mean that the products in question are "sold, offered for sale, or kept with the intention of selling at wholesale in the city" within the meaning of the ordinance.

In an opinion addressed to the City Collector on January 27, 1948 we were faced with a similar problem where a Michigan coal corporation maintained only an order office in Chicago. The ordinance involved in that opinion required a license for dealers in solid fuel and the definition of a dealer included one who performed acts of selling or offering for sale. We said in that opinion:

> "As we view the ordinance it is one enacted pursuant to the city's grants of power to regulate and prevent the storage of combustibles . . . It's mainifest purpose is to protect life and property against the hazards of fire and explosion. Though the ordinance definition of dealer in solid fuel is broad, when the ordinance is read as a whole it appears to be one designed to regulate and license those operating coal yards and those storing or handling solid fuel within

the fire limits of the city. We doubt that the courts would uphold a construction of the ordinance which would subject to license those persons who *do not handle or store any solid fuel* within the city but who *merely maintain branch offices here* and solicit orders for coal to be shipped from . . . another state." (Emphasis added.) 22 Op. Corp. Coun. 339 (No. 11919).

The analogy to the matter before us is clear. The entire ordinance relates to problems presented in terms of health, safety and sanitation peculiar to the premises where drugs, paints and chemicals are actually located. We do not believe it was intended to include a location used merely as an office where *no products of this nature whatsoever* are found.

We are therefore of the opinion that Dana Perfumes, Inc. is not required to procure a Wholesale Drug, Chemical or Paint Store license for their office at 65 East South Water Street.

PARKING LOT LICENSE

(No. 11692—Commissioner of Police—M. I. W.—May 26, 1953.)

We have your request for an opinion and a report forwarded by the commanding officer of the 40th District as to whether a parking lot being operated at the southwest corner of Devon and Winthrop Avenues is required under City ordinances to secure a license for such operation.

The report forwarded by you states that the Police Department's investigation showed that the lot in question has a 68 car capacity, fenced in with an in-and-out driveway, with numbered stalls and that a fee of $10.00 per month is charged for the privilege of parking. There is reportedly no paid attendant on the premises.

Section 156-15 of the Municipal Code provides that: "No person shall engage in the business of a public garage without first having obtained a license therefor."

Section 156-13 defines "public garage" as meaning:

> "* * * any building, structure, premises, enclosure, or other place, except a public way, within the city, where two or more motor vehicles are stored, housed, or parked for hire, in a condition ready for use, or where rent or compensation is paid to the owner, manager or lessee of the premises for the housing, storing, sheltering, keeping, or maintaining of such motor vehicles, *provided that nothing in this section shall be construed as applying to off-street parking of passenger vehicles with seating capacity of not more than seven passengers on vacant property maintained for the accommodation of patrons or employees of business establishments or occupants of residential units, where such parking is permitted without supervision by paid attendants.*" (Emphasis added.)

The italicized portion of the above was added by amendment on January 30, 1952.

You inquire as to whether the addition of the amended portion operates to remove these premises from the licensing requirements.

Further information made available to us indicates that the persons making use of this lot are occupants of residential units in the immediate area. Since it appears that the lot in question is "maintained for the

accommodation of . . . occupants of residential units" and that "parking is permitted without supervision by paid attendants" the conditions of exemption created by the amendment appear to be met. Whether or not a charge is made for this service is immaterial under the ordinance once the terms of the exemption are met.

It is therefore our opinion that under Section 156-13 no license is required for the lot at the southwest corner of Devon and Winthrop Avenues as it is presently reported to be operating.

LICENSING LABORATORIES

(No. 11705—President, Board of Health—M. I. W.—June 29, 1953.)

We have your letter of June 4, regarding licensing and inspection of laboratories. You cite section 144-2 of the Municipal Code of Chicago as follows:

> "No person shall conduct or operate any laboratory or laboratory agency for a fee without first having obtained a license therefor."

You further cite section 144-4 as follows:

> "Laboratories are hereby classified into three classes, and the annual license fee for each class shall be fixed as follows:
>
> "Class I. Laboratories operating and conducting examinations, analyses, experiments, or determinations in the city. The license fee for this class shall be based on the number of persons engaged in such laboratory on the basis of ten dollars for each person so engaged.
>
> "Class II. An agent or agency soliciting for examinations, analyses, experiments, or determinations, which are conducted in a laboratory located outside of the city. The license fee for this class shall be thirty-five dollars where not more than two persons are engaged and an additional fee of twelve dollars for each additional person engaged in such establishment.
>
> "Class III. A laboratory conducted by a person in connection with another business where such laboratory does not directly serve the public for pay and which is maintained as a part of his principal industry or profession. Such laboratories shall be exempt from the payment of a license fee.
>
> "Provided, however, that any person conducting examinations, analyses, experiments, or determinations (whether or not the same are carried on in connection with another business), all of which are without charge, shall be exempt from the payment of a license fee.
>
> "Such license fee shall not apply to municipal, county, state and federal institutions conducting examinations, analyses, experiments, or determinations."

You request our opinion as to whether the exemption of laboratories rendering service without charge, created by the fifth paragraph of section 144-4, quoted above, operates to exempt such laboratories from inspection by the board of health.

It will be noted that the provisions of section 144-2 are very broad in scope and require all persons operating a laboratory or laboratory agency to procure a license.

The exemptions granted in section 144-4 relate specifically to "the payment of a license fee," and neither expressly or impliedly remove the obligation to secure a license, to comply with the other provisions of the code and to "be open at all times to inspection by the board of health." (section 144-6.1.)

The obvious purpose of the city council was to free such laboratories that are operated in the public interest without charge from the financial burden of procuring a license, thereby furthering the advancement of scientific investigation and analysis, while at the same time, protecting the public health by insisting that the minimum standards prescribed by the code be observed in all cases.

It is therefore our opinion that the exemptions found in section 144-4 are exemptions from the payment of a license fee but do not operate to remove laboratories falling in the fee exempt classes from the obligation: (1) to procure a license (which should be issued without charge); (2) to comply with other provisions of chapter 144; including (3) holding themselves open to inspection by the board of health.

COMPENSATION FOR CANOPY

(No. 11717—Superintendent of Compensation—J. D. M.—July 17, 1953.)

Your letter of July 7, 1953, requests our opinion in regard to the payment of compensation for the 377 foot canopy which extends westward on the south side of West 15th Place, westerly from Western Avenue.

Examination of available records pertaining to the streets involved in this matter reveal that in 1869 the then owners of Ogdens and others subdivision of the East half of the Northeast quarter of Section 24-39-13, petitioned the City Council for the passage of an ordinance requesting the vacation of certain north and south streets then existing between Western Avenue and Rockwell Street and 15th Street and 16th Street.

On October 4, 1869, an ordinance was passed by the City Council which was recorded as document No. 1720086 in Book 2841 at page 336. This ordinance provided that when the then owner or owners of Ogden's subdivision hereinabove mentioned would resubdivide said subdivision then, and in that event, the whole subdivision would be vacated which included the north and south streets. The new subdivision known as T. M. Jordan's resub of Lots 13, 14, 15, 17 and 18 of Ogden's subdivision of the East half Northeast quarter of Section 24-39-13 was created. This new subdivision dedicated a 66 foot street now known as 15th Place running westerly from Western Avenue to Rockwell Street.

An examination of the premises involved herein reveals that West 15th Place is a brick paved 66 foot roadway without sidewalks on either side. The buildings which are warehouses apparently were erected directly on the street line. The building on the south side of the street has the canopy in question which extends about 8 feet over West 15th Place for the entire length of the street, westerly from Western Avenue. This canopy is a permanent structure attached to the building by steel griders which support the said canopy over the street.

On November 4, 1912, the first of a series of permits were issued by the City Council for the installation and maintenance of a canopy on

15th Place, West of Western Avenue. Several different railroads have since that time been the permittees for the use of the canopy and have paid the required compensation to the City of Chicago for said permit.

The City Code 34-17 provides for the issuance of permits and the payment of compensation for the erection of canopies. The City's right to regulate canopies and charge a fee therefor has been previously ruled on in an opinion written by Mr. Sullivan of this office on November 19, 1931, in which it was held that the City Council has authority to pass an ordinance regulating the issuance of permits for the construction of canopies and that the City Council may revoke said permit at any time if the grantee fails to comply with the City ordinance regulating canopies.

Under the authority of the *City of Geneseo* v. *Illinois Northern Utilities Company*, 378 Ill. 506, (1941), the City may license that portion of the street which is not within the Railroad right-of-way and charge a fee for such use. In that case, the court said:

> "It is our view that the power vested in cities to permit or refuse a license or franchise to a public utility has not been repealed by the provisions of the Public Utilities Act, and anything said to the contrary in *City of Geneseo* v. *Illinois Northern Utilities Company, supra,* or *Chicago Motor Coach Company* v. *City of Chicago, supra,* is not adhered to."

It is, therefore, our opinion that the Chicago River and Indiana Railroad Company should pay the said compensation for the right to maintain the canopy in its existing location and if they refuse to pay the compensation, steps should be taken to have them remove said canopy.

BODINE ELECTRIC—BUILDING PERMIT

(No. 11734—Building Commissioner—L. H. G.—August 18, 1953.)

We have your letter of August 10th asking for an opinion from us on the question of issuing a building permit as requested in the letter to you from Attorneys Kirkland, Fleming, Green, Martin & Ellis in behalf of their client, Bodine Electric Company.

On March 11, 1953 an ordinance was presented to the City Council as appears at p. 4310 of the Journal of Proceedings as follows:

> "To classify as an Apartment District instead of a Manufacturing District the area bounded by a line 125 feet north of and parallel to W. Addison Street; N. Campbell Avenue; W. Addison Street; and N. Talman Avenue or the line thereof if extended where no street exists (Map No. 15);
>
> To classify as a Family Residence District instead of a Manufacturing District the area bounded by
>
> W. Berenice Avenue or the line thereof if extended where no no street exists; N. Campbell Avenue or the line thereof if extended where no street exists; a line 125 feet north of and parallel to W. Addison Street; and N. Talman Avenue or the line thereof if extended where no street exists (Map No. 15)."

On April 14, 1953 a public hearing was had on the proposed ordinance. No later action has followed.

It is thus clear that all the real estate described in the ordinance would become zoned in part for apartment house use, and in part for family residence use if and when the ordinance is passed and becomes effective. The attorneys for the Bodine Electric Company, in their letter to you, state:

> "The only property available zoned for manufacturing use with sufficient area was the property referred to as the Mid-City Golf Course property and this property, consisting of approximately fifty acres was purchased by the company in August, 1952, at a cost of $700,000."

The letter also points out that the property, which is the property described in the ordinance, has been zoned for manufacturing since 1942; that nearby are located the Atlantic Brass Works and the Victor Adding Machine Company, who have made substantial additions to their plants in 1943, 1944 and 1953, and that the land in question was previously owned by two brick companies, who excavated about 65% of the area of which much has been filled in, and that before any future use of the land is made steps will be required to prevent subsidence; that the Bodine Electric Company must expand its operations and that a new plant must be constructed upon the property as shown on plans submitted to you. They, therefore, demand that you issue forthwith a permit for the construction of the foundations as set forth in the plans submitted to you.

You also submit the letter addressed to you by the Alderman of the 45th Ward, calling your attention to the proposed ordinance above mentioned and suggesting that while this ordinance is pending no permit be issued.

In the case of *Trustees of Elizabethtown* v. *Emily Ann I. Lefler*, 23 Ill. 88, the court said, at p. 89;

> "Until the town adopted such an ordinance, and it had been published as required by the charter, the town could not recover any penalty for the commission of an assault. Even had an ordinance been regularly adopted and published the court could not judicially know it, but it should have been proved as any other fact. * * * Until they were adopted and published in the manner prescribed by the charter they had no force and no person was bound to their observance."

In the case of *Deere Park Civic Ass'n.* v. *City of Chicago*, 347 Ill. App. 346, the court said, at p. 348:

> "In the comprehensive zoning ordinance of 1942 the area, except for 125 feet, was zoned for manufacturing use. A permit to build its plant was issued to defendant company April 4, 1951."

An amendatory zoning ordinance rezoning the area to family dwellings was passed March 2, and became effective April 19, 1951. At p. 349, the court said:

> "The questions presented here are whether the zoning amendment, which became effective April 19, 1951 revoked the building permit issued April 4th."

At p. 350, the court said:

> "The relief sought by the plaintiffs is a judicial declaration that the building permit had been revoked and that the building commissioner had the duty to prevent the use of the area for manufacturing use."

At p. 351, the court said:

"Nothing in the record shows that the ordinance was not regularly adopted. We presume in the absence of a contrary showing the statutory requirements for the validity of an ordinance were furnished. The general rule is that any substantial change of position, expenditure or incurrence of obligation under a building permit entitled the permittee to complete the construction and use the premises for the purpose authorized irrespective of subsequent zoning or changes in zoning."

At p. 352, the court said:

"There were no issues of fact, and judgment was founded on a stipulation."

The court found that defendant (that is, the property owner), prior to the effective date of the amendatory ordinance and in reliance upon the zoning classification in effect at the time, and upon its permit, paid $41,000.00 for the property and made contracts for the land, geologic serveys and soil test borings, fabrication of structural steel, stripping top soil, architectural services and general contract work for the construction of the building * * *.

At p. 353, the court said:

"The trial court found that all these things were done either in reliance on zoning or in reliance on the permit. Plaintiffs contend that the trial court erred in failing to differentiate between the defendant's reliance on the zoning and its reliance on the permit, that only that which is done in reliance on the permit can bring about a vested right.

"This work was done in partial performance of the contracts made before the permit issued and most of it was done under the construction contract made in the interim between the application for and issuance of the permit. This partial performance of contracts made in reliance on the probability that the permit would issue and pursuant to substantial obligations related directly to the purpose of the permit is, we think, sufficient to give rise to a vested right in the defendant company.

"For the reasons given, the judgment is affirmed."

This opinion was concurred in by the three justices of the Appellate Court. In view of the law as stated in the case of *Trustees of Elizabethtown* v. *Emily Ann I. Lefler*, above referred to, as to the effective date of a city ordinance, and in view of the law as stated in the case of *Deere Park Civic Ass'n* v. *City of Chicago*, we are of the opinion that, *first*, the proposed ordinance can have no effect upon the zoning of the real estate in question, and *secondly*, that the facts pertaining to the Bodine Electric Company are sufficiently similar to the facts stated in the *Deere Park* case as to be the law governing in the question raised by you. The applicant for the permit has already expended the sum of $700,000.00 to purchase the land in question, which land was zoned for manufacturing purposes at the time of the purchase, and has also incurred the expenses of architectural fees and building plans. In the *Deere Park* case a permit had issued before the ordinance became effective, and the ordinance did have all the statutory requirements for its validity. Yet, the court held that, in view of the fact that the defendant had already acted upon and in reliance upon the zoning classification in effect at the time, together with the expenditures made by it, the company had a vested right to use the real estate for the purpose for which it was zoned.

For the reasons above stated, we believe that the present effective zoning requires that a permit be issued for a manufacturing use.

JEWELRY AUCTION SALES

(No. 11761—City Council—A. F. G.—November 4, 1953.)

On October 28, 1953 you sent to this office draft of a proposed ordinance introduced in the city council on October 14, 1953 for the purpose of licensing and regulating jewelry auction sales, which was referred to the Committee on License.

The ordinance provides for a license to conduct a "jewelry auction sale." The "property" which may be sold at such sale is defined in section 106.1-1 of the draft. Section 106.1-4 provides for the filing of an inventory setting out in great detail the articles to be offered for sale. A public hearing shall be held on each application for a license after publication of notice of such hearing for at least five days in a newspaper of general circulation in the city of Chicago. Section 106.1-8 limits the duration of the sale to thirty consecutive days with a possible extension of another period of thirty days, also prohibiting sales at night. A bond of twenty-five hundred dollars is required to be filed by the licensee to indemnify any purchaser for damages suffered by misrepresentation at such sales. Section 106.1-10 prohibits the issuance of a license to conduct such sales unless such person shall have been continuously engaged for a period of at least one year next preceding such sale in the business of selling at retail within the city, property covered by the ordinance on the same premises where the auction sale is to be held. Section 106.1-11 requires every item of property displayed or offered for sale to be tagged with a ticket, card or label on which is plainly writen the same information regarding such item of property which is included in the inventory required in the ordinance. The licensee is required to file with the city collector on or before 11:00 A. M. of each day during the sale, a true and correct list of all property sold during the next preceding day, which list is required to be sworn to. The mayor may revoke any license for any violation of the provisions of the ordinance, and a penalty is provided for violation of its provision and each violation constitutes a separate offense.

While these provisions appear to be drastic, authorities may be found in other jurisdictions upholding similar provisions in city ordinances. However, authorities equally respectable have held provisions such as these invalid. The courts of Illinois have never passed on an ordinance of this character.

In an early case in this State our Supreme Court, with respect to the City's power to license and regulate auctioneers, said:

> "The power conferred by the charter to tax, license and regulate auctioneers, authorized the city to adopt any reasonable ordinance for the purpose. The charter points out no particular mode. The city may tax, may license and may regulate the business of auctioneers. The city may not directly prohibit the business, nor can it adopt such unreasonable regulations as would produce such results, or even be oppressive and highly injurious to the business. All means employed for the taxation, license and regulation of the business must be reasonable." *Wiggins* v. *City of Chicago*, 68 Ill. 372, 377 (1873).

The chief sponsors of this proposed ordinance are the State Street Council and the Retail Jewelers Association, whose members come in business competition with these jewelry auctions. This fact might lend color to the claim of the opponents of this draft that the ordinance is intended to prohibit rather than regulate jewelry auction sales. However, it is also sponsored by the Chicago Better Business Bureau, Inc., which is primarily concerned with the prevention of fraudulent sales practices against the public.

While we may entertain some doubts about the validity of some of the provisions in this draft, in the absence of any express decision in this State holding them invalid we are inclined to the opinion your body should resolve these doubts in favor of their validity.

RADIO AUCTION PROGRAM

(No. 11771—City Collector—M. I. W.—November 19, 1953.)

In your letter of November 6, you relay a communication from Radio Station WAIT, in which the station describes tentative plans to present a series of programs, the format of which is described as follows:

> Items of new merchandise of various kinds and value such as electric toasters, irons, vacuum cleaners, perhaps even washing machines, radios, T-V sets, and refrigerators would be acquired either by purchase for cash or in trade for broadcasting services.
>
> The listening audience—not in our broadcast studios—would be given the opportunity of phoning in their bids within a specified period of the broadcast. The merchandise would be sold to the person phoning in the highest bid.

In a telephone conversation with Mr. Samuel R. Wittel, 7 S. Dearborn, attorney for the radio station, we are further informed that the bidding will not be conducted in the customary competitive fashion in that there will be no announcement during the course of the program as to what is the highest bid received at any given point.

Our opinion is requested as to whether any form of license would be necessary for the presentation of such a program.

The only license required that suggests itself for consideration is found in Chapter 106 of the Municipal Code, which provides for the licensing of auctioneers.

Section 106-1 defines an auctioneer as any person who sells real or personal property at public or private auction for another or for himself.

An auction is generally defined as a sale by consecutive bidding, intending to reach the highest price of the article by exciting competition for it. *Hibler* v. *Hoag*, Pa., 1 Watts & S. 552, 553. This competition is a necessary element of each offer and each bid. *Crandall* v. *State*, 28 Ohio St. 479, 481.

Under the system of sale the station proposes to use there will be no consecutive bidding with the excitement of open competition, since there will be no announcement of what the highest bid may be at any given moment.

We are therefore of the opinion that under the facts described the station will not be conducting an auction within the meaning of the ordiance and that no license will be required.

In reaching this conclusion we expressly reserve our opinion as to the power of the City to require a license where an actual auction is conducted over the air.

LICENSING PLUMBERS

(No. 11773—City Council—A. F. G.—November 27, 1953.)

With your letter of November 19, 1953 you sent a copy of an ordinance prepared by this office prescribing new regulations for the examination and licensing of plumbers.

You state that the ordinance prescribes sundry fees and request our opinion as to the power of the city council to change the fees prescribed.

The power of the City to enact this ordinance is found in Section 16 of the "Illinois Plumbing Law", enacted by the 68th General Assembly, and reads in part as follows:

> "Any city, village or incorporated town, having a population of 500,000 or more may, by *an ordinance containing provisions substantially the same as those in this Act* and specifying educational requirements equivalent to those prescribed in this Act, provide for a board of plumbing examiners to conduct examinations for, and to issue, suspend, or revoke, plumbers' licenses, within such city, village or incorporated town. Upon the enactment of such ordinance the provisions of this Act shall not apply within any such municipality except as otherwise provided herein."

In drafting this ordinance we followed this section and made every provision substantially the same as those in the State Act, including the provisions for fees which are identical with those provided in the statute. The fees fixed for the various kinds of licenses in the statute are mandatory, the language used in each case being, "the fee shall be".

We do not believe that an ordinance enacted under Section 16, which provides fees substantially higher or lower than those provided in the Act, would meet the requirement of the Act and might jeopardize the validity of the ordinance. We would not recommend such an increase or reduction in the fees provided by the ordinance.

We would call attention to the fee fixed by statute for "plumber's license certificate", which was inadvertently omitted from the draft of the ordinance. We believe it should be included and enclose a draft of an amendment which will accomplish that purpose.

CHAPTER VII—BUILDING AND ZONING

A. BUILDINGS

REVOCATION OF PERMIT

(No. 11127—Commissioner of Buildings—M. J. N.—March 1, 1949.)

We reply to your letter of February 18, 1949 in which you request us to interpret an order of the City Council passed on January 28, 1949, (C. P. page 3772) which reads as follows:

> "Ordered that the Commissioner of Buildings be and he is hereby directed to revoke the building permit issued to Ray School to construct a school at Nos. 72-78 E. Cedar Street."

You advised that on December 21, 1948 permit No. B-22079 was issued to the Ray Schools, Inc., to erect a reinforced concrete school building. You also enclosed your file containing the application for a permit and a duplicate copy of the permit issued.

Please be advised that Chapter 43 of the Municipal Code is an ordinance passed by the City Council and it sets up in complete detail the requirements to be complied with by an applicant before he can be entitled to the issuance of a building permit.

We have not been able to ascertain that Chapter 43, as aforesaid or any part thereof, has been amended or repealed by the Council. Chapter 43.7 provides as follows:

> "At the proper time, notice shall be given by the Commissioner of Buildings to the applicant that his plans have been examined and are ready to be returned to him, and if such plans have been approved as submitted to the various department and bureaus as aforesaid, the Commissioner of Buildings shall, according to the building provisions of this Code, issue a permit for the construction, erection, repair, or alteration of such building or structure; and shall file such application, and shall apply to such plans a final official stamp, stating that the drawings to which the same has been applied, comply with the provisions of this Code. The plans so stamped shall then be returned to such applicant."

We construe the words "the Commissioner of Buildings shall * * * issue a permit * * *; and shall file such application and shall apply to such plans a final official stamp," as being mandatory on the commissioner if the requirements of the ordinance have been complied with by the applicant.

Chapter 43.24 provides for the revocation of a permit as follows:

> "If the work in, upon, or above any building or structure shall be conducted in violation of any provision of this Code, it shall be the duty of the Commissioner of Buildings to revoke the permit for the building or wrecking operations in connection with which such violation shall have taken place."

Under the foregoing provisions only the "Commissioner of Buildings" can revoke a permit and then only if the work "shall be conducted in viola-

tion of any building provisions of this Code." The Council does not set up any reasons for its direction nor does the file including the application which you forwarded with your inquiry show any violations.

On August 7, 1930 the Corporation Counsel rendered its opinion No. 6744 (Opinions of the Corporation Counsel, Volume XVIII, page 382) in which he said:

> "The Building Commissioner cannot revoke a building permit and stop construction of such building merely because the City Council ordered that no such building permits be issued. An issued permit cannot be revoked unless there has been a violation of City ordinances in the erection of said building."

Again on October 8, 1931 (7179 Opinions of the Corporation Counsel, Volume XVIII, page 382) the Corporation Counsel said:

> "When the City Council or the proper city officer, in the absence of fraud, grants a permit for the construction of a building, and the party, acting on the good faith of the permit, commences the erection of the building, he acquires something more than a mere license, something in the nature of a vested right, and the permit cannot then be revoked by the city."

By the order in question the Council, in effect, repeals or at least amends Chapters 43.7 and 43.24 above. This, the Council cannot legally do since it was held:

> "A Council order cannot amend an ordinance, and where the purpose of the order is to cause the issuance of a license or a permit in violation of the terms of an ordinance, such order is void and of no effect."
>
> *Ruban* v. *Chicago*, 330 Ill. 97 (1928)
>
> *People* v. *Thompson*, 209 Ill. App. 573 (1918).

Conversely, when the purpose of the order is to cause the revocation of a license or a permit legally issued and to which the licensee has a clear legal right and has given no cause for its revocation by violating the terms of the ordinance under which it was issued, the Council order is void and of no effect.

It is, therefore, our opinion that the Council order in question is void and of no effect.

PRE-EXISTING BUILDINGS

(No. 11130—A. F. G.—March 4, 1949.)

In your letter of January 27, 1949 you refer to a case pending in the Municipal Court against the company operating the Metropole Hotel, 2400 S. Michigan avenue.

You state, "The Metropole Hotel was built in the year 1892, and at that time there was no requirement for the installation of inside standpipes. In later years ordinances were passed requiring buildings of over 100 feet to make this installation. The Metropole Hotel is 92 feet high."

"In the present ordinance the heights have been changed to 80 feet, but have not been made specifically applicable to existing buildings."

The quoted statements from your letter are in part correct.

The first time a requirement for the installation of inside standpipes, appeared in the building provisions of the code was in section 210 of the building ordinance passed March 28, 1898 (C. J. p. 2067). The requirement was as follows:

> "Inside of all buildings over 100 feet in height, there shall be one 4-inch iron standpipe, extending from pump to roof, also connection on first floor with two-way siamese connections for Fire Department and check valve against pump; * * *"

Complete revisions of the Code were made in 1905, 1911, 1922, 1931 and the present code in 1939.

Section 680 of the Code of 1905 provided:

> "Inside of any building of any of the classes hereinbefore defined which is over 100 feet in height, and inside every building over three stories in height which is occupied exclusively or chiefly for hotel or lodging house purposes, there shall be one four inch standpipe extending from pump to roof * * *"

This provision was prospective only as Section 446 of that code provided:

> "Nothing in this Chapter contained shall be construed as requiring alteration in the construction or equipment of buildings in existence at the time of the passage of this ordinance and which at the time of their construction were built in compliance with the ordinances then in force."

In 1911 the Code was again revised and Section 674 had this provision:

> "In every building one hundred feet or more in height, not provided with a three inch or larger standpipe, and in all buildings hereafter constructed of a greater height than 75 feet, * * * and in all buildings of a greater height than five stories, *now or hereafter used* for hotels or public lodging house purposes, there shall be installed one or more 4 inch standpipes which shall extend from basement to roof with necessary hose connections."

In the next revision of the Code in 1922 the provision quoted above in the 1911 Code with reference to hotels and lodging houses was dropped and the section on standpipes (1301) only applied to existing buildings one hundred feet or more in height and to buildings constructed between November 12, 1910 and July 22, 1912 of a greater height than 75 feet.

The 1931 Code provided in section 2462 that every building one hundred feet or more in height in existence on December 5, 1910 not provided with a three inch standpipe or larger shall have installed one or more four inch standpipes.

In the present code of 1939 section 48-70 requires a standard inside standpipe system, meeting the requirements of Chapter 92 of this code, to be provided in every multiple dwelling which is more than eighty feet in height. But this provision by section 48-1 only applies to buildings *hereafter* designed, erected, altered or connected for use as a multiple dwelling.

None of the several codes referred to above with the exception of the code adopted in 1911 and repealed in 1922 would apply to the hotel here involved. We are of the opinion the officer charged with the enforcement of section 674 of the code of 1911 could have required the installation therein provided during the period the section was in force, but we doubt if any court will impose a penalty for such violation twenty-seven years after the section has been repealed, particularly in view of section

15 of the Statute of Limitations which limits actions for a statutory penalty to two years from the time the action accrued.

ABANDONED FIRE STATION

(No. 11163—City Comptroller—H. S.—July 28, 1949.)

Your letter of June 6, 1949 requests advice as to whether the old fire station building owned by the City, at 14-16 W. Taylor Street, now abandoned as a fire station may be demolished without taking into consideration the rights of the adjoining owners in and to a party wall, which is the west wall of the said fire station building.

You transmitted with your letter what purports to be a copy of a deed from Andrew Crawford and Sarah L. Crawford, his wife to the City of Chicago, dated April 9, 1881 and recorded May 12, 1881 as Document No. 326302, which conveyed the said fire station property to the City of Chicago subject to the following party wall agreement:

> "It is hereby understood and agreed by and between the parties hereto that the wall now upon the west side of the property hereby conveyed shall be and remain a party wall to be used as such by the grantor herein, his heirs and assigns."

We have made an extensive search of the law covering the question in your letter and find no pertinent decisions on the subject in Illinois, but we did find legal precedent in other states, as follows:

> "The easement in a wall terminates when the wall is taken down pursuant to an order of the authorities, requiring its destruction as dangerous and a menace. (*Fewell* v. *Kinsella,* (1912) Texas Civ. App.) 144 S. W. 1174; p. 290-85 A. L. R."

> "One adjoining land owner may not enjoin the other from tearing down a party wall if the wall is unsafe and dilapidated, or if plaintiff or his predecessor in title has abandoned the wall as a party wall, or if conditions have so changed as to render the purpose of the party wall agreement not applicable" *Fleming* v. *Cohen,* 186 Mass. 322; 71 N. E. 563; *Partridge* v. *Gilbert,* 15. N. Y. 601.

We are of the opinion that the Illinois Courts would also apply what appears to be a reasonable rule, but because there are no Illinois decisions on the point in question, we are of the opinion that it would best serve the interest of the City if a release instrument is obtained from the adjoining owner, the Atchison, Topeka and Santa Fe Railroad Company.

A suggested form of release to be obtained is attached herewith.

AIRPLANE WARNING LIGHTS

(No. 11181—Commissioner of Public Works—J. C. M.—September 30, 1949.)

In your letter of September 22, 1949, you make the following inquiries in connection with aviation in the City of Chicago:

"1. Does the City have the power to require lights on tall structures?

2. If so, under what conditions?

3. If so, in what form should such a regulation be made?"

1. We are of the opinion that the City of Chicago has the general police power to require tall structures that present a hazard to aviation to have lights or markers thereon and require that the same be maintained.

The protection of the health and lives of the public is paramount and "whenever a police regulation is reasonably demonstrated to be a promoter of public health, all constitutionally guaranteed rights must give way, to be sacrificed without compensation to the owner." (*People* v. *Strautz* (1944), 386 Ill. 360, at page 366.)

The City of Chicago also has such special police power under Chapter 15½, Section 48:11 (Ill. Rev. Stat.) wherein it is the declared policy of the State that airport hazards are contrary to the public interest.

2. and 3. A valid ordinance could be passed requiring all structures within the city limits extending in height a designated number of feet or more to be equipped with proper lights or markers so as to disclose their height and location every night during the year from sunset to sunrise. The intensity and type of the illumination should be defined in the ordinance.

The designation in the ordinance of the minimum number of feet in height of the structures to which it would apply should have a rational relation to the protection of aircraft and the public under existing flying conditions and Federal regulations.

NEW ELECTRIC SUPPLY

(No. 11252—Alderman, 24th Ward—A. F. G.—February 23, 1950.)

In your letter of November 28, 1949 you ask our opinion concerning the application of section 79-1 of the Municipal Code of Chicago, to a situation where an owner of a building, to which the Commonwealth Edison Company discontinues supplying direct current, installs a rectifier to convert alternating current furnished by the said company to direct current for the continued operation of existing direct current elevator motors.

You call attention to a "change-over" program by which the Commonwealth Edison Company will eventually completely discontinue supplying direct current throughout the city and substitute alternating current. You express the belief that as this program progresses the question of the proper interpretation of section 79-1 will arise with increasing frequency whenever building owners are confronted with the necessity of making appropriate adjustments in their electrical systems to continue to have the direct current required for elevator operation.

Prior to April 16, 1945 the first sentence of the last paragraph of section 79-1 here in controversy read as follows:

> "When the alteration of an existing device consists solely of a change in the character of electric power supply, only such parts, the operation of which is thereby affected, need be changed, except that in all cases electrically released brakes shall be installed."

Early in 1945 at the request of Mr. Paul Gerhardt, Jr., then commissioner of buildings, we prepared an amendment to that sentence which was adopted by the city council, which changed that sentence to read as follows:

"When the alteration of an existing device consists solely of a change in the character of electric power supply, all such parts, the operation of which is thereby affected, shall be changed and all interlocks, terminal stopping devices, electric contacts and locks, car and counterweight safeties shall comply with the present code provisions, and in all cases electrically released brakes shall be installed."

A day or two ago we discussed with Mr. Gerhardt the amendment proposed by him and he stated that it was his intention by the amendment to require compliance with the present code provisions for interlocks, etc., only when there had been an actual change in the character of electric power supplied; that where electric power in a building had been changed from D. C. to A. C. and the owner installed an approved "rectifier" or other device which effectively converted alternating current to direct current which heretofore had been employed in the operation of the elevators, it was not his intention to require observance of the amended section, as there was no such change in the character of electric power supply to justify such requirement.

The electric inspection department advises us that their department issues permits for and approves the installation of rectifiers and other similar devices for changing alternating current to direct current and that such devices are effective for that purpose. In their opinion such an installation would not change the character of the electric power supply or require any alternation in the elevator itself.

It must be assumed when the city council passed the aforesaid amendment, it had the same intention as its sponsor, Mr. Gerhardt. Any other construction of the ordinance would probably render the 1945 amendment invalid, because there is no rational relation between change from A.C. to D.C. by means of a rectifier and the necessity of changing all elevator equipment the operation of which is not affected by the character of electric power supply.

It is our opinion, therefore, that where the utility company changes the electric power supply in a building from D. C. to A. C. and the owner by the installation of an appropriate device retains the direct current employed for operation of his elevators before the change made by the utility company, there has not been such a change in the electric power supply as to bring it within the provision of section 79-1.

DRY CLEANING SYSTEMS

(No. 11276—Alderman, 20th Ward—A. F. G.—March 27, 1950.)

In your letter of March 20, 1950 you refer to the last paragraph of section 60-25 of the new building code which provides for the ventilation of rooms in which dry cleaning systems are installed in which solvents of the chlorinated hydrocarbon type are used.

You ask our opinion as to the following:

"(1) Does this mean that the actual cleaning unit employing solvents of the chlorinated hydrocarbon type must be enclosed in a room having ventilation capable of changing the air in the room every three minutes, or

"(2) By use of the word 'systems' in the ordinance, is it meant that the entire process including spotting, repairing and pressing of the garments after they leave the cleaning and drying machines must also be done in a room having ventilation capable of changing the air every three minutes."

The last paragraph of section 60-25 is as follows:

> "Dry cleaning systems in which solvents of the chlorinated hydrocarbon type are used may be employed in any business, mercantile, industrial or storage unit: Provided, that such system is so constructed as to prevent the escape of any vapors into the atmosphere of the room, or shall be enclosed within air tight partitions, immediately surrounding the system, so as to prevent the escape of such vapors beyond the enclosed space; provided adequate ventilation capable of changing the air in the room every three minutes shall be supplied; provided that such systems shall exhaust to the outside atmosphere, and the exhaust outlet shall not be closer than twenty feet to the opening of any building; and provided further, that no such dry cleaning system shall be located in any dwelling or place of public assembly."

In section 60-2 the terms "Dry Cleaning Buildings," and "Dry Cleaning Room," are separately defined indicating that the city council distinguished the terms and did not consider them synonomous. "Dry Cleaning Room" is defined as follows:

> "A room for the purpose of carrying on dry cleaning processes in a dry cleaning building."

We believe the construction suggested in your first query is the proper interpretation of the section. The word "systems" as used in the ordinance means in our opinion, the apparatus, machine, device or unit in which the cleaning solvent is contained and the actual cleaning process performed, and does not include other processes in connection with the cleaning of garments such as repairing and pressing. We reach that conclusion from the language: "Provided, that such system * * * shall be enclosed within air tight partitions, *immediately surrounding* the system, so as to prevent the escape of such vapors beyond the enclosed space:" It certainly could not have been the intention of the city council to require the entire premises where all processes of dry cleaning are carried on to be so enclosed, or to require persons engaged in repairing or pressing garments to do their work in such an air tight enclosure.

We also construe the second proviso in that paragraph which reads: "provided further, that in any case where such systems are used, adequate ventilation capable of changing the air *in the room* every three minutes shall be supplied;" to mean that the required ventilation shall be supplied *in the room* in which the cleaning unit is operated and not in the entire dry cleaning building, the council by definition having made a distinction between a dry cleaning room and a dry cleaning building.

If it had been the intention of the council to require this type of ventilation throughout the entire building it would have been a simple matter to have said so, but having limited the requirement by express language *to the room* in which such device is used, it cannot by construction be extended to the entire building.

It is our opinion, therefore, that where the actual cleaning unit, employing solvents of the chlorinated hydrocarbon type is enclosed in a room having ventilation capable of changing the air every three minutes, the requirements of the said section will have been complied with.

CONDEMNATION OF "ALLEY-SHACKS"

(No. 11371—Commissioner of Buildings—S. R. D.—March 9, 1951.)

We are in receipt of your letter of February 19, 1951 in which you request us to advise you whether the Department of Buildings may proceed

immediately to effect condemnation of structures, such as sheds, trailers, garages, etc., along the alley line, which are considered unfit for human habitation. Attached to your letter is a copy of a letter you have addressed to Mr. D. E. Mackelmann, Acting Housing and Redevelopment Coordinator, in which you state that the Department of Buildings will proceed immediately with final condemnation inspections on the alley shacks which are designated as unfit for habitation. You further state that in making the inspections you will employ two inspectors who will condemn the building, and have a picture taken of one of the inspectors standing in front of the condemnation sign; that when the condemnation is consumated, 30-day notices will be sent to the owners and occupants to vacate the wreck; and that at the same time you will notify Mr. Mackelmann of your action so that he may proceed with his re-location work.

There is no doubt that the City has the power to declare unsafe and unsanitary structures a nuisance and abate the same.

Section 23-61 of the Cities and Villages Act (1949 Ill. Rev. Stats. chap. 24, par. 23-61) grants to the municipality the power "To define, prevent and abate nuisances."

Section 21-20 of the Cities and Villages Act, which pertains to the powers of the City Council of the City of Chicago (1949 Ill. Rev. Stats., chap. 24, par. 21-20) provides that "The city council shall by ordinance, be empowered to declare and define nuisances and abate the same, and shall have the power to regulate the location and conduct of hospitals, and infirmaries."

In the exercise of the powers thus conferred by the statutes of the State, the City Council of the City of Chicago has enacted several ordinances defining certain buildings to be nuisances and providing for abatement.

Sections 13-22, 13-23 and 13-24 of the Municipal Code of Chicago provides for the powers and duties of the Commissioner of Buildings when he finds any building or structure in an unsafe condition or when constructed or built in violation of any of the provisions of the Building Code. Sections 96-9, 96-10 and 96-11 declare a building unfit for habitation a public nuisance and set forth the powers and duties of the Commissioner of Buildings and the Commissioner of Public Health pertaining thereto.

It thus appears that the City, through its City Council, not only possesses, but exercises the power to define and declare nuisances and to make provision for their abatement. There remains, however, the question of the procedure to follow to accomplish the abatement of a public nuisance by reason of an unsafe or unsanitary building. In *Laugel* v. *City of Bushnell*, 197 Ill. 20 (1902), the Supreme Court of Illinois said (p. 26):

> "* * * Nuisances may thus be classified: *First*, those which in their nature are nuisances *per se* or are so denounced by the common law or by statute, *second*, those which in their nature are not nuisances but may become so by reason of their locality, surroundings or the manner in which they may be conducted, managed etc.; *third*, those which in their nature may be nuisances, but as to which there may be honest differences of opinion in impartial minds."

What the Supreme Court said in the *Laugel* case was approved in *Sings et al.* v. *The City of Joliet*, 237 Ill. 300 (1908), in and In *The People, ex rel. Lincoln Ice Company* v. *City of Chicago*, 260 Ill. 150 (1913).

In the latter case the Supreme Court held (p. 152):

> "* * * The power granted to cities in relation to nuisances authorizes the city council to declare those things following within the first and third classes to be nuisances, but as to those things falling within the second class the only power the city has is to declare such of them to be nuisances as are so in fact. * * *"

The power of a city to define and declare nuisances does not extend to declaring anything a nuisance which is not a nuisance in fact. *People* v. *City of Chicago*, 280 Ill. 576 (1917); *City of Bushnell* v. *Chicago B. & Q. R.R. Co.*, 259 Ill. 391 (1913); *City of Chicago* v. *Neber*, 246 Ill. 304 (1910). If a city declares property to be a nuisance and destroys it when in fact, it is not a nuisance, the city is liable for damages sustained by the owner. *Sings, et al.* v. *City of Joliet* 236 Ill. 300 (1908).

In view of the distinctions drawn in these cases and the practical difficulty of determining just when a building is unsafe, unsanitary, or unfit for human habitation, it would be advisable in order to obviate any question of the validity of the Council's definition or declaration of a nuisance, except in cases so urgent that failure immediately to abate would result in danger to life and limb, to institute equity proceedings and present competent evidence of the unsafe or unsanitary condition of the premises so that the court in its decree may make the necessary findings, based on sufficient evidence declaring the premises to be a public nuisance. *People* v. *Hulz*, 355 Ill. 412 (1934); *City of Huron* v. *Bank of Volga*, 8 S. D. 449 (1896); and *City of Pana* v. *Central Washed Coal Co.*, 260 Ill. 111 (1913).

Your letter is not clear as to whether the "sheds, trailers, garages, etc., along the alley line" are considered unfit for human habitation because of their being unsafe structually or because of their unsanitary condition. If they are unsafe structurally, you should proceed in accordance with Sections 13-22, 13-23 and 13-24 of the Municipal Code of Chicago. If they are unfit for human habitation because of unsanitary conditions, then you should proceed in accordance with Sections 96-9, 96-10 and 96-11.

After you have proceeded in accordance with the provisions of the Code and when it has been ascertained that a building is in such an unsafe or unsanitary condition as to be a public nuisance, the following steps should be taken to accomplish abatement:

First. Notice must be given to the owner in the manner provided by law and an opportunity afforded him to abate the nuisance by measures of his own adoption.

Second. When a reasonable time for abatement has expired (and what is a reasonable time must depend upon the special facts and circumstances or each particular case) and no action has been taken by the owner, a survey of investigation should be made so as to provide evidence, sufficient to meet the requirements of technical proof, that the building in question is in fact so unsafe or unsanitary as to be a public nuisance.

Third. Where the evidence affords a basis for abatement through an equity proceeding a court of equity may be resorted to for appropriate relief by way of injunction and receivership or an order for demolition by the proper department of the city government.

In conclusion, we desire to state that this opinion is not to be construed as relating to emergency situations created by buildings so eminently dangerous to public health or safety as to require their immediate demolition.

MECHANICAL VENTILATION EQUIPMENT

(No. 11414—L. L. K.—August 13, 1951.)

This will acknowledge receipt of your various letters with respect to Warrant Numbers F-17271, F-15934, F-17109, and F-17644 for inspection of mechanical ventilation equipment for the years of 1948, 1949, 1950 and 1951.

You state that you have been advised by the Illinois Manufacturers Association that the City is without authority to make these charges because the Health and Safety Act of 1936 of the State of Illinois vests in the Industrial Commission all power to make rules concerning such equipment and to make inspections and that the City, therefore, has no power in this field.

It is our opinion that your point is not well taken. The City has complete power to regulate the construction of buildings and equipment therein contained. You will note that paragraph 137.3 of chapter 48, Illinois Revised Statutes, 1949, provides that:

> "Nothing in this Act shall be construed to grant to the industrial commission the power to make any rule which will require the submission of any plan, specifications or other information concerning any proposed installation, alteration, construction, apparatus or equipment, or in any manner regulate the hours of labor of any employee in this State."

From this it is apparent that the Legislature had no intention of vesting in the Industrial Commission any power over construction or installation of buildings or equipment but intended to leave that power in the municipalities where it was heretofore vested by the Revised Cities and Villages Act (chap. 24, Ill. Rev. Stats., 1949, par. 23-70, 23-72), and the Health power contained in paragraph 23-81.

The power of the City to enforce this ordinance was sustained in the *City of Chicago* v. *Western Shade Cloth Co.*, 301 Ill. App. 611 (1939).

DAY NURSERY INSPECTION

(No. 11473—President, Board of Health—C. P. H.—January 30, 1952.)

We have your letter of January 18, 1952 wherein you request our opinion as to what department or agency of the city of Chicago is given authority and is charged with the duty to enforce the provisions contained in the first paragraph of section 158-6 of the Municipal Code of Chicago which provides as follows:

> "Every room in the day nursery to be used for the care of children, shall be adequately ventilated in conformity with the building provisions of this code applicable to nurseries. Except in extremely cold weather, adequate ventilation must be maintained, so far as possible, by means of open windows. All such rooms for the care of children under the age of six years shall be located so that the floor will not be below the surface of the ground surrounding the building or below the level of the street sidewalk. The doors and windows of the day nursery shall be provided with screens and every appliance necessary for the exclusion of flies from the fifteenth of May to the fifteenth of November of each year."

Those provisions are a part of the day nursery ordinance appearing in chapter 158 of the code. Section 158-2 of the chapter makes it unlawful for any person to operate a day nursery without first obtaining a permit therefor. Section 158-3 requires that an application for a day nursery permit shall be made to the board of health. This section further provides that the board of health, when such application is made, shall make or cause to be made a strict inquiry of the statements therein contained and

a thorough inspection of the premises proposed to be used for a day nursery to determine whether the day nursery is suitably and properly located and that it complies in all respects with the requirements of the chapter.

Section 158-11 makes it the duty of the board of health to inspect all day nurseries as often as it shall deem necessary for adequate supervision of the same. This section also gives the board of health and the commissioner of buildings to the right to enter or cause to be entered all such places for the purpose of making inspections. Under section 158-12 if, upon inspection, the board of health shall find that any day nursery is conducted or managed in violation of the provisions of the code or in violation of any the regulations of the board of health or the laws of the state, it may revoke the permit issued.

Under section 158-13 if any person conducting a day nursery shall be found guilty of a violation of any of the provisions of this chapter relating to the safety of or the accommodation for the children, it shall be the duty of the board of health to close such day nursery and keep it closed until such repairs or alterations shall have been made as will make it comply with the provisions of this chapter.

In view of these provisions it is clear that it was the intent and purpose of the city council to vest the board of health with broad powers to issue and revoke day nursery permits and to inspect all premises for which such permits are sought or have been issued to determine whether or not such places conform in all respects with the ordinances of the city and the laws of the state relating to day nurseries. While section 158-11 also gives the commissioner of buildings the right to enter day nurseries to make inspections, such inspections are made for the sole purpose of determining whether or not such places comply with the requirements of the building regulations of the code. The commissioner of buildings makes such inspections in compliance with section 13-11 which gives him authority to administer and enforce the provisions of the code relating to the erection, construction, alteration, repair, removal and safety of buildings and the use of buildings and premises with the exception of those provisions which by their terms are to be under the direct and immediate supervision of the board of health or of the bureau of fire prevention or of such other departments or officers of the city designated by such code provisions.

It is therefore our opinion that the board of health has authority and it is its duty to enforce the above quoted provisions of the first paragraph of section 158-6 in the manner provided in chapter 158. For the purpose of discharging these duties and for the protection of the health, safety and welfare of the public, the board of health, as often as it deems necessary, may request the commissioner of buildings to inspect any premises for which a day nursery permit is sought and any premises for which such a permit has been issued to determine whether or not they comply in all respects with the provisions of the code under his jurisdiction which are referred to in the above quoted paragraph and to submit reports of such inspections to the board of health.

EMERGENCY DEMOLITION

(No. 11474—Purchasing Agent—J. E. C.—February 1, 1952.)

In your letter dated January 21, 1952, you state that it has been the policy of your Department to accept requisitions from using departments and agencies and to process in the regular manner requests for demolition either on City-owned property or in instances in which the demolition has been authorized by a court order.

You further state that the Commissioner of Buildings has from time to time on requisition asked your Department to enter into demolition contracts for buildings that have to be wrecked as an emergency operation under authority granted to him in the Municipal Code, Chapter 13-11.

You also state that the Municipal Code still refers to the Commissioner of Public Works as the one who is actually to do the demolition, and makes no reference to the Purchasing Agent or the processing of such contracts for demolition through your Department.

You request a review of the entire process of emergency demolition and the accepted routine for handling such work as it may be related to the Department of Purchases.

We have reviewed Chapter 13-11, Chapter 8-19 and Chapter 26 of the Municipal Code. Chapter 26 of the Municipal Code of Chicago establishes an executive department of the City which is known as the Department of Purchases, Contracts and Supplies. It states that the head of the Department shall be the Purchasing Agent, whose appointment, powers, functions, duties and obligations are provided for by the Municipal Purchasing Act for cities in excess of 500,000 population, approved July 21, 1947, being Article 22A of the Cities and Villages Act of the State of Illinois, approved August 15, 1941, as amended, (Chap. 24, Art. 22A, Ill. Rev. Stats., 1951). Section 22A-3 of the Purchasing Act above referred to provides for letting all purchase orders or contracts of whatever nature, whether above $2,500.00 or less than that amount. Section 22A-5 provides for letting emergency contracts. In both sections the Purchasing Agent is the principal contracting agent of the City. We are of the opinion that the proper procedure for demolition of buildings, whether in an emergency or not, requires the Buildings Commissioner to requisition the Purchaseing Agent, who will process same according to the provisions of the Municipal Purchasing Act.

DAY NURSERY CRIBS

(No. 11508—Board of Health—E. R. H.—April 2, 1952.)

We acknowledge your letter of March 18, 1952, in which you referred to Section 7 of Chapter 158 of the Municipal Code of Chicago, and asked our opinion on the question:

> "Is a bed pad placed upon the floor of a day nursery a crib or bed within the meaning of Section 7, Chapter 158?"

Section 158-7 above referred to, provides in part:

> "The mattresses or under blankets of the cribs or beds must be protected by rubber or oilcloth, and they shall be kept clean and in a sanitary condition at all times. Each bed or crib shall be so placed that there will be a space of one foot on all sides except where the head or one side of the bed may touch the wall. Children not of common parents may not occupy the same bed at the same time."

Webster's New International Dictionary Second Edition, defines the word "bed" as "an article of furniture to sleep or take rest in or on; a couch. As generally understood, a bed includes the bedstead, mattress and bedding."

Webster's defines the word "crib" as "a small bedstead with high enclosing sides for a child."

In the case of *Dean Milk Company* v. *City of Chicago*, 385 Ill. Page 565-70, our Supreme Court said:

> "As in the case with statutes, the primary rule for the interpretation and construction of ordinances is to ascertain and give effect to the intention of the law making body. * * * Expediency, born of changing circumstances and conditions, will not alter the meaning of plain and ordinary language used in an ordinance. The words of an ordinance must be taken in the sense in which they were understood at the time the ordinance was enacted. * * * The intent that controls in the construction of an ordinance has reference to the intent of the council which passed it and the question is what the words used therein meant to the council using them."

In the ordinance you referred to, in addition to the word "bed," the word "crib" appears. It is provided that, "*each bed or crib shall be so placed that there will be a space of one foot on all sides except where the head or one side of the bed may touch the wall.*" When the word "crib" is used to denote a bed, it has only one meaning; "a small bedstead with high enclosing sides for a child." Further, the wording of the ordinance: "except where the head or one side of the bed may touch the wall," clearly indicates that a frame or bedstead was intended by the council.

In our opinion the answer to your question is, No. The plain intent of the ordinance is that a crib, frame or bedstead is required.

CLASSIFYING A MULTIPLE USE AS A BUSINESS

(No. 11531—City Council—J. C. M.—May 13, 1952.)

In reply to your letter of April 18, 1952 and the inquiries therein contained, we submit the following:

1. In the second paragraph of your letter you inquire "whether a multiple use can be classified as a business, with a license and annual inspection thereof required." The term "multiple use" has no legal definition as far as we are able to determine. Chapter 63 of the Code before the revision of December 30, 1949, entitled "Multiple Use Buildings," restricted certain classes of occupany when considered with certain other types of uses. The new Chapter 63 of the Code deals with construction and fire-resistant materials. In considering your query we will assume that you used the words "multiple use" in the sense of "multiple dwelling," which is defined in Section 48-2.2. The term "multiple dwelling" now applies to two or more apartments, apartment hotel, tenement house, rooming house, lodging house, etc. having accommodations for more than ten persons and the increase of the number of apartments by alterations may or may not intensify the use.

In the Sixty-Sixth General Assembly (1949), House Bill 206 was introduced but not enacted. It provided for authorizing municipalities to license, tax and regulate every building or structure or any part thereof, used or held out to the public to be a place where sleeping accommodations are furnished or maintained for five or more persons as regular roomers for periods of one week or more, such place being commonly called a rooming house. We mention this in order to bring to your attention that the subject matter has had consideration of the General Assembly.

The power of the municpality to license, tax or regulate must be delegated by the legislature before it can be exercised legally. The legis-

lature has not delegated the power to license the business of operating multiple dwellings, rooming or lodging houses. The municipality cannot extend its power by a mere definition. (*Emmons* v. *City of Lewiston*, 142 Ill. 380). The requirement for annual inspections by the Building Department of multiple dwellings under the present Building Code is limited to lodging or rooming houses with sleeping accommodations for twenty or more persons and to all multiple dwellings four stories or more in height. (Section 46-2). The Board of Health has the authority to enter any building for examination of cellars, vaults, sinks or drains. (Section 9-11). These provisions relating to inspections of buildings could be enlarged upon by the City Council.

2. A "dwelling unit" is defined in the Building Code as:—"A room or suite of rooms designed or used for living purposes including a family unit or a room for sleeping accommodations, including hotel and dormitory rooms." (Section 47-2).

In paragraph (a) of your letter you propose to redefine a "dwelling unit" to be a minimum of two habitable rooms, one of which would have at least 150 square feet, with kitchen and bath. Such a definition, of course, would have to apply to new as well as old structures where permits for alterations are sought.

The present Building Code contains definition of Class A, Residential Units, Class A-1 Single Family Dwellings (having accommodations for not more than ten persons) and Class A-2 Multiple Dwellings (having accommodations for more than ten persons). (Sections 48-2.1, 48-2.2).

Minimum room areas are set forth in Section 52-4, (a) to (e). There, at least one room in every family unit shall have a floor area of not less than 150 square feet; kitchens or dining space shall have a floor area of not less than 60 square feet and all other habitable rooms shall have a floor area of not less than 70 square feet. A "habitable room" is defined in the Code as applicable to a residential unit, but not otherwise. (Section 47-2).

A "family unit" is defined as:—"A room or group of rooms designed or used as a housekeeping unit for a family or for a group of not more than ten persons other than a family and providing living, sleeping, eating, cooking and sanitation facilities complying with the requirements of the Code." (Section 47-2).

The present "family unit" as defined by the Building Code and the minimum room area requirements provided for Class A-1 would not be affected by the proposed "dwelling unit" definition. In fact, under the present Code, as we have above set forth, the minimum size of one room, kitchen or dining space and all other habitable rooms are specifically set forth, whereas the size of the kitchen is not set forth in the proposed definition.

Applying the proposed definition to the Class A-2 Multiple Dwellings, which include apartment buildings, boarding houses, clubs, fraternities, hotels, lodging houses, rooming houses and tourist homes (Section 48-2.2), a different situation is presented. The effect of the proposed amendment to the Code, would be to eliminate units consisting of a single room and bath, two sleeping rooms with bath in between, and a suite of rooms and bath where no kitchen facilities are provided.

We are of the opinion that the minimum requirements set forth in the proposed definition would not be enforced by the courts as to multiple dwellings. The requirement (1) that there be at least two habitable rooms, and (2) that those rooms be supplemented by a kitchen and bath would have no reasonable bearing upon the public welfare, health and safety and would constitute an unreasonable restraint upon the use of property for hotel, apartment hotel and other uses. The fact that hotels and apartment hotels have operated for years with a separate room and bath or

a bath between two rooms, a one room-kitchenette and bath, and a suite of rooms with bath demonstrates that their elimination by requiring a kitchen or kitchen facilities is not essential to the public welfare, health and safety. In *Evans* v. *Roth,* (1947) (Mo.) 201 S. W. (2) 357, 364, the court took judicial notice "that bachelor apartments do not customarily include kitchen equipment." The court there held that an apartment is no less an apartment because the tenant chose to eat out, and did not actually use the kitchen as such. In *Schneider* v. *Board of Appeals* (1949), 402 Ill. 536, 547, the court made the following observation:

> "However, there is no more reason why the use of appellants' property by ten sets of persons maintaining ten seprate household units should be regarded as any more adversely affecting the public welfare than if the same number of persons were living in the property as a single or as two separate household units."

3. Your next inquiry is whether physical alterations can be limited to buildings constructed prior to 1922.

In the present Zoning Code (Section 194A-20) the normal useful life of each class of buildings is fixed, with the proviso that:

> "If a building has been reconstructed in major part its normal useful life hereby is fixed in accordance with the foregoing schedule from the time of its reconstruction."

You propose to prohibit alterations of all buildings constructed subsequent to 1922 on the basis that those erected prior thereto are obsolete and subjects for rehabilitation by alteration and those constructed subsequent to 1922 are not obsolete and therefor are not subjects for rehabilitation by alteration. The premise, of course, is not true. Chase on Building Standards says:—"After a building becomes 35 years old, you deal in obsolescence depending on the particular building and the uses it has been put to. Some residential buildings last one hundred years and others are torn down after twenty or twenty-five years. Obsolescene has nothing to do with the physical structure of the building.

The Assessor, for valuation purposes, gives effect to the age of the buildings if they have remained in their original state. But the Assessor is informed by the Building Department as to legal alterations made and the Assessor gives effect thereto regardless of the year in which the building was constructed in arriving at present assessed valuations. Obsolescence presents many factors involving depreciation, use, utility and neighborhood conditions for which no set rule can be laid down.

It is our opinion that the City does not have authority to restrict alterations or rehabilitation to buildings constructed prior to 1922. Such action would be considered arbitrary.

4. LICENSING AND REGULATING BUILDING CONTRACTORS.

On February 26, 1936 in an opinion rendered to the Chairman of the Finance Committee (Opinion No. 9438, reported in full in Vol. 19 Op. of Corp. Counsel, p. 163), this office stated that the City does not have power to enact an ordinance licensing and regulating building contractors. In that opinion we pointed out that while the City had powers to regulate the construction of buildings and to make regulations necessary or expedient for the promotion of health or suppression of disease, we did not believe the powers so granted were broad enough to authorize the Council to license and tax building contractors. In *Arms* v. *City of Chicago,* 314 Ill. 316, an ordinance providing for the examination and licensing of electrical contractors was held invalid because of lack of power in the City to enact it. In that case the court said, (p. 321):

> "Since a city has no power, except by delegation from the General Assembly. to license any occupation or to require the payment

of a tax for the privilege of engaging in it, the power must be expressly granted in the City's charter or necessarily implied in or incident to the power expressly delegated."

The court, then held that there was no implied power to license electrical contractors by reason of the enumerated delegated police powers in general terms. Subsequently in 1925 the legislature did grant the power to require the registration of electrical contractors and impose an annual registration fee. (Chap. 24, Article 23-95).

While it is true that the City does license and regulate certain businesses and occupations, it does so only under express power.

This office has likewise held that the City is without power to impose a registration fee upon persons engaged in constructing and repairing the whole or any part of buildings, (Vol. IX Op. Corp. Counsel, p. 673). We there further held that the City could require the registration of all those engaged in the construction, alteration or repair of buildings and Section 42-1, as amended November 29, 1949, so provides. In passing that amendment the City went as far as it could under the existing statutes. In that Chapter penalties are provided for its violation, (Sections 42-5, 42-6). Other penalties are contained in Sections 39-1.1 and 43.10, 43-11.

Section 39-1.1 provides for penalties for violations, as follows:

> "*Any person violating* or resisting or opposing the enforcement of the building provisions of this code, where no penalty is provided, *shall be fined not more than two hundred dollars for each offense.* Each day such violation shall continue to constitute a separate and distinct offense. Any *builder or contractor* who shall construct any building in violation of any of the building provisions of this code, and any *architect* who shall design, draw plans or have supervisions of such building or who shall permit it to be constructed *shall be liable* for the penalties provided by this section."

Section 43-1 provides that it shall be unlawful to proceed with the erection, enlargement, alteration, repair, etc. of any building, structure or structural part thereof unless a permit shall have first been obtained.

We reaffirm our opinion that the City Council does not have the power to license and regulate building contractors. The provisions of the Code, however, can be enforced against them, architects and other persons as therein provided.

5. PARKING FACILITIES.

In view of the recent decision relative to the parking compound requirements contained in the zoning provisions of the Code, we do not deem it advisable at this time to consider an amendment having in mind a limitation based upon facilities that may be available.

6. Any violation of the Building Code is punishable, whether the element of fraud is or is not present. Further provisions based upon fraud are unnecessary.

7. You supplemented your letter with a verbal request for advice as to whether it is lawful to clothe the Building Commissioner, and his deputies, with the power to arrest or issue arrest slips for violations of the Rat Enforcement Ordinance.

Under Chapter 24, Article 23-105, the corporate authorities have the power "to pass and enforce all necessary police ordinances."

In the City Code, the power of arrest is alread vested in the following departments, other than the police and fire departments:—Health Department, (Sections 9-5 and 95-24); Bureau of Electrical Inspection, (Section 86-9); City Collector, (Section 101-28); Market Master, (Section 35-3).

It is our opinion that the City Council could clothe the Building Commissioner and his inspectors with the authority to make arrests or issue arrest tickets similar to traffic regulations, not only as to the Rat Control Ordinance, (Section 99-61.3) but also as to any other police regulations contained in the Building Code.

DAY NURSERY—DEFINITION

(No. 11534—Board of Health—E. R. H.—May 15, 1952.)

We acknowledge your letter of May 9, in which you call our attention to the definition of the term "day nursery" in Chapter 158 of the Municipal Code and in which you request that we answer the following question:

> "What provision, if any, of the Code is there requiring permits, or for other control, of institutions or places in which are received at one time for periods of four hours or less, three or more children under the age of fourteen years and not of common parentage, for nursing or care apart from their parents."

For answer to your question we refer you to Section 136-1 of the Municipal Code which provides:

> "The word 'home' is hereby defined to mean any institution, place, or family used for the reception or care of three or more infants or children apart from their parents. A 'home' is further defined to mean any institution used for the reception or care of persons who are dependent or not capable of properly caring for themselves, and shall be understood to include homes for the aged or infirm, orphan asylums, half-orphan asylums, refuges and shelters." Section 136-2 provides:

> "It shall be unlawful for any person other than the regularly constituted authorities of the United States, the county, the city, or any association or institution for the care of children which has been accredited, certified, or licensed by the state pursuant to an act of the legislature, to regulate the treatment and control of dependent, neglected, and delinquent children, to conduct or operate any home within the city, without first obtaining a license therefor."

In answer to your question, it is our opinion that it would be unlawful for any person, institution or place to receive three or more children under the age of fourteen years, for periods of four hours or less for nursing and care apart from their parents without obtaining a license as required by Section 136-2 above quoted.

INSTITUTIONAL UNITS

(No. 11627—Commissioner of Buildings—E. R. H.—December 17, 1952.)

We acknowledge your letter of December 3, 1952 asking our opinion regarding under what classification of Chapter 48 of the Building Code to place a building occupied by less than ten persons requiring medical care, and which is licensed as required by Chapters 136, 136.1 and 137.

Section 48-1 of Chapter 48 of the Municipal Code of Chicago provides:

"Every new or existing building or part thereof, shall for the purpose of this Code, be classified according to its use or occupancy in one of the following occupancy classes:

Class A, Residential Units.

Class A-1. Single-Family Dwellings.
Class A-2. Multiple Dwellings.

Class B, Institutional Units.
Class C, Assembly Units.

Class C-1. Large Assembly Units.
Class C-2. Small Assembly Units.
Class C-3. Schools.

Class D, Open Air Assembly Units.
Class E, Business Units.
Class F, Mercantile Units.
Class G, Industrial Units.

Class G-1. Low Hazard Industrial Units.
Class G-2. Moderate Hazard Industrial Units.

Class H, Storage Units.

Class H-1. Low Hazard Storage Units.
Class H-2. Moderate Hazard Storage Units.
Class H-3. Garages.

Class I, Hazardous Use Units.
Class J, Miscellaneous Buildings and Structures.

Each occupancy class shall include buildings or parts of buildings as hereinafter defined and those of similar character or use. Whenever there is any uncertainty as to the classification of the building, the commissioner of Buildings shall fix the classification within which it falls according to the relative fire hazard involved."

Manifestly, the city council intended "that every building or part thereof" should be classified. To that end the above classification embraces "Miscellaneous Buildings and Structures" and "whenever there is any uncertainty as to the classification of buildings, the commissioner of buildings shall fix the classification within which it falls according to the relative fire hazard involved".

Chapter 136 refers to homes for the reception and care of three or more infants or children apart from their parents.

Chapter 136.1 covers nursing homes for the reception or care of three or more dependent persons of the age of sixteen or more.

Chapter 137 treats of hospitals caring for two or more persons.

Class B—Institutional Units—are provided for in Section 48-3 of Chapter 48, as follows:

"Buildings, or parts thereof, designed or used for the harboring of more than ten persons for medical, correctional, penal, or other care, treatment or detention shall be classified as Class B. Institutional Units. Class B, Institutional Units shall include, among others, the following:

Asylums
Homes for aged
Homes for blind
Hospitals
Infirmaries
Institutional homes
Jails
Nurseries
Orphanages
Sanitariums"

There is no difficulty of classification of buildings employed for use or occupancy as referred to in Chapters 136, 136.1 and 137, where such buildings house ten or more persons. The problem arises when the occupancy is of less than ten persons.

You will note the code provision under Class B—Institutional Units, above quoted, refers to "Buildings, or parts thereof, designed or used for the harboring of more than ten persons," etc. Even though the building be used by less than ten persons, if it is designed for more than ten persons it would come within Class B.

It is our opinion that the proper classification of buildings used or occupied as homes, nursing homes and hospitals, as defined in Chapters 136, 136.1 and 137, when such buildings house less than ten persons, is Class B above referred to if it appears that such buildings are "designed" for the harboring of more than ten persons, even though such buildings may be temporarily occupied by less than ten persons. Where there is any uncertainty as to the classification of such buildings, it is the duty of the commissioner of buildings to fix the classification within which such buildings fall according to the relative fire hazard involved.

LIEN FOR DEMOLITION EXPENSE

(No. 11640—City Comptroller—G. D. W.—January 23, 1953.)

Pursuant to your request for the collection of the attached warrants representing wrecking costs, we wish to advise you that there is no authority under the law that gives us the right to collect such costs.

The matter was fully decided in the case of *Village of Palmyra* v. *G. S. Warren et al.*, 114 Ill. Appellate Court, page 562. In that case quoting from the passage on page 567;

> "It will be observed that no power is therein conferred upon municipalities by either ordinance, resolution or regulation, to impose upon any person or property, real or personal, the cost of abating a nuisance existing thereon or arising therefrom. It follows that there was no legal obligation upon appellees to pay the expense of abating the nuisance in question, and therefore no promise to pay the same could be implied. For this, and the further reason that the property sought to be charged therewith was real estate, we are of the opinion that no lien at law existed or could exist upon the property described in the bill."

In the absence of specific authority from the State Legislature* giving the City of Chicago the right to collect costs for wrecking of buildings, we are without authority to file suit for the collection of such costs.

In view of these facts we are herewith returning the warrants that you have submitted to us for collection.

COST OF EMERGENCY DEMOLITION AS LIEN ON PROPERTY

(No. 11658—Commissioner of Buildings—E. R. H.—March 6, 1953.)

We have your letter of January 26, 1953 wherein you state that on December 29, 1952 a serious fire occurred in the building of the General

---

* Ed. Note: Statutory authority granted in 1953.

Furniture Company located at 6155 S. Halsted Street, Chicago. The fire practically destroyed the entire building leaving only a part of the walls standing in a very dangerous and precarious condition.

You further state that you ordered the Speedway Wrecking Company to remove a very large electric sign on the Halsted Street side of the building and to remove all of the wall on the west side of the building down to the second floor level and about three-fourths of the wall on the south side of the building down to the second floor level, which action rendered the building reasonably safe. This wrecking work was necessary in order to recover three bodies that were in the wreckage.

The Speedway Wrecking Company has presented to you a bill for this emergency work in the sum of $3,397.05. You request advice as to what action may be taken to recover this sum from the owner of the premises.

In the case of *Village of Palmyra* v. *Warren*, 114 Ill. App. 462 (1904), the question as to whether a municipality could recover the cost of abating a nuisance upon private property was before the court. The court in holding that municipalities have no statutory power to recover such cost stated at page 567:

> "It will be observed that no power is therein conferred upon municipalities by either ordinance, resolution or regulation, to impose upon any person or property, real or personal, the cost of abating a nuisance existing thereon or arising therefrom. It follows that there was no legal obligation upon appellees to pay the expense of abating the nuisance in question, and therefore no promise to pay the same could be implied. For this, and the further reason that the property sought to be charged therewith was real estate, we are of the opinion that no lien at law existed or could exist upon the property described in the bill."

From our examination of the statutes we are unable to point to any provision which expressly or impliedly gives the city of Chicago power to recover the cost of wrecking parts of buildings or structures under the circumstances set forth in your communication. In the absence of such power and in the light of the decision quoted above it is our opinion that the city of Chicago cannot legally compel the owner of the premises of the General Furniture Company at 6155 S. Halsted Street to reimburse the City of Chicago for the sum of $3,397.05 charged to the city by the Speedway Wrecking Company for such emergency work *.

SLUM ERADICATION

(No. 11674—J. J. M.—April 6, 1953.)

I have your letter of April 1, 1953 in which you ask if a proposal has been made to create a separate city authority charged with functions of eradication of slums and blighted areas in Chicago.

We have at this time in Chicago the following departments, bureaus or agencies which perform functions in connection with the eradication of slums and blighted areas:

(a) *The Building Department.* This department is under the direction of a cabinet officer, the Commissioner of Buildings and has the duty of inspecting buildings for violations of the building code, and taking the necessary steps to obtain compliance or the initiation

---

*Ed. Note: Statutory authority granted in 1953.

of prosecutions of violations by the Department of Law. It should be mentioned that the Fire Department and the Health Department inspections also turn up violations which might contribute to the growth of slums and also call for prosecution. However, for the purpose of this recital it is considered that their function in regard to slums is more or less incidental. Prior to 1945, much of the in-inspection work involving the housing was performed by the Health Department. In 1945, the Health Department employees assigned to this work were transferred to the Building Department and the Housing Inspection Bureau established. All housing inspections are now the responsibility of the Building Department and as indicated above, the work of the Health and the Fire Departments is quite limited.

(b) *The Chicago Housing Authority.* This municipal body has Board of Commissioners and its own staff and functions independently of the City although its selection of sites for public housing requires approval of the City Council. You are, undoubtedly, aware of its use of state and federal monies, as well as city bond issue money. It has the power of eminent domain and employes its own legal staff.

(c) *The Chicago Land Clearance Commission.* Again, this Commission has its own Board of Commissioners functioning independently of the city administration, although its selection of areas for redevelopment must be approved by the City Council. Its acquisition of land, by eminent domain proceedings, extends to blighted vacant areas; i.e., subdivided land blighted by reason of tax delinquency, poor platting and small lot size, as well as land occupied by typical slum structures. (The Illinois Supreme Court has just determined in *People ex rel. Gutknecht* v. *Chicago Land Clearance Commission* (not) yet reported) that such blighted vacant land was properly the subject of acquisition by the Commission). You are, of course, familiar with the Federal participation in the loss occasioned by the write-down of the land for resale to private as well as public developers. You are probably also aware that resale can be made for industrial or business development as well as residential.

(d) *Chicago Dwellings Corporation.* This is a semi-private, not for profit corporation, whose function it is to construct housing for private use, including middle-income housing. It does not have the power of eminent domain, but has generally obtained its sites from the Land Clearance Commission.

(e) *The Interim Neighborhood Conservation Commission.* This is a temporary commission which is about to be succeeded by a permanent commission to be composed in membership of representatives of all of the above bodies, the Commissioner of Police, the Corporation Counsel, Chairmen of the Counsel Committee on Building and Zoning, on Planning, on Housing, on Forestry and Recreation, on Traffic and Public Safety and the Council joint Sub-Committee on Neighborhood Conservation, the Superintendent of Schools of the Chicago Board of Education, Superintendent of Chicago Park Ristrict, and the Executive Secretary of the Mayor's Committee for a Cleaner Chicago. The permanent commission is to have the following powers and duties:

"1. To function as an advisory body to the Office of the Housing and Redevelopment Coordinator in regard to the neighborhood conservation program;

2. To prepare and recommend a comprehensive program for the conservation of neighborhoods in the City and to maintain a continuing analysis of the effectiveness of such program and the development of ways and means for its improvement;

3. To exercise such other powers germane to the powers herein granted as may be conferred by the city council; and

4. To render periodical reports to the Mayor and the City Council."

(f) *The Housing and Redevelopment Coordinator.* The Coordinator, who is appointed by the Mayor, has the coordinating of the functions or activities of all of the above bodies to achieve the end result and the duty of assisting in relocating persons who are deprived of their homes by reason of the clearing of sites for public improvements and other instances were land is acquired for public purpose.

I believe that the proposal of which you speak is a recent one which has not gained much support, calling for the consolidation of the Land Clearance Commissions and the Chicago Housing Authority with various city departments with a view of reducing expenditures and having a consolidated operation. Thus, the legal work for both of those organizations would probably be handled by the Law Department of the City and certain inspection work would be the responsibility of the Building Department, etc.

I see no particular merit in the suggestion in that the reduction of the employees would be minimal and obviously there is always the possibility that the work now performed by the respective existing organizations would become submerged, at least to some extent, by the exigencies of unrelated emergency problems which constantly occur in all city offices.

The work of the Housing and Redevelopment Coordinator, has served to provide a smoothly working operation which, in my mind, would be impaired if there is any tampering with the structure.

DAY NURSERY STANDARDS

(No. 11699—President, Board of Health—M. I. W.—June 12, 1953.)

Reference is made to your letter of February 10, to which you attach a document entitled "General Standards and Requirements for the Conduct of Day Nurseries in the City of Chicago," which was prepared by you to be presented to the Board of Health for adoption for the City of Chicago. You requested our opinion as to its legality.

The board of health is given rule making power by section 9-13 of the Municipal Code, which provides that:

"The board of health shall have power to make such rules and regulations, as it may deem necessary or advisable, in relation to the sanitary condition of the City and for the prevention and suppression of disease, not inconsistent with the provisions of this code. Such rules or regulations shall take effect and be in force ten days after publication in a daily newspaper of the city, and in cases of emergency as hereinafter provided."

Chapter 158 of the code establishes regulation of day nurseries and provides in section 158-12:

"If upon such inspection the board of health shall find that any day nursery is conducted or managed in violation of the provisions of this code *or in violation of any of the regulations of the board of health* or of the laws of the state, it may revoke the permit issued." (emphasis added)

It is thus seen that the city council has in enacting the above section, expressed its intention that the rule making power of the board of health shall extend to nurseries for children.

We have carefully examined this material and have had intensive discussions with members of your staff, going over the document line by line. We have had occasion to suggest several changes in language and form which have been incorporated in the revised document we are transmitting herewith. In all cases, the views and judgments of your representatives on matters relating to health have been accepted.

We find that this material is in harmony and does not improperly conflict with the state statute, the minimum standards published in accordance with said statute by the State Department of Public Welfare and the Municipal Code of Chicago. Indeed almost all of the standards spelled out in these regulations have their origin in the above sources and therefore do not add substantially to existing requirements. The most significant new requirement relates to standards of nutrition and since this subject relates directly to the health of the children under care, it constitutes an appropriate subject for regulation by you.

We call your attention for consideration to language in an opinion directed to the president of the board of health, dated October 19, 1945 in which we said:

> "However, if the practice of adopting and publishing identical rules of the State Department of Public Health is continued any slight changes in the rules of the State Department made from time to time may require duplicate revision of the rules of the Board of Health. This is a waste of time and would require unnecessary expenditures of city funds for newspaper publication." 22 Op. Corp. Coun. 75 (No. 10864)

It may be that you will wish to consider the advisability of formally adopting as regulations only those provisions of the proposed rules which are not now in effect either by ordinance or state regulation since the substantial body of these proposals is already enforceable by you.

If it is desired to assemble all the standards the board of health will apply to day nurseries in one document for distribution to operators and other interested parties this could of course be done without the adoption of already existing requirements.

Should you desire however to adopt this entire document in a formal manner as rules and regulations of the board of health, it is our opinion that the material contained in the revised document we are transmitting herewith meets legal requirements as to substance and form.

DAY NURSERY VIOLATIONS

(No. 11702—President, Board of Health—M. I. W.—June 25, 1953.)

In your letter of May 6, 1953, you raise the following question for our opinion:

> "In the case of day nurseries which are required to procure permits from the Board of Health under Chapter 158 of the Municipal Code of Chicago, where no violations of health requirements are found by the Board of Health; no fire violations are found by the Fire Department and no building violations are found by the

Building Department, except for the violation of zoning requirements, upon which Department of the City, if any, does the responsibility rest for enforcement of the zoning provisions? Specifically what is the responsibility of the Board of Health in situations of this nature?"

We shall first answer the question as to the situation that exists when an application is made for such a permit and all other requirements are met except for zoning. Since one of the criteria for the issuance of the permit is that the nursery is "properly located" (section 158-3 Mun. Code) it is obvious that no permit can issue.

The next question is what is the role of the board of health where a permit has not been issued for the sole reason of zoning violation and the nursery continues to operate.

Chapter 194A-21 of the Code, which is section 21 of the Chicago Zoning Ordinance, provides that "this ordinance shall be enforced by the Commissioner of Buildings." The city council has thus centered responsibility upon that officer for such enforcement.

Sections 158-12 and 158-13 spell out the responsibilities of the board of health for the enforcement of the Nurseries for Children Code. They read as follows:

"158-12. If upon such inspection the board of health shall find that any day nursery is conducted or managed in violation of the provisions of this code, or in violation of any of the regulations of the board of health or of the laws of the state, it may revoke the permit issued.

"158-13. If any person conducting or operating a day nursery shall be found guilty of a violation of any of the provisions of this chapter relating to the *safety of or the accommodation for the children*, it shall be the *duty* of the board of health, and it is hereby authorized, to close such day nursery and keep it closed until such repairs or alterations shall have been made as will make it comply with the provisions of this chapter." (emphasis added).

Thus the board of health has primary enforcement responsibility *where the safety or accommodation of children is concerned.* This responsibility exists whether or not the establishment is operating under a permit. Further, where a violation of the above nature exisits the board of health is not relieved of responsibility when it merely disapproves such application and returns same to the city collector, or where it merely reports that such an institution is operating without a license to the licensing agency. 19 *Op. Corp. Coun.* 31 (No. 9167, May 19, 1936).

However, where the violation does not relate to the safety and accommodation of the children, and we believe a zoning violation ordinarily will not so relate, the prime responsibility should rest with the department given that responsibility by the city council, which in the case of zoning is the commissioner of buildings.

It is our opinion that where the only violation found is that of zoning, the board of health discharges its responsibility by so notifying the commissioner of buildings and notifying the city collector that the application has been disapproved.

In this way each department assumes prime responsibility for that area of enforcement for which it is particularly designed and best qualified. It would be as ill-fitting for the board of health to attempt to enforce a zoning requirement in terms of an over-all city policy on such matters, as it would be to suggest that some technical quirk of law made it mandatory for the building department to act unilaterally on matters of quarantine. Notification of the appropriate sister department marks

the co-operative relationship which will result in the effort of personnel in each department being directed to matters which are its prime concern. This makes for sound and effective over-all administration of laws and policies in the best public interest.

TWO-STORY AND ENGLISH BASEMENT

(No. 11715—President, Board of Health—M. I. W.—July 16, 1953.)

We have your letter of July 9, in which you request our opinion as to whether a two-story home with an English basement is considered a three-story structure within the meaning of section 136.1-7 of the Municipal Code of Chicago. Said section reads in part as follows:

> "A nursing home as defined herein may be located in an institutional building or in a single or multiple dwelling of ordinary construction or a superior construction not exceeding *three stories and basement* in height and having sleeping accommodations for not more than fifty persons, including attendants.
>
> "* * * Where sleeping accommodations are provided in the third story of such building they may not exceed six in number and may be used only for the keeper's family and staff. * * *" (Emphasis added.)

The language of the first paragraph indicates a permitted structure is one which has three stories *and* a basement and it is on the top floor of such a structure that we view the prohibition of sleeping patients to have been intended. The purpose of this section is obviously directed toward the problem of leaving the structure in case of fire or other emergency and the City Council has decided that there is too great a potential danger where patients are on the third floor. In the situation you describe, the sleeping patients are in no greater danger or will encounter no greater difficulty in leaving the building in an emergency than persons on the second floor of a building that had three stories and a basement.

It is, therefore, our opinion that an institution housed in a two-story structure with an English basement is not a three-story structure within the meaning of this section and may have patients sleeping on the top floor.

HOUSING ENFORCEMENT AND SLUM CLEARANCE LEGISLATION

(No. 11733—City Council—M. I. W.—August 17, 1953.)

We are in receipt of your communication of August 10th, in which you request our opinion as to the legality of Senate Bills Nos. 524, 587 and 827, as enacted by the Sixty-eighth General Assembly.

Powers granted in these bills are of novel nature in this state and indeed may be said to present what would be questions of first impression in most jurisdictions. Because of the high public interest involved in the destiny of these bills, they are deserving of most careful and thorough ex-

amination and consideration before any final opinion is uttered. The brief time available to prepare this opinion prompts us to express a reservation of the right, coupled with the intention of further study and analysis before our judgment in this matter should be considered final. The following discussion should be read accordingly.

I.

Senate Bill No. 524.

Known as the Urban Community Conservation Act, this bill authorizes the city, after 30 days notice by publication and a public hearing, to create a Conservation Board consisting of five members to be appointed by the Mayor with the approval of the City Council and of the state Housing Board. Each member must be a resident of the city and not more than three of them shall belong to the same political party. Each member of the board must have some experience in the fields of finance, real estate, building, or related endeavors and he may not hold any other public or political office during his term as a member of the board, excepting as a chairman or a member of the Redevelopment Commission under the Neighborhood Redevelopment Corporation Law.

The Mayor designates the presiding officer of the board as the "commissioner" who will devote his full time to the duties of his office as long as the Mayor desires his services. The four other members of the board are appointed by the Mayor to serve initial terms of one, two, three and four years, and after the expiration of the initial terms of office the term of the four members shall be four full years. Members of the board other than the Commissioner are to serve without pay, and the Commissioner is to receive no other public funds from any other governmental agency by way of salary or compensation for services rendered. However, each member of the board is entitled to receive and retain any salary either as chairman or member of the redevelopment commission.

The conservation board is given power to designate "conservation areas." These are defined in Section 3 (d) of the Act as follows:

> " 'Conservation Area' shall mean an area of not less than 160 acres in which the structures in 50% or more of the area are residential having an average age of thirty-five years or more. Such an area is not yet a slum or blighted area as defined in the Blighted Areas Redevelopment Act of 1947, but such area by reason of dilapidation, obsolescence, deterioration or illegel use of individual structures, overcrowding of structures and community facilities, conversion of residential units into non-residential use, deleterious land use or layout, decline of physical maintenance, lack of community planning, or any combination of these factors may become such a slum and blighted area."

This definition is quoted in full because it presents the central question raised both by this bill and by Senate Bill No. 627 which defines a conservation area with this exact language.

The board is authorized, after investigation and hearings, including at least one in the affected area, to designate an area as fitting this definition and develop or have submitted to it a "conservation plan" (defined as a comprehensive program for the physical development and replanning of a "conservation area" embodying the steps required to prevent the "conservation area" from becoming a "slum or blighted area.")

Such a plan may include among others such matters as:

"(1) land uses, residential and non-residential;

"(2) improvement, alteration, or vacation of major or minor streets and alleys, provisions of restrictive service access, and off-street parking;

"(3) locations and easements for public utilities;

"(4) community facilities; ('defined as physical plants implementing supporting or facilitating the activities, services and interests of education, recreation, shopping, health welfare, religion and general culture')";

"(5) landscaping and site engineering;

"(6) building restrictions;

"(7) recommended construction including new buildings, rehabilitation and conversions, demolitions of designated structures and elimination of non-conforming uses;

"(8) population density, ground coverage and number of dwelling units recommended;

"(9) recommended standards of maintenance, and requirements of applicable health and safety ordinances;

"(10) zoning and/or re-zoning required;

"(11) costs and financing arrangements of public portions of the plan;

"(12) recommended time table of various stages of the program; and

"(13) any and all other steps needed to carry out the plan."

Before its approval of the plan the board is required to consult with public and private agencies interested in the area and submit it first for approval of a "conservation community council" which the board nominates and the mayor appoints. Said council must consist of at least nine and not more than fifteen residents of the community, a majority of whom must be legal or equitable owners of real property in the affected area. (These councils are given additional assignments in an advisory capacity to the board in the preparation of the plan, in stimulating individual and block rehabilitation efforts, and in the administration of the plan within its area.)

The plan must also be submitted to the plan commission for an opinion and then to the City Council for adoption or rejection.

Following favorable City Council action the board must certify the plan as adopted and it may then exercise the powers granted in the Act including the specific power granted in section 6 of the Act:

". . . to acquire by purchase, *condemnation* or otherwise any improved or unimproved real property the acquisition of which is necessary or appropriate for the implementation of a conservation plan . . ." (emphasis added.)

and the general power granted in section 4 (f) to

"Exercise *any and all other powers as shall be necessary* to effectuate the purpose of this Act." (emphasis added.)

The acquisition of property by purchase or condemnation and the management and disposition of the property by sale or lease is a city function and the board acts as the agent of the city for such purposes.

Controls are established requiring among other matters that work done involving $1,000 be let by competitive bidding, that new construction for occupancy be on privately owned land, that sale and lease be to the highest bidder at not less than "fair use value" and requiring the turning over of management of property to private real estate firms within 60 days. There is also contained provision prohibiting the inclusion of a racial restrictive covenant in any lease or deed.

If owners, agents or mortgagees of improved property fail after notice to improve their property up to the minimum standards set by existing ordinances, the board may request the city to apply for a court order permitting the city to make necessary improvements and collect from the owners the cost of such repairs. This cost becomes a lien subordinate to existing encumbrances. (The provision described in this paragraph is similar to that found in Senate Bill No. 587 and it will be reviewed in our discussion of that bill below.)

The bill also grants the board power to carry out enforcement duties relating to existing ordinances if the City Council should *choose* to make such assignment.

The principal problem presented by this bill is whether or not the power of eminent domain has been properly granted for the activity described above in a "conservation area."

The objection which it must be expected will be raised is that the acquisition of property by condemnation by or under control of a public agency for subsequent sale to private interests is not acquisition for a public use or public purpose and that therefore, eminent domain may not be employed. This question has been litigated in Illinois in relation to slum clearance and public housing.

The Illinois Supreme Court has held that the expenditure of public funds for the acquisition of land by a public agency to be sold to a private developer for the construction of non-low-rent housing constitutes a public purpose. *Cremer* v. *Peoria Housing Authority*, 399 Ill. 579 (1948).

In *Zurn* v. *City of Chicago*, 389 Ill. 114 (1945) it was held that the elimination and redevelopment of slum and blighted areas was a public purpose and a public use regardless of the subsequent sale or lease of the property to private interests.

The court also held that a condemnation proceeding under the Blighted Areas Redevelopment Act of 1947 was not a proceeding to acquire land for private purposes merely because the Land Clearance Commission had entered into a contract with a private corporation for the sale of the area after it was acquired. *Chicago Land Clearance Commission* v. *White*, 411 Ill. 310 (1952).

This principle has been reaffirmed even more recently in *People ex rel. Gutknecht* v. *City of Chicago*, 414 Ill. 600 (1953) where vacant land which was deemed unmarketable because of "obsolete plotting, diversity of ownership, deterioration of structures or site improvement or taxes and special assessment delinquencies" was taken for subsequent sale to private developers.

The bill we are concerned with raises the question of whether these same principles apply to land which is not a slum or blighted area but which "may become such a slum or blighted area."

An understanding of why such taking is permissible in the case of a slum will be helpful in anticipating the approach the court can be expected to take in the case of an area not yet a slum. In the *Zurn* case the court said at page 128:

> "The Legislature has definitely determined that the prevalence of the conditions enumerated in section 2 are conducive to ill health, the transmission of disease, infant mortality, juvenile delinquency, crime and poverty. It is further declared that the elimination of the conditions set forth in section 2 of the act is in the best interest of the health, morals, safety and general welfare, of the citizens of the State. In view of this legislative declaration, the court cannot say that the finding of the legislature, that the elimination and redevelopment of slum and blight areas is a public purpose is unwarranted, or

that the use to be made of the property is not a public use and a public purpose. The taking of property for the purpose of the elimination, redevelopment and rebuilding of slum and blight areas meets all the requirements of a public use and public purposes within the principles of the law of eminent domain."

In the Urban Community Conservation Act before us the legislative determination is essentially the same as that discussed above.

"Section 2. It is hereby found and declared that there exist in many urban communities within this State conservation areas, as defined herein; that these conservation areas are rapidly deteriorating and declining in desirability as residential communities and may soon become slum and blighted areas if their decline is not checked; that the stable economic and physical development of these areas is endangered by the presence of blighting factors as manifested by progressive and advanced deterioration of structures, by the over-use of housing and other facilities, by a lack of physical maintenance of existing structures, by obsolete and inadequate community facilities and a lack of sound community planning; that as a result and concomitant of the decline of conservation area, *there is a growth of delinquency, crime and of housing and zoning violations* in such areas, together with an abnormal exodus of families; that the decline of these areas threatens to produce the conditions characteristic of slum and blighted areas which threaten the health, safety, morals and welfare of the public. * * * " (Emphasis added.)

Applying the reasoning of the *Zurn* case, the court would not theoretically take the position that this finding and declaration is unwarranted. Although the language of the bill speaks (perhaps unfortunately) of what these areas "may" become, there is also a finding and declaration in the above section and in the definition of a "conservation area" of what *is*. The differences are matters of degree. The evils described are not remote eventualities. They are visible, present and evergrowing. The power of government to deal with those evils which are within its proper scope does not, for example, await a mass epidemic to enforce a health regulation or a crime wave to make an arrest for a misdemeanor or crime. The bill has perhaps been unnecessarily weakened by dwelling on what may happen rather than on what has and is happening. But there too, the court has pointed a direction when in passing it referred to slum *prevention* in the *Cremer* case, saying:

"The public purpose of the State Grant acts is supplemented to the extent that, although grants are no longer contingent upon the elimination of an equivalent slum area, they promote the development of substantial housing and thus aid in *preventing the creation of new blighted areas* and permit existing slum areas to be cleared." (Emphasis added.)

It is therefore, our present opinion that the extension of these powers to so-called conservation areas is probably sustainable.

This conclusion does not necessarily mean that the Urban Community Conservation Act is necessarily valid.

There remains the question of whether the standards set for exercise of the granted powers are sufficiently definite so as not to constitute an unwarranted delegation of legislative powers to an administrative body.

In the *Zurn* case it was contended that the Neighborhood Redevelopment Corporation Act failed to fix sufficient standards. The court said that it had considered this contention carefully but did not find it necessary to enter into a "detailed discussion" and held this argument to be without merit.

We find *no* distinction between the standards set in the act before the court and the present acts of sufficient substance to cause us to foresee any other result with the one exception referred to above. That is, there is here involved one additional element which might be challenged as adding undue uncertainty and that is the kind of predicting that is necessary where an administrative body is given power to foresee what the area "may become." The problem would be to persuade the court that there exists sufficient data and experience on the history of urban communities which clothes such "predictions" with almost uncontrovertable or at least most reasonable certainty.

There remains one other major area to be considered and that is related to the plan which is to be prepared which may include any combination of the thirteen factors listed above. The court is certain to examine any plan to see if it is sufficiently related to the existing evils so that it may reasonably be expected to combat those evils. This test will probably be strictly applied since the right to take the land rests on what will be done with it. We are not prepared to say that "any combination" of the thirteen factors will necessarily be sufficiently related to the problem to meet such a test.

We have confined ourselves in consideration of this bill to several basic constitutional questions and have refrained from any discussion as to administrative difficulties including the obvious question of financing.

It is our opinion that this bill should be tested in a proper manner so as to remove those doubts which exist.

II.

Senate Bill No. 627.

By this bill the Neighborhood Redevelopment Corporation Law is amended to include "conservation areas" within the scope of such corporation, through the use of private capital. Each conservation area is limited to a minimum of two city blocks and a maximum of 160 acres. "Conservation area" is defined in language identical to that found in Senate Bill No. 524.

The basic act has been upheld as to validity in *Zurn* v. *City of Chicago*, 389 Ill. 114 (1945). The inclusion within the provisions of the act of "conservation areas" raises questions similar to those discussed in connection with Senate Bill No. 524 (*supra.*). The other principal addition is a modification of the requirement of sixty per centum ownership or land option by the corporation in the affected area as a condition precedent to the exercise of condemnation powers to include as an alternative the written consent of sixty per cent of the owners within the area. We can see no difficulty in persuading the court that this change involves no question basic to its decision in the *Zurn* case.

III.

Senate Bill No. 587.

The Revised Cities and Villages Act is amended to add two new sections to Article 23, Nos. 23-70.2 and 23-70.3. They authorize the city to demolish, repair or enclose dangerous and unsafe buildings or uncompleted and abandoned buildings if after notice to do so, owners fail to put such building in a safe condition or to demolish it. The city is authorized to apply for an order authorizing such action to the Circuit Court. This hearing is to be given precedence over all other suits. The costs of the demolitions or repairs are recoverable from the owners of the property and are made a lien thereon subordinate to all prior existing liens.

The bill further provides that a court of competent jurisdiction may upon application by the appropriate municipal officer issue an injunction,

after due notice, to cause any building or structure that fails to conform to the minimum standards of health and safety as set forth in the ordinances of the city to comply with such ordinances.

It should be noted that this bill appears distinguishable from the "lien" provisions of Senate Bill No. 524 described above. In that bill the lien may be attached for any repairs to bring property up to minimum ordinance requirements, while in this bill the lien may be attached for repairs to "dangerous and unsafe" buildings. Whether this is a "distinction without a difference" is a question that should be examined further.

It should be noted that the lien provided for in both acts is made subordinate to prior existing encumbrances on the property. Enactment of a priority lien provision would have given rise to a serious legal questions that have been litigated in other jurisdictions. A subordinate lien does not present those questions and is not novel in Illinois statutes and city ordinances. (See chap. 24, sec. 23-109 Ill. Rev. Stat. (1951) authorizing lien for rat extermination and Section 99-9 of the Municipal Code of Chicago regarding the elimination of injurious weeds.)

There appears to be no legal objection to this procedure. In the case of *Rockford Savings and Loan Association* v. *City of Rockford,* 352 Ill. 348 (1933) a statute was held invalid which authorized a lien on property for water charges.

The basis of the court's objection however appears to have been that the charge was not based on the amount of water actually used. In that case the court said at page 354:

> "It cannot be disputed that the General Assembly may declare rates for the use of water furnished by a city * * *, or by a corporation organized for the purpose, to be a lien on the premises upon which the water is used or supplied, as a means of enabling the city or the company furnishing the water * * * to secure the collection of its charges, on the ground that the furnishing of water is *essential to the health and safety of the community* * * *."

Under the reasoning and authority of this case there should be little question as to the validity of the bill before us.

Effectiveness in securing results however is another matter. It does not seem amiss to suggest that a lien that is made subordinate to other claims while it may become more sustainable, becomes at the same time less collectible. Particularly in those areas where repairs will be most needed, there will tend to be found in disproportionate numbers, structures which are so encumbered and so delinquent as to render the filing of a subordinate lien an almost empty gesture. This is not to be construed as questioning the obvious benefit such a provision will bring to many situations.

Conclusion.

As indicated above, this opinion represents our general view based on a short study of the problem.

We stand ready to respond to your requests for any further interpretation you may deem helpful.

BUILDING REMODELING ADVERTISEMENTS

(No. 11732—Alderman, 5th Ward—A. F. G.—August 17, 1953.)

We have your letter of August 10, 1953 to which was attached an advertisement of Community Builders Inc., whose main office is 4101 Demp-

ster Street, Skokie, Ill., and which is engaged in the business of remodeling homes. This ad appeared in the Chicago Sun-Times, Thursday, July 16, 1953. In your letter you say:

> "I have checked with the Building Department and I am told that alterations of the kind described are not in accordance with the Building Code. It was suggested that you be asked to provide a legal opinion, particularly on the statements underlined in red as they relate to what is not permitted under the Municipal Code. The Better Business Bureau, on the basis of such an opinion, would then advise newspapers against carrying this kind of advertising in the future."

The ad carries pictures illustrating a number of types of conversions in which the company specializes. You call attention particularly to two of these, one converting basements into living units and the other providing roof dormers for the conversion of attics into flats. Basement and attic flats are not prohibited per se.

However, the addition of a basement or an attic flat or both to a single family residence would change the character of the building to a duplex residence or to an apartment house as the case may be, so the zoning of the block in which such conversion is to be made will determine the validity or invalidity of such conversion.

Section 52-7 of the Municipal Code of Chicago provides: "Habitable rooms shall be permitted in a basement *only* when the floor is not more than two feet below finished grade level at all exterior walls containing openings required for natural light and ventilation." Section 52-5 of the said code provides "The minimum ceiling height in a habitable room shall not be less than seven feet six inches" with certain exceptions in rooms under sloping roofs.

Most of the basements in existing buildings in Chicago which were designed for basement purposes only such as laundries, boiler room, fuel rooms, storerooms, etc. do not meet the requirements of the code for conversion into living units. In most of such basements the floor is more than two feet below the finished grade level and the ceilings rarely exceed seven feet in height.

We think that the advertisement is misleading in that a property owner might get the impression that any basement regardless of the zoning requirements of its location may legally be converted into a living unit. It is our opinion that the ad should be qualified by inserting in each case the words: "Subject to the zoning and building regulations of the municipality we can convert," etc.

REDEVELOPMENT COMMISSION

(No. 11736—Deputy Housing Coordinator—M. I. W.—August 27, 1953.)

In your memorandum dated August 21, 1953, you requested that we check drafts or various resolutions to be considered at the first official meeting of the Redevelopment Commission and make any changes we deem necessary.

We have examined these documents and find them in order subject to the following suggestions:

1. The oath to be executed by Commission members should be amended by adding thereto the following language after the word "Illinois" which should be followed by a semicolon instead of a period:

> "that I have resided in said City of Chicago for more than one year prior to August 18, 1953, and that I am a qualified elector of the City of Chicago."

This suggestion is made since it is our opinion that members of this Commission are municipal officers within the meaning of section 9-87 of the Cities and Villages Act, said section requiring that any person to be eligible for a municipal office must be a qualified elector of the municipality and must have resided therein at least one year next preceding his appointment.

2. On page number 1, it would be good practice to include a notation, following the recital of the names of those in attendance, a statement to the effect that a quorum was present.

3. The first paragraph of Resolution No. 53-1 (page 4) should be changed to indicate that the Commission is organized pursuant to sections 21-44 to section 21-48 of the Municipal Code of Chicago as well as pursuant to the "Neighborhood Redevelopment Corporation Law" as is already indicated.

> NOTE: Following the enactment by the City Council of proposed amendments to those sections this resolution should be amended to indicate organization pursuant to the "Neighborhood Redevelopment Corporation Law" as amended. Other places where the words "as amended" should be added after City Council action to the words "Neighborhood Redevelopment Corporation Law" are found in the by-laws proposed in Resolution No. 53-2 in section 4 of Article II and in Article V.

4. Section 2 of Article I of the by-laws relating to a seal and Resolution No. 53-3 should be eliminated since we have investigated the records of the activities of the Redevelopment Commission in past years and find that a seal was adopted at a meeting of the Commission held on March 20, 1945. It is not however inappropriate for the Commission to reaffirm that earlier action.

5. The provisions of section 4 of Article II of the by-laws (page 6) do not seem to be drawn with due regard for the provisions of the statute and the ordinance both of which require moneys paid to the Commission to be transferred to the City within 10 days after receipt. Those funds are then to become part of the corporate fund of the City and are not Commission funds. Expenses of the Commission will be paid by the City rather than by the Commission.

This section of the by-laws is saved from inconsistency with the statute and ordinance by the last sentence therein. It is suggested that the apparently inconsistent language be eliminated or that the last sentence be strengthened by changing it to read as follows:

> "Nothing in this section will be construed so as to conflict in any way with the requirements for the receipt, custody, control or disposition of funds as are now or may be provided by any statute of the State of Illinois or any action of the City Council of the City of Chicago."

6. The sentence relating to the bonding of the Treasurer found in the same section 4 should be amended to read:

> "He shall give such bond for the faithful performance of his duties and the payment of all moneys received, as may be required by law or by ordinance or for such additional amount as the Commission may designate."

This change is to take account of section 25-14 of the Municipal Code which already spells out a required bond for members of the Redevelopment Commission in the amount of $1,000.00.

7. It is further suggested that it might be better form to adopt the by-laws providing for the creation of certain offices before the election is held filling such offices. It should be noted that the statute unlike the statute authorizing the creation of land clearance commission does not expressly provide for the creation of the office of vice-chairman or treasurer. However, section 5 of the Neighborhood Redevelopment Corporations Act provides as follows:

> "Consistent with the provisions of this Act, the Redevelopment Commission may adopt such rules and regulations and may alter, amend and repeal the same as it shall deem advisable relative to the calling, holding and conduct of its meetings, the transaction of its business, the regulation and control of its employees, the conduct of its hearings, inquiries and investigations, and the performance in general of its duties and powers hereunder."

Under this section, we believe, the Commission may organize for internal purposes by designating certain members to perform certain functions, if it is felt desirable.

PHOTOSTATS OF ELEVATOR CERTIFICATES

(No. 11750—Building Commissioner—M. I. W.—September 30, 1953.)

In your letter of September 23, you request our opinion as to whether a photostatic copy size 3¼" x 3¼" may be framed and put in elevators in lieu of the original elevator certificate measuring 7¼" x 9". We understand from your chief elevator inspector that this question is raised by a company which is in the process of designing a control panel for new elevators to be installed in a building. The company would like to have this design include a smaller space for the certificate of which it would have photostats made. In addition to considerations of design it is urged that it has become common for vandals to deface, remove, or destroy the original certificates now being used and that these certificates have importance as potential evidence of compliance to City requirements of safety in the event of a claim for damages growing out of an accident.

Section 46-12 of the Municipal Code provides that after prescribed inspection and tests of equipment and safety devices have been completed with satisfactory results, that:

> "it shall be the duty of the Commissioner of buildings to issue or cause to be issued a certificate setting forth the result of such inspection and tests and containing the date of inspection, the weight which such equipment will safely carry and a statement to the effect that the shaft doors, hoistway and all equipment, including safety devices, comply with all applicable provisions of Chapter 79 of this Code, upon the payment of the inspection fee required by the provisions of this Code. It shall be the joint and several duty of the owner, agent, lessee, or occupant of the building in which such equipment is located and of each person in charge or in control of such equipment *to frame the certificate and place the same in a conspicuous place in each elevator* and near each dumbwaiter, movable stage, movable orchestra floor, movable platform or escalator . . ." (Emphasis added.)

From the foregoing it will be seen that while the ordinance sets forth specific requirements as to the content and posting of the certificate, there is no prescribed form or size spelled out therein. It would therefore appear that the building commissioner is given discretion in prescribing the form and size of the certificate and could, if he chose, issue certificates of a smaller size than that now in use.

However, the ordinance directs the owner or operator of the building "to frame *the certificate*" and the framing and hanging of a copy made by the applicant would not meet this express requirement.

It is therefore our opinion that an applicant may not prepare a 3¼" x 3¼" photostatic copy of an elevator certificate to be hung as a substitute for the certificate issued by your department. Authority to permit such substitution must come from the City Council by way of amendment of the ordinance.

NURSING HOMES

(No. 11775—City Collector—M. I. W.—December 3, 1953.)

In your letter of November 23, you state that a question has been raised by the Fire Prevention Bureau with reference to Nursing Homes regarding conflicting provisions of Chapter 136 and Chapter 136.1 of the Municipal Code.

You ask for a clarification of those two chapters since it is your understanding that chapter 136.1 was enacted as a temporary war-time measure.

Section 15 of Chapter 136.1 reads as follows:

> "This chapter shall be in force and effect only for the duration of the war and six months thereafter. For the effective period of this chapter the provisions hereof which are in conflict with the provisions of chapter 136 or any of the building provisions elsewhere in this code now or hereafter in force shall supersede those other provisions, but those provisions shall remain in full force and effect as to 'homes' covered by chapter 136 which are not 'nursing homes as defined in this chapter'."

In an opinion to the president of the board of health dated April 29, 1952, we considered the question of the period of effectiveness of this chapter and held that chapter 136.1 "expired six months after the duration of the war".

It is therefore our opinion that the provisions governing the regulation of homes are those found in chapter 136, and that chaper 136.1 is no longer in force.

B. FRONTAGE CONSENTS

NURSING HOME

(No. 11315—Board of Health—M. J. N.—June 26, 1950.)

We respectfully reply to your letter of May 11, 1950 in which you advise that application was made by Dr. Paul Hochberg for a license to operate a home in the above premises. You further advise that the par-

ticular premises have been used and operated as an orphanage under the name of "Daughters of Jacob Day and Night Nursery," for a number of years and that license No. 37 for such operation was issued for the year 1949.

You also advise that your records indicate that the premises are in a neighborhood consisting of multiple family dwellings and apartment buildings of 2, 3 and 6-flat variety and that directly to the north is a large parking lot and a Wieboldt store.

Please be advised that our examination of the Sanborn Use Maps in possession of the Commissioner of Buildings confirms your observations.

The Courts have consistently held that our frontage consent ordinances are generally valid but our Courts have also consistently held substantially as follows:

> "The privilege of each citizen to use his property according to his own wish is both a liberty and property right. 'Liberty' includes not only freedom from servitude or restraint but also the right of every man to be free in the use of his powers and faculties, to pursue his occupation or business as he may choose, and to use his property in his own way and for his own purposes subject only to the restraint necessary to secure the common welfare.
>
> "The police power is limited to enactments having reference to the public health, comfort, safety and welfare."

Bjork v. *Safford*, (1929) 353 Ill. 355. *City of Aurora* v. *Burns*, (1925) 319 Ill. 84. *Forbes* v. *Hubbard*, (1932) 348 Ill. 166. *Mercer Lumber Company* v. *Glencoe*, (1947) 390 Ill. 128.

The fact that the property in question has for years been occupied for a similar use to the one now proposed and the further fact that the property is located in an apartment area adjacent to the 63rd and Halsted Streets business district and in close proximity to a large department store and its parking lot inclines us to the opinion that we would have difficulty in sustaining a position that new frontage consents are necessary under section 136.1-15 of the Municipal Code in this particular case.

Spies v. *Board of Appeals*, (1929) 337 Ill. 507. *Koos* v. *Saunders*, (1932) 349 Ill. 442. *Kumpp* v. *Rhoades*, (1935) 362 Ill. 412. *Lee* v. *City of Chicago*, (1945) 390 Ill. 306. *City of Watseka* v. *Blatt*, 320 Ill. App. 191.

We must caution, however, that since our frontage consent ordinances have on a number of occasions been held valid in their general aspects that this opinion should be applied only in the present circumstances since another set of facts, however, similar, may vary sufficiently to warrant a different conclusion. In the case of *Lee* v. *City of Chicago* cited above at page 312 the Court, in holding our frontage consent ordinance invalid as it applied to the property involved in that case, said:

> "It comes within that class of cases where an ordinance or law which may be valid as to one set of facts, may be invalid if applied to another particular state of facts."

In light of the facts in this case, as we understand them, we are of the opinion that the requirements of the applicable frontage consent ordinance should be waived.

AUTHORITY OF CITY COMPTROLLER

(No. 11347—City Comptroller—H. S.—December 15, 1950.)

Your letter of recent date concerninng the above subject requests advice as to the authority of the Comptroller of the City of Chicago to sign frontage consents on behalf of the City of Chicago under the following circumstances.

(a) for property owned by the City in fee;

(b) for property held by the City as Trustee, as in case of school property;

(c) for property acquired for limited use by deed or through condemnation such as playground or street right-of-way;

(d) for school property under lease to the City.

We have checked the provisions of the City Code relative to the powers and duties of the City Comptroller, and are of the opinion that he has no authority to sign frontage consents on behalf of the City in any one of the situations mentioned in your letter.

We are also of the opinion that the Comptroller may sign a frontage consent only when duly authorized by a council order, inasmuch as the signing of a frontage consent is tantamount to disposing of a vested right in real estate and may result in a depreciation in value of the property involved, and such council order is required whether the real estate is held by the City in fee, or whether the interest therein is limited or less than a fee.

Further, we are of the opinion that the Comptroller has no authority to sign frontage consents involving real estate held by the City in trust for use of schools, or of such parcels of real estate as are used by the City under lease from the School Board, because of the following statutory provision.

> * * * "No sale of real estate, or interest therein, used for school purposes or held in trust for schools shall be made except by the City Council, upon the written request of the Board, ordered by a vote of not less than ¾ of its full members." (Chap. 122, Sec. 34-20.)

In all cases involving frontage consent the action of the City Council must be by ordinance and passed by a vote of at least three-fourths of the members elected to the council.

HOME FOR THE AGED

(No. 11397—Board of Health—M. J. N.—June 19, 1951.)

We respectfully reply to your communication of February 8, 1951 supplemented by your communication of April 10, 1951, in which you advised that an application was made for a license to operate a nursing home known as Zlotnik's Home for the Aged, located at 1632 S. Millard Avenue.

In your letter of April 10, 1951, you quote the attorneys for Zlotnik Home as follows:

"The area surrounding the premises is question have now been changed to a rooming house district and that the owners of the various properties surrounding said premises cannot be found. Numerous properties located in this area are leased by absentee owners. A great proportion of the surrounding properties are tax delinquent."

Attached to your communication of January 29, 1951 is a copy of a letter from Milton H. Miller, Attorney for the Home in which he suggests that the circumstances surrounding this application might be similar to the circumstances which prompted our opinions of June 26, 1950 and November 28, 1950 (correct date November 24, 1950), involving premises at 6410 S. Peoria Street and 435 W. Barry Avenue.

You inquire whether or not in our opinion frontage consents are required for the licensing of this home based upon the representation made by the attorney, as aforesaid.

Assuming that the representations made by the attorney, as aforesaid are true and based further upon common knowledge that the area surrounding 1632 S. Millard Avenue is as represented by Mr. Miller, we advise as follows:

The Courts have consistently held that our frontage consent ordinances are generally valid but our Courts have also held substantially as follows:

"The privilege of each citizen to use his property according to his own wish is both a liberty and property right. 'Liberty' includes not only freedom from servitude or restraint but also the right of every man to be free in the use of his powers and faculties, to pursue his occupation or business as he may choose, and to use his property in his own way and for his own purposes subject only to the restraint necessary to secure the common welfare. The police power is limited to enactments having reference to the public health, comfort, safety and welfare."

Bjork v. *Safford*, (1929) 353 Ill. 355. *City of Aurora* v. *Burns*, (1925) 319 Ill. 85. *Forbes* v. *Hubbard*, (1932) 348 Ill. 166. *Mercer Lumber Company* v. *Glencoe*, (1947) 390 Ill. 128.

The fact that the Home is already established and your inspection indicates that the institution is in full compliance with the requirements of the Municipal Code of Chicago for the purpose of obtaining a license to operate a home with the exception of frontage consents, as aforesaid, and except as suggested in your letter of April 10, and the further fact that the Home is located in an area in which the uses are of a nature barely distinguishable from the use in question, we are of the opinion that we would have difficulty in sustaining the matter for frontage consents under Section 136.1-6 of the Municipal Code of Chicago in this particular case.

People v. *City of Chicago*, (1914) 261 Ill. 16. *Spies* v. *Board of Appeals*, (1929) 337 Ill. 507. *Koos* v. *Saunders*, (1932) 349 Ill. 442. *Krumpp* v. *Rhoades*, (1935) 362 Ill. 412. *Lee* v. *City of Chicago*, (1945) 390 Ill. 306. *City of Watseka* v. *Blatt*, 320 Ill. App. 191.

We must caution, however, that since our frontage consent ordinances have on a number of occasions been held valid in their general aspects, that this opinion should be applied only in the present circumstances since another set of facts, however, similar may vary sufficiently to warrant a different conclusion.

In the case of *Lee* v. *City of Chicago*, cited above at page 312 in holding the provisions of an ordinance regulating the location of theatres invalid as applied to the property in that case, the Court said:

"It comes within that class of cases where an ordinance or law which may be valid as to one set of facts, may be invalid if applied to another particular set of facts."

In light of the facts in this case as we find them, we are of the opinion that the requirements of the applicable frontage consent ordinance should be waived.

BOARD OF HEALTH DUTIES

(No. 11566—Board of Health—E. R. H.—July 23, 1952.)

We acknowledge your letter of July 14, 1952 in which you ask our opinion upon the following questions:

"What duties, if any, does the Health Department legally have with respect to frontage consents for institutions operating as hospitals or homes?"

"If the frontage consent requirements of the Municipal Code are legally to be enforced by some department other than the Health Department, how and by what department should they be enforced?"

You, also, request that we send to you a concise statement as to what an applicant for a hospital or home licensed should do with respect to various departments which may be involved.

The provisions of the Municipal Code of Chicago with respect to filing of applications for the establishment of homes and hospitals are substantially similar in that an application is required to be filed with the Board of Health as well as with the City Clerk. Sections 136-3, 136.1-3, 137-4.

With reference to frontage consents, Section 136-6 of the Municipal Code of Chicago, after stating the frontage consent requirements, provides:

"* * * Such written consents of the majority of said property owners shall be filed with the board of health before a license shall be issued for the operation or conducting of any such home."

The provisions of the Muniicipal Code as to frontage consents are substantially alike with reference to hospitals and homes and such consents must be filed with the board of health. Sections 136-6; 136.1-6, 137-8.

Section 8-38 of the Code provides:

"Whenever any ordinance of the City requires the filing of frontage consents, said frontage consents shall be verified by the bureau of maps and plats. A fee of twenty-five dollars shall be required for such verification except upon application for a permit for the conduct of a carnival or street fair in a public way or public place. Said fee must be paid at the time of the filing of the frontage consent petition in each case."

Section 101-5 of the Code sets forth the duties of the City Clerk upon receipt of an application for a license which requires the investigation or inspection of any department or board of the City. It further provides:

"* * * If any department head or president of a board shall disapprove such application and the applicant for license shall be in business or shall have been engaged in the occupation for which a

license is sought, it shall be the duty of such department head or president of a board to take such action as shall be necessary to compel compliance with the provisions of this Code."

In our opinion, under the various provisions of the code above referred to, it is your duty to check the genuineness of the signatures on the frontage consents, refer the consents to the Map Department for verification, advise the City Clerk of the action of the Map Department and your findings on such frontage consents, and to prosecute any applicant operating or attempting to operate a home or hospital without the required frontage consents. The duty of enforcement for lack of the required proper frontage consents is a duty of the Board of Health.

Anent providing you with a condensed statement as to the proper order to be followed by an applicant, as required in your letter, we have conferred with the office of the City Clerk and with your department as to the practice and procedure in such cases. We suggest that this is an administrative matter and that improvement of the practice and procedure now in use, if possible, would best be left to departmental conference.

NURSING HOME AS CONTINUING USE

(No. 11567—Board of Health—L. L. K.—July 23, 1952.)

This will acknowledge receipt of your letter of April 16, 1952 wherein you attach a copy of a letter which you received from Dr. Carl Potkin of 7331 Sheridan Road, Chicago, and you request our opinion whether new frontage consents must be obtained upon the sale of a nursing home formerly operated at that location as Father Basil's Lodge, Inc., which is now being operated by the new owner as the Shore Crest Convalescent and Nursing Home.

Frontage consents for nursing homes are required by Section 136.1-6 of the Municipal Code, which section also includes the following provision:

> "* * * provided, further, that said consent by the majority of the property owners shall be in effect so long as the original licensee conducts and operates the home; a request for a license by any person other than the original licensee shall require a new consent as hereinbefore provided."

We have in the past rendered opinions on the question of the necessity of frontage consents upon change in ownership of the property which had formerly obtained frontage consents. In an opinion to the President of the Board of Health on April 18, 1940 (Opinions of the Corporation Counsel, Volume 21, p. 173) we stated that new frontage consents are not needed to continue to conduct a home in a residential block upon a change of ownership if there is no lapse of time in the operation of the establishment, nor need new frontage consents be secured if the premises is changed to a home from a hospital or nursery. Opinions to the same effect appear in Volume 6 at page 809, Volume 10 at page 642 and Volume 18 at page 578.

The limitation in Section 136.1-6 above quoted does not appear in Chapter 136 of the Municipal Code regulating "homes" and were it not for this special limitation, unquestionably the opinions which we have referred to would be a complete answer to your question. However, Section 136.1-15 provides that Chapter 136.1

"shall be in force and effect only for the duration of the war and six months thereafter. For the effective period of this chapter the provisions hereof which are in conflict with the provisions of Chapter 136 or any of the building provisions elsewhere in this Code now or hereafter in force shall supersede those other provisions, but those provisions shall remain in full force and effect as to "homes" covered by Chapter 136 which are not "nursing" homes as defined in this chapter."

From this it is clear that the provisions of Chapter 136.1 which are inconsistent with the provisions of Chapter 136 expire six months after the duration of the war. The state of war between this country and Germany was terminated on October 19, 1951 (16 F.R. 10915, 1951 U. S. Code Cong. and Adm. Serv. 4569). The war with Japan was terminated by the signing of a treaty of peace on September 8, 1951 which became effective by presidential proclamation April 28, 1952. The quoted provision of Chapter 136.1 would end by its own limitation on October 28, 1952. However, the requirement of Section 136.1-6 is unique in that it has no counter part in our ordinances and as a discrimination against licensees of nursing homes, it appears to us to be of doubtful validity. Section 136-6 which governs homes generally provides that "no new frontage consents shall be required if such home has heretofore been licensed by the city as a hospital, home or nursery at the present location."

In view of the opinions which this office has heretofore rendered, as hereinabove referred to, we are of the opinion that Dr. Carl Potkin, operating Shore Crest Convalescent and Nursing Home as successor to Father Basil's Lodge, Inc., without any intervening discontinuance of operation, is entitled to a license without any requirement for new frontage consents.

FRONTAGE REQUIREMENT

(No. 11575—Board of Health—E. R. H.—August 7, 1952.)

We acknowledge receipt of your letter of August 5, 1952, in which you ask our interpretation of Section 136.6 of the Municipal Code of Chicago as to whether the frontage consents required thereby are based upon two-thirds of the buildings in such block or two-thirds of the frontage in that block.

Section 136.6 provides:

"No city license shall be issued to any person to operate or conduct a home in any block in which two-thirds of the buildings fronting on both sides of the street on or along which the proposed home may face are devoted exclusively to residence purposes, unless the owners of a majority of the frontage in such block and the owners of a majority of the frontage on the opposite side of the street on or along which said building faces, consent in writing to the operation or conducting of any such home in such block. . . ."

In the case of *Standard Oil Co.* v. *Kamradt*, 319 Ill. 51-54 our Supreme Court in a case involving frontage consents, defined the word "frontage":

"The term 'frontage' unless a special meaning must be given it by reason of language in the particular ordinance, may be defined as the line of demarkation between private property and that open to the general use of the public, such as a street, stream or park. Where two sides of property face or abut upon streets, streams or parks it must be said to have frontage on both sides."

In interpreting a similar provision of the Revised Code of 1931, requiring frontage consents for funeral homes, this office stated in Volume 19, page 290, Opinions of the Corporation Counsel:

> "The frontage consents must be signed by a majority of the property owners according to the frontage on both sides of the street of the block in which it is proposed to locate a funeral home. The signatures must be signatures of the owners of the fee. Each co-tenant whether the title is recorded as a joint tenancy or tenancy in common is entitled to sign a frontage consent for only his apportionate interest in the property."

It is our opinion that under Section 136.6 of the present code above quoted, where an application is made to conduct a home in a block in which two-thirds of the buildings on both sides of the street on and along which the proposed home may face are devoted exclusively to residence purposes, the written consent of the owners of a majority of the frontage in such block and on the opposite side of the street on and along which said building faces must be obtained.

FUNERAL PARLOR

(No. 11577—Board of Health—E. R. H.—August 8, 1952.)

We acknowledge your letter of August 1, 1952 in which you state that Mr. Leonard J. Koslow, a contractor asked your department for a waiver of frontage consents as he was going to build a funeral parlor at 5734 W. Diversey Avenue and in which you asked our opinion on the following questions:

> "Who is to determine when frontage consents are necessary to obtain a permit for an undertaking establishment?
>
> Also who is to certify on the funeral home plans (blue print) that frontage consents are not necessary?"

Section 181-3 of the Municipal Code of Chicago provides:

> "No morgue or undertaking establishment shall be conducted or operated on or along any boulevard or pleasure driveway, or in any block in any street in which one-third of the buildings on both sides of the street in such block are used exclusively for residential purposes, without the written consent of a majority of the property owners according to the frontage on both sides of the boulevard, pleasure driveway, or street in the block in which it is proposed to conduct or operate such morgue or undertaking establishment, but nothing herein contained shall apply to any block in any street in which street cars are operated.
>
> Frontage consents, when required under this section, shall be obtained and filed with the board of health before a license shall be issued to an undertaker for the premises sought to be used by such licensee."

Under the above provisions of the Code, it being the duty of the board of health to withhold the issuance of a license until the required frontage consents are filed with the board, it is our opinion that it is the duty of the board of health to investigate and determine if fronage consents are necessary, and if the board determines that frontage consents are not necessary, it is the duty of the board to certify that fact to the commissioner of buildings.

WITHDRAWAL OF FRONTAGE CONSENTS

(No. 11726—Commissioner of Buildings—M. I. W.—August 5, 1953.)

In your letter of June 9, regarding a proposed filling station to be located at 5035-43 W. Division Street, you state that a petition showing consents as required by Section 40-8 of the Municipal Code to locate tanks for flammable liquids was received by your office and forwarded to the Bureau of Maps and Plats on June 2, for checking as to ownership and was returned to your department on June 5, showing a surplus of required frontage of 4.11 feet. You further state that on June 9, nine letters of withdrawal were received from signers of this petition.

You request our opinion as to whether these names should be removed from the petition, thereby leaving it far short of the required majority necessary to secure a permit for the installation of these tanks.

In an opinion to the Fire Commissioner dated October 8, 1925, with facts precisely similar to those you describe, we said:

> "This department had uniformly held that a party signing a frontage consent petition required by the ordinance may withdraw that consent at any time before the petition for such consent has been formally acted upon and the permit granted." (14 Op. Corp. Coun. 364.)

In a similar opinion dated December 31, 1923, we had held that:

> "Until the permit is actually issued, the signers can withdraw their names, as such voluntary acts on their part were not irrevocable." (12 Op. Corp. Coun. 630.)

This view has been consistently followel by this office. 12 Op. Corp. Coun. 354 (August 11, 1923), 16 Op. Corp. Coun. 396 (No. 6132 December 5, 1927). It is based on Illinois authorities which have taken the view that "a petitioner has the right to withdraw his name from the petition at any time before the tribunal created by law to determine the matter submitted by the petition has finally acted." *Kinsloe* v. *Pogue*, 213 Ill. 302 (1904); *Littell* v. *Board of Supervisors of Vermillon County*, 198 Ill. 205 (1902); *Theurer* v. *People*, 211 Ill. 296 (1904).

Attorneys for the party on whose behalf the petition you submit was circulated have contacted this office regarding this matter and have cited authorities found in 126 A.L.R. 1031 and 27 A.L.R. 2d 604. They have urged that where there is no discretion in the administrative officer once the sufficiency of the petition has been determined, the issuance of the permit itself is merely automatic and that the "final action" used as the shutting off point for further withdrawals under the test applied by Illinois courts is the determination that sufficient footage is represented by the signatures before him to warrant his granting of the permit. The issuance of the permit is under this theory, a mere formality.

We have considered this contention and are not prepared to accept a view which regards the issuance of the permit as a mere formality following automatically from the filing of sufficient consents. Other matters in addition to consent are left to the determination of the building commissioner. (See Chapter 60 Mun. Code of Chicago relating to regulation of hazardous use units.)

Even without this latter consideration we are bound by the Illinois Supreme Court which in all the cases we have found has consistently upheld

the right of the petitioner to withdraw. *Mach* v. *Polecat Drainage District*, 216 Ill. 56 (1905); *Malcomson* v. *Strong*, 245 Ill. 186 (1910); *Sny Island Drainage Dist.* v. *Divell*, 256 Ill. 126 (1912); *People* v. *Strawn*, 265 Ill. 292 (1915): *People* v. *Oakwood*, 290 Ill. 45 (1919); *People* v. *Drennan*, 307 Ill. 482 (1923); *People* v. *Kramer*, 397 Ill. 592 (1947); *People* v. *Hurst*, 401 Ill. 158 (1948).

In rejecting the opposing view urged upon it, the court said in the case of *Boston* v. *Kickapoo Drainage District*, 244 Ill. 577, 579 (1910):

> "This theory overlooks the fact that the court is authorized by the statute to enter the order only when requested at the time and in the manner, and by the persons having the qualifications and complying with the requirements mentioned in the statute . . . It is the order of the court and not the presentation of the petition which abolishes the district."

Relating this reasoning to the situation before us, it is the permit which gives the party the right to proceed with his plans. The building commissioner cannot issue a permit unless the consent of a sufficient frontal footage is *before him* at *the time* he *issues* the permit. Therefore any properly filed withdrawal of consent before issuance which leaves the total short of that required by the ordinance would render the act of subsequent issuance null and void.

It is therefore, our opinion that under these circumstances the names properly withdrawn before issuance of a permit cannot be considered as part of the petition.

C. ZONING

STORAGE OF MOTION PICTURE FILM

(No. 11193—Commissioner of Buildings—M. J. N.—October 20, 1949.)

We reply to your inquiry of September 30, 1949 in which you ask us to advise in what zoning district under our ordinance it is permissible to construct a suitable building for the storage of motion picture film.

You enclose a letter from J. E. Brulatour, Inc., and a plat of a lot located at Peterson Avenue and Rogers Avenue. Use district map 8 of our zoning ordinance indicates that the Peterson Avenue frontage is zoned commercial and that the Rogers Avenue frontage is zoned manufacturing.

Our information is that there are two kinds of motion picture film.

1. Over 16 m.m. made of cellulose nitrate.

2. 16 m.m. and under called safety film made of cellulose acetate. Both are celluloid products.

Paragraph 3 (e) of Section 11 of the Zoning Ordinance permits in a commercial district the following uses:

> "Manufacturing, processing or storing of merchandise from the following finished products: bone, celluloid, cloth, etc."

It is, therefore, our opinion that subject to all other ordinances, the storage of motion picture film is permitted in a commercial district under the zoning ordinance.

WOODWORKING SHOP

(No. 11208—A. F. G.—November 16, 1949.)

In your letter of November 8, 1949 you inquire if a city permit or license is necessary to establish in North avenue, between Wells street and Ogden avenue, (1) an attorney's office, or (2) "an amateur non-business woodworking shop."

North avenue between Wells street and Ogden avenue covers several blocks. The south side of North avenue, between the said streets is zoned for "Commercial" use. On the north side of the street some of the attorney's office may be established anywhere in this area and no permit blocks are zoned "Commercial" while others are zoned "Business." An or license is required.

A "carpentry workshop" and "a hand workshop" are permitted uses in a Business or Commercial district, but "manufacturing woodwork" is a Manufacturing use. We do not know just what "an amateur non-business woodworking shop" is, but assume that it is a place where the occupant carries on light woodworking not as a business, but rather as an avocation or hobby pursued for the operator's enjoyment. We are of the opinion such a use may be carried on in the area described, and no permit or license is required.

Any material change in the electric wiring system of a building should not be undertaken without a permit being first issued for such work.

DEFINITION OF CORNER LOT

(No. 11229—Commissioner of Buildings—M. J. N.—December 28, 1949.)

We reply to your letter of December 14, 1949 requesting an opinion with respect to the southeast 8,000 square feet of the vacant property located on the north side of Rosemont Avenue between Sheridan Road and Lake Michigan. Your specific inquiry is whether the southeast 8,000 square feet, as a unit, constitutes a corner lot within the meaning of the Chicago Zoning Ordinance.

Zone and volume district maps No. 10 of the Zoning Ordinance show the property in question to be in apartment and 3rd volume districts. If the property in question is a corner lot the owner could under section 15 utilize ground area for all buildings exclusive of garage up to 60% of the total area. If the property in question is construed to be other than a corner lot then the owner may cover (exclusive of garage) up to a total of 50% of the area.

Section 2 of the ordinance defines:

"*BLOCK*—all that part of one side of a street which is between two intersecting or intercepting streets, or between an intersecting or intercepting street and a railroad right-of-way or waterway."

"*LOT*—a parcel of land or two or more parcels of land, or parts or portions thereof, as shown on registered or recorded plat, used or intended to be used as a unit. Each building and its accessory buildings shall be on a separate lot."

"*A CORNER LOT*—is not more than 8,000 square feet in area adjoining two street lines which form an angle of not more than 120 degrees."

"*STREET*—a public way other than an alley."

A navigable body of water has on numerous occasions been held to be a public way.

Robert v. *Parsons*, (N. Y.) 24 S. Ct. 8, 191 U. S. 17, 48 L. Ed., 73.

La Casse v. *Great Lakes Engineering Works*, 219 N. W. 730, 242 Mich. 454.

Lake Michigan, being one of the great lakes, is a navigable body of water and, therefore, a public way.

La Casse v. Great Lakes Engineering Works, supra.

Certainly in the commonly accepted meaning of the word street as the public understands and uses a street, Lake Michigan is not a street and to determine whether the Council, for the purpose of identifying of a corner lot, had in mind the broader meaning of the word when defining a street, we must look into the intent of the zoning ordinance with respect to volume and intensity uses of lot areas.

The first paragraph of the zoning statute (Sec. 73-1, Chap. 24, Illinois Revised Statutes) provides among other things the following:

"To the end that adequate light, pure air, and safety from fire and other danger may be secured; * * *, the corporate authorities in each municipality have the following powers:

(1) To regulate and limit the height and bulk of buildings thereafter to be erected; (2) to establish, regulate and limit the building or set back lines on or along any street, traffic-way, drive or parkway; (3) to regulate and limit the intensity of the use of lot areas, and to regulate and determine the area of open spaces, within and surrounding such buildings; * * *."

In the exercise of the power granted by this section, the Council when restricting the ground coverage of lot areas and providing for the area of open spaces surrounding buildings, in order that its action be valid, had in mind the reasons for the grant of power such as providing for adequate light, pure air and safety from fire and other dangers.

The Superior merits of a lot located at the corner of two intersecting streets as against an inside lot with respect to light, free flow of pure air and safety from fire are obvious and it was this that prompted the Council to provide in section 15 of the Zoning Ordinance that a corner lot may have more area coverage than an inside lot.

The same situation holds true where a street intercepts the lake. Certainly, a corner of a street and the lake affords so much if not more opportunity for light, free flow of pure air and safety from fire as a corner lot at the intersection of two streets.

It is also significant that the Council, when defining a block, included among intersecting streets a waterway as a terminal point at either end of a block. We must, therefore, incline toward the opinion that when the Council defined a street as "a public way other than an alley," it had in mind also Lake Michigan.

It is, therefore, our opinion that the southeast 8,000 square feet of the premises on the north side of Rosemont Avenue at Lake Michigan, otherwise described as 950 Rosemont Avenue, constitutes a corner lot within the meaning of the Chicago Zoning Ordinance.

DRIVE-IN RESTAURANT PARKING LOT

(No. 11305—Chairman, Board of Appeals Zoning—M. J. N.—June 6, 1950.)

We reply to your letter of May 26, in which you advise that an application was filed to operate a parking lot at 6821-25 W. Irving Park Boulevard, in connection with a "Drive-In Restaurant." You further advise that the patrons of the restaurant are not served within the building, but while seated in their automobiles.

You inquire as to whether the parking space constitutes a use auxiliary to the conduct of a restaurant or a special use as a parking lot. You advise further that the district is zoned for business.

A restaurant is a permitted use in a business district. On September 27, 1946 this office, in an opinion, held that when the City Council adopted an ordinance granting a variation for a bowling alley it included authority to use the parking lot which, under the ordinance, is an essential part of a bowling alley. (Opinions of the Corporation Counsel, Volume 22, page 398.) In the present case the drive-in area, reserved for the

accommodation of the customers of the restaurant, is also an essential part of the restaurant business and auxiliary to the conduct of such business.

We are, therefore, of the opinion that the applicant has a legal right to use the vacant portion of the property described as 6821-25 W. Irving Park Boulevard for the parking of automobiles while the occupants thereof are being served as customers of the restaurant business conducted at said address and that the granting of the special use for this purpose is unnecessary.

ZONING CONDITIONED UPON VACATION OF STREETS

(No. 11349—City Council—M. J. N.—December 22, 1950.)

At the meeting of your Honorable Body held December 13, 1950 at the time of presentation of a proposed amendment in which certain streets and alleys in NYLIC Area of Redevelopment Project No. 1 are rezoned to become effective upon passage of ordinances vacating the respective streets and alleys lying within said area, a question arose as to the validity of zoning conditioned upon the vacation of streets and alleys. This matter was referred to the Corporation Counsel for his opinion.

The question undoubtedly arose because of the holdings in some cases that conditional vacation ordinances of streets and alleys are invalid where the condition is such that the ordinance may never take effect and is beyond the control of the City Council.

We are of the opinion that this law does not apply to the zoning amendment in question. The effect of the amendment of the zoning ordinance under discussion is that when the streets and alleys will be vacated, the area now devoted to those streets and alleys will be zoned in manner as therein provided. This is a situation which is not beyond control of the Council. The zoning of any area and amendment thereof is within the control of the City Council.

Section 3 of our zoning ordinance now precisely provides that if streets or alleys become vacated they shall take the zoning as is provided in that section, but the method therein provided is not deemed adequate in the present instance and for that reason the matter received the special treatment as indicated in the amendment.

We are of the opinion, therefore, that the action taken is a valid exercise of power by the City Council.

DIVIDING LOTS

(No. 11356—Commissioner of Buildings—A. F. G.—January 23, 1951.)

In your letter of November 3, 1950 you ask our interpretation of the following situation: The owner of a piece of land at the N. W. corner of Lunt avenue and Hamilton avenue approximately 60 feet wide by about 172 feet deep, being all of lot 20 and the east 9 feet 7¼ inches

of lot 19 in a platted subdivision, desires to resubdivide this property into two lots, each approximately 30 feet wide, and has filed with you a surveyor's plat showing the subdivision, but has not filed an order for approval of the proposed plat of resubdivision with the city council, as required by law.

Section 1-7 of the Revised Cities and Villages Act is as follows:

> "Maps—approved of). The corporate authorities have the power to provide by ordinance, that any map, plat or subdivision of any block, lot, sublot, or part thereof, or of any piece or parcel of land, shall be submitted to the corporate authorities, or to some officer to be designated by them, for their or his approval. In that case no such map, plat, or subdivision shall be entitled to record in the proper county, or have any validity until it has been so approved."

Section 194-A-14 of the Municipal Code of Chicago provides that no piece or parcel of land in a registered or recorded subdivision, shall be divided or apportioned or resubdivided into lots for building purposes, unless a plat of such piece or parcel of land has been filed with the superintendent of maps and approved by him when authorized by the city council in each case and registered or recorded as required by law in relation to plats. The only restriction in this section is that such subdivision shall not serve to reduce or to increase the building line setback in the block.

We have examined the plat submitted to you with the application for a building permit and are of the opinion the subdivision shown thereon does not violate any provision of the city ordinance.

The only error here was the failure of the owner to submit his plat for approval as provided by ordinance. If he corrects this error by submitting his plat for approval, we have no doubt the council will approve the same, and when recorded he may proceed with the erection of his buildings.

POULTRY STORES

(No. 11366—Commissioner of Buildings—L. L. K.—March 1, 1951.)

This will acknowledge receipt of your letter of February 21, 1951, in which you refer to the poultry ordinance passed December 1, 1950 (C. J. p. 7250) and point out that poultry killing is designated as a manufacturing district use under Section 194-A-12, while "food purveyor—class 2", which formerly included the sale and slaughter of live poultry, was a use permitted in a business district pursuant to Section 194-A-10. You ask our interpretation of the zoning provisions referred to.

Early in 1949 when the poultry ordinance was first under discussion, we suggested to the Committee that the zoning ordinance be amended when an ordinance was finally passed so that it would permit whatever the poultry ordinance permitted. Apparently this was overlooked at the time of the passage of the poultry ordinance. It is our opinion that the zoning ordinance should be amended in Section 194-A-10 (6) by deleting from the last sentence thereof the words "where meats are sold" so that the auxiliary uses permitted in a business district will include the following:

> "In a retail store, poultry and game-birds may be killed but not for sale elsewhere."

This will enable the continuance in business districts of the sale and slaughter of live poultry from the zoning standpoint subject, of course, to limitations contained in the poultry ordinance. It is our opinion that this question should be interpreted as permitting the issuance of licenses under the ordinance. However, in order to eliminate any doubt for the future, we are preparing an amendment and will seek to have it introduced at the earliest possible date.

LABORATORY IN COMMERCIAL DISTRICT

(No. 11432—Alderman, 40th Ward—M. J. N.—October 3, 1951.)

We reply to your communication of September 24, 1951, respecting the right to use property as indicated in your letter. We presume that you direct your inquiry as the same pertains to the Chicago Zoning Ordinance.

You describe a three-story brick building located on the north side of Grand Avenue between Michigan Avenue and N. St. Clair Street, constructed approximately 30 to 35 years ago for manufacturing and warehousing purposes. You ask if this building may be used as a laboratory for the purpose of testing equipment employed in extracting and separating ingredients from various chemicals. We assume that in addition to the testing, operations incidental to the adjustment of the equipment will also be performed.

Map No. 22 of the Chicago Zoning Ordinance indicates that the block mentioned is zoned Commercial. Section 11 of the text of the ordinance defines the uses permitted in a Commerical District and among them is a "laboratory". The following is also permitted:

> "Manufacturing, processing, compounding, packing or storing of cosmetics, drugs and perfumes."

Examination of the Sanborn Maps kept by the Zoning Board discloses that the only three-story brick building in the block described by you is located at No. 158 to No. 164 Grand Avenue. It was first used by J. Meltzer & Sons for a wagon works; later a woodworking and painting establishment occupied the building and on November 6, 1947 the Zoning Board granted a variation to permit a candy factory to occupy the building.

Section 20 of the Zoning Ordinance provides, among other things, that a building designed for a nonconforming use may continue to house such nonconforming use for its normal use life according to a schedule set up in said Section 20.

It is, therefore, our opinion that the use as described by you is a permitted use in the premises under the provisions of Section 11 of the Ordinance, if the intended use is that of a laboratory under accepted professional standards in the field of drugs and medicine.

SWITCH TRACK AS PERMITTED USE

(No. 11529—Alderman, 17th Ward—E. W. P.—April 30, 1952.)

We have your letter together with memorandum raising a question of the right to install a switch track which does not cross any public right-of-way, such as street or alley, but swings from a railroad right-

of-way lying within the right-of-way of Wentworth Avenue between 82nd and 83rd, southwesterly and westerly from the said right-of-way, and services some new plants on the north side of 83rd Street between Stewart and Wentworth Avenues. This track would swing thru 125 feet of commercial zoned property, into the aforementioned manufacturing zoned property.

The owners of the subject property applied to the Board of Appeals—zoning on May 7, 1951 for the approval of the said railroad switch track over their property, and in their description of the case stated as follows:

> "The above property was purchased by N. J. Wagner and Geo. C. Parker under Trust #6835 and is so held—American National Bank & Trust Co. of Chicago, Illinois dated August 30, 1946.
>
> Following the above, the South Park Commission elected to condemn the top half of the property—approximately 500,000 sq. ft. from Stewart to Wentworth—south from 82nd Street to within 333 feet of the North Line of 83rd Street. We elected not to contest the court action that would come up, but settled the case at the price the South Park elected to pay. In having a new survey made, the South Park Board allowed us to keep and own a triangle as shown on this print, so as to enable us to serve this property with private switch track.
>
> We wish to erect a switch track that will be used for the servicing of some of the manufacturing buildings that are now erected on the premises."

This application was withdrawn by the applicant on June 18, 1951, after it was indicated by the Zoning Board of Appeals that it would not have the power to grant the right to the switch track as a special use.

You request an opinion relative to the right to install this switch track lying entirely on private way between private properties, all of which property is owned or under the control of the installer and user of the track, and where the track leaves the railroad right-of-way and swings through property zoned as commercial, into property zoned as manufacturing.

Section 11 of the Chicago Zoning Ordinance, Chapter 194A of the Municipal Code of Chicago as amended, title Commercial Districts, Subsection 7 sets forth that a private way for access and ingress to, and eggress from premises used for manufacturing or industrial purposes is a permitted use in a commercial district.

Even where the switch tracks are laid in the streets with which to connect manufacturing plants located upon private property with the main track of a railroad company in said street, it has been consistently held that a municipality has authority to grant to private individuals the right to lay such said switch tracks. (*People* v. *Blocki* 203 Ill. 363-369.)

It is our opinion that where no street is involved, as in this case, and the track is entirely on private way, even though it swings over a commerical zoned property, under the Zoning Ordinance the installation of the switch track is a permitted use.

ADDITION TO BUILDING

(No. 11602—City Council—A. F. G.—October 24, 1952.)

With your letter of October 20, 1952, you attached a copy of the Truck Terminal Ordinance adopted June 14, 1950.

You request our interpretation of the authority of the building department to issue a permit to an applicant who desires to extend his present building by the addition of loading doors requiring new construction. You state further:

> "There has been considerable controversy on this matter and the Building Commissioner has attempted in every way to equitably solve the problem; however, it now becomes rather serious due to the fact that one particular company desires to double the size of its present building in a location that is not zoned for truck terminal districts."

Prior to the enactment of the aforesaid ordinance there was no definition in the zoning ordinance of the term "motor freight terminal". In the new ordinance that term is defined as "a building in which motor freight operators engaged in intrastate and interstate commerce assemble and sort freight".

Non-conforming use is defined in the zoning ordinance as, "A use which does not conform with the regulations applicable to the use district or the volume distance in which this use is made".

Section 19 of the Chicago Zoning Ordinance is in part as follows:

> "Non-conforming uses. Any lawful use of property on the effective date of this ordinance, which by virtue of its provisions is a non-conforming use, is permitted after this ordinance becomes effective, subject to the following limitations: * * *
>
> (c) A building designed or arranged for a non-conforming use or devoted to a non-conforming use on the effective date of this ordinance shall not be re-constructed, altered or enlarged unless it is designed, arranged and intended for a conforming use, excepting (1) when the building is devoted to an auxiliary use incidental and accessory to the lawful use of the lot * * *.

Under the definition, the *building* in which motor freight is assembled and sorted is the "motor freight terminal" and under section 19, quoted above, a motor freight terminal which is a non-conforming use, may not be enlarged. The paved area surrounding the terminal and any building accessory to the terminal such as an office or a building for the repair and servicing of trucks are auxiliary uses incidental to the lawful use of the lot and under the exception to this section may be enlarged.

In the preamble to the ordinance creating new use districts known as motor freight terminal districts the city council pointed out clearly the existing conditions inimical to the public health, safety, comfort, morals and public welfare, which motivated it in establishing districts for the operation of motor freight terminals.

Paragraph (4) of the third whereases of the preamble is as follows:

> "(4) Expansion of business has rendered many of the motor freight terminals located in all parts of the City inadequate to warehouse and sort freight as well as to garage, trucks, tractors and trailers. This has resulted in the street parking of such vehicles thus blocking streets and wrecking curbs and parkways. This expansion has caused carrier companies to acquire vacant lots in close proximity to

their terminals for parking purposes. Many such lots are in residential districts and the arrival and departure of large tractors and trailers, the starting of engines and the dust, noise and fumes created by the movement of such vehicles at all hours of the day and night have become public nuisances and dangerous to the surrounding neighborhoods;"

In the first case you refer to in your letter, "the addition of loading doors requiring new construction" the building commissioner advises us that this application contemplates the enlargement of the building, that being true we are of the opinion that no permit should be issued.

In the second case where the applicant desires to double the size of the present building, certainly no permit should be granted.

The granting of permits to enlarge non-conforming motor truck terminals is contrary to the provision of section 19 of the zoning ordinance and no such permits should be issued by the commissioner of buildings.

Every effort should be made by the responsible officials to enforce strict compliance with these salutory provisions of the zoning ordinance designed and intended to remedy the intolerable conditions growing out of the expansion of motor truck terminals which are so cogently referred to in the preamble to the ordinance.

OFF STREET PARKING REQUIREMENT

(No. 11672—City Council—L. L. K.—H. H. P.—March 25, 1953.)

On March 23, 1953, the Supreme Court affirmed the judgment of the Circuit Court of Cook County holding that paragraph 2 of section 8 of the Chicago Zoning Ordinance, effective December 3, 1942, (Section 194 A-8 (2), Municipal Code of Chicago) is void. Said section provides:

"194A-8. Apartment House districts. Permitted uses in apartment House districts are: (2) Apartment house, provided that where there are more than two apartments in the building a private garage or automobile compound for the storage of one passenger automobile of each 33 per cent of the number of apartments shall be erected or established and maintained on the lot used for the apartment house."

Said section only required apartment houses in apartment house districts to provide off-street parking facilities. Other uses in such districts were exempt from this requirement. In holding this requirement void, the court said:

"Statutory classifications can only be sustained where there are real differences between the classes, and where the selection of the particular class as distinguished from others, is reasonably related to the evils to be remedied by the statute or ordinance. Tested in the light of these established rules of law, we believe it is manifest that subparagraph (2) of section 8 creates an unlawful classification, both arbitrary and discriminatory in its nature. Of all the different types of structures upon which the section is made to operate, it is only apartment buildings that are required to furnish off-street parking facilities. The evils to be remedied on crowded city streets are well known, but we do not see that the singling out of apartment buildings from the other types of buildings embraced by the ordinance is reasonably related to the elimination of those evils. The street congestion problems created by boarding or rooming houses, hotels, and

the like, are not essentially different from those caused by apartment buildings. All are similarly situated in their relation to the problems of congestion that are caused by parking cars in the street, and all contribute proportionately to the evil sought to be remedied. Indeed, we think it is not unreasonable to say that the scope and nature of the congestion may be greater in the case of large rooming houses and hotels than in the case of apartment houses. It is our conclusion that the differences in kind between apartment buildings and numerous of the other structures upon which the section is made to operate are not such as to warrant the distinction made by subparagraph (2). Relieving congesion in the streets is no doubt a proper legislative purpose, but imposing the burden on one kind of property, while excepting other kinds not significantly different, is not a valid means for its accomplishment."

It is our opinion that an ordinance requiring off-street parking facilities for all structures similarly situated would be valid.

DAY NURSERY ZONING REQUIREMENTS

(No. 11724—President, Board of Health—M. I. W.—July 31, 1953.)

This letter is by way of supplementation of our opinion dated June 25, 1953, written in response to your inquiry of May 6, 1953, regarding the responsibility of the Board of Health in enforcement of zoning requirements for day nurseries.

We held that the primary responsibility for zoning enforcement lies with the Commissioner of Buildings and that the Board of Health discharges its responsibility when it notifies the Commissioner of Buildings and the City Collector that approval has not been given because of a zoning violation.

The purpose of suggesting notification of the City Collector was to enable him to proceed with his responsibility of enforcing the licensing requirement. Under the procedure of co-ordination established in a document entitled "Policies, Organization, and Procedures for Issuing Licenses for New Businesses" dated May 24, 1948, the City Collector prepares a complaint affidavit on the charge of operating without a license and requests the Commissioner of Buildings to prepare a complaint affidavit for violation of the zoning ordinance, both of which are transmitted to the Corporation Counsel for prosecution. This action by the City Collector is in his capacity as the licensing agency.

In our letter to you we were not aware that the case of day nurseries represents the sole exception to the general practice and it is the Board of Health that acts, not only as an inspection agency but as the licensing authority. In such a case the duties that are ordinarily carried out by the City Collector will fall on the Board of Health.

Thus where a day nursery operates without a license, it is the duty of the Board of Health to initiate prosecution for such violation. The Board of Health should secure a complaint affidavit from the Commissioner of Buildings for the zoning violation, who still remains the responsible officer for zoning enforcement.

The procedures set out in the document referred to above will be helpful in guiding your procedure, with the understanding that the duties performed by the City Collector will in this case fall upon the Board of Health.

OFF-STREET PARKING

(No. 11745—Alderman, 5th Ward—A. F. G.—September 22, 1953.)

You request in your letter of September 18, 1953 the effective date of the ordinance passed by the city council on August 18, 1953 (C. J., pp. 5430 to 5436). You state that the ordinance in question amends the Chicago Zoning Ordinance to require off-street parking facilities in certain cases. You then ask:

> "Are the provisions of Chapter 24, Article 10, paragraph 3, of the Illinois Revised Statutes applicable to the above ordinance? The off-street parking ordinance itself does not contain any penalty provisions, and raises the question whether it comes within the scope of the statute referred to."

The ordinance amends section 2 and adds two new sections to the Chicago Zoning Ordinance. This amendatory ordinance does not contain a penalty clause for the reason that the Chicago Zoning Ordinance provides a penalty in section 26 for violations of its provisions. Where an amendment is proposed to an existing ordinance which contains a penalty clause, it is not necessary to insert a penalty clause as the proposed amendment when adopted becomes part of the existing ordinance and is subject to the same penalties provided in the ordinance which it amends.

Because the off-street parking ordinance is a penal ordinance it is subject to the publication requirements of section 10-3 of the Revised Cities and Villages Act. The ordinance was passed August 18, 1953 and published in pamphlet form on August 24, 1953 (see city clerk's report as to publication of miscellaneous ordinances in pamphlet form, C. J., August 26, 1953, p. 5442). The ordinance having been published on August 24, 1953 it became effective 10 days thereafter, which would make the effective date of the ordinance September 3, 1953.

CHAPTER VIII — RELIEF AND WELFARE

CARE OF NON-RESIDENT PATIENTS

(No. 11131—Commissioner of Welfare—R. N.—March 11, 1949.)

You have asked for the opinion of the Law Department on two specific questions in connection with the handling of expenses of persons who require medical institutional care for tuberculosis but for whom there are not hospital facilities immediately available and who, therefore, must remain in the community pending admission:

1. Must the Department of Welfare provide care for such persons without billing the county?

2. Must the Department of Welfare bill the county for temporary support given such persons?

The administration of welfare in the city of Chicago is carried on under the provisions of chapter 21 of the Municipal Code of Chicago. Section 21-5 creates the office of commissioner of welfare. Section 21-6, which prescribes the functions of said commissioner, provides in part:

> "The commissioner shall have the care and oversight of such poor and indigent persons, as are not supported by their relatives or by the county, and shall see that they are suitably relieved, supported, * * * by distributing funds or supplies by any other means deemed desirable by the commissioner."

Statutory provisions which deal with responsibility of the county toward paupers and persons in need of medical care and unable to pay necessary expenses incidental to their illness are found in the Pauper Act (Ill. Rev. Stat., Ch. 107).

Section 14a of said Act provides, in part:

> "Cities * * * having a population of more than 500,000 inhabitants shall relieve and support all poor and indigent persons lawfully resident therein, except as herein otherwise provided."

The office of commissioner of welfare is created pursuant to section 17a of said Act, which provides, in part:

> "In cities * * * having a population of more than 500,000 inhabitants the city council * * * shall provide by ordinance for the appointment of an overseer of the poor or like officer * * * to properly relieve and support the poor and indigent persons lawfully resident therein. * * * Such officer shall also have the same powers and duties as other overseers of the poor under the provisions of * * * this Act." Section 25 of that Act provides, in part:

> "When any person not coming within the definition of a pauper shall fall sick or die not having money or property to pay his board, nursing and medical aid or burial expenses, the overseer or overseers of the poor of the governmental unit charged by this Act with the duty of providing poor relief to residents thereof in which such person may be, shall give, or cause to be given to him such assistance as they may deem necessary and proper * * *. The expenses so incurred shall be a charge * * * against the governmental unit in which he

resides and which is charged by this Act with the duty of providing poor relief to residents therein; *provided, that if such person falls sick or dies in any city, * * * of more than 500,000 inhabitants * * *, the expenses so incurred shall be a charge against the county* in which is situated such city, village or incorporated town of more than 500,000 inhabitants * * *; provided further, that such county may in the case of any such person being a resident of any governmental unit charged with the duty of providing poor relief to residents therein (*other than such cities * * * of more than 500,000 residents * * **) recover such expenses from such governmental unit." (Emphasis ours.)

You will note that the statute makes a distinction between:

a. paupers, who are required to be supported by the municipality in cities of over 500,000 inhabitants (section 14a and 17a above quoted); and

b. persons "not coming within the definition of a pauper" but who are ill and unable to pay necessary expenses incident to their illness, which expenses are made a charge against the county in which such cases (section 25 above quoted).

This brings us to a consideration as to what effect, if any, upon this obligation is created by the establishment by the city of the Municipal Tubeculosis Sanitarium. The Municipal Tubeculosis Sanitarium is established by virtue of Article 72 of the Cities and Villages Act. It is maintained by annual tax levy (Sec. 72-1). By section 72-7 thereof it is provided that every sanitarium established under the provisions of the statute "shall be free for the benefit of the inhabitants of the city * * * which established it, if they are afflicted with tuberculosis. They shall be entitled to occupancy, nursing, care, medicines and attendance * * *." Nowhere in the Act is there any provision for the relief of persons afflicted with tuberculosis other than the furnishing of hospitalization, nursing, care, medicines and attendance, and where necessary, the extension of said services into the homes of afflicted persons. Within these prescribed limitations the obligation of the county to care for persons afflicted with tuberculosis and unable to pay necessary expenses incidental to their illness, is shifted to the municipality in those cities in which a Municipal Tuberculosis Sanitarium is established. For such other and further relief as is required by such persons the county, remains primarily liable, and such expenses cannot be recovered by the county from cities of more than 500,000 inhabitants.

Our conclusions in answer to your questions are:

1. The responsibility of the county for the expenses of persons who require medical institutional care for tuberculosis but for whom there are not hospital facilities immediately available is in no way affected by the establishment of the Municipal Tuberculosis Sanitarium:

2. The Department of Welfare may furnish temporary support to such persons as are not supported by the county, under section 21-6 of the Code, and such expenses shall be a charge against the county under section 25 of the Pauper Act.

VETERANS IN C. H. A. PROJECT OUTSIDE CITY

(No. 11168—Commissioner of Welfare—F. P. K.—August 22, 1949.)

In your letter of August 12, 1949 requesting an opinion, you ask the following question:

"Can the City of Chicago Department of Welfare accept applications for general assistance from veterans who are residing at housing units (Thatcher housing project, Norwood Park, Illinois) under the control of the Chicago Housing Authority but which are located outside the city limits and can assistance already granted to Chicago resident veterans be continued after the veteran has moved to the aforesaid housing project and continued to reside there for more than six months?"

You refer to our Opinion of April 11, 1941.

The Chicago Housing Authority in its letter requesting that opinion stated in part:

"As you know, in carrying out the program of providing temporary housing for Chicago veterans in cooperation with the City, we are utilizing every available piece of vacant public land as sites for reasons of speed and economy. However, such available land is limited and it has been difficult to obtain enough sites to accommodate the number of temporary dwellings needed by the City. For this reason, we have found it necessary to lease from the Forest Preserve District of Cook County, two sites which lie outside the City limits but adjacent thereto—both sites lie in unincorporated territory within three miles of the City limits, but are within our area of operation—." The Opinion of April 11, 1946 stated in part as follows:

"Authority to furnish the services requested in your letter quoted above is found in the Housing Cooperation Law. Section 4 of that Act provides: 'For the purpose of aiding and cooperating in the planning, undertaking, construction, reconstruction, improvement, alteration, repair or operation of housing projects located in whole or in part within the area in which it is authorized to act, any State Public Body may upon such terms, with or without consideration, as it may determine . . .

(j) Cause services of the character which such State Public Body is otherwise empowered to furnish to be furnished to a housing authority . . .'

The sites selected while outside the corporate limits of Chicago are within the 'area of operation' of the Chicago Housing Authority and are part of a single project known as the Veterans' Temporary Project, the major part of which is located within the city limits. The housing authority has undertaken this project at the request of the City which by ordinance has authorized a loan of one million dollars to the Authority to carry on the project. Coun. J. January 9, 1946, p. 4711). The City has agreed to furnish services of the type requested in the foregoing letter to the Veterans' temporary project."

The ordinance set up in the preceding paragraph stated that the funds would be used by the Chicago Housing Authority to provide emergency housing accommodations for veterans of the recent World War who before their induction into the Armed Forces were residents of the City of Chicago.

In the case of *The People* v. *Lyons*, 374 Illinois Supreme p. 557 (1940), the Court because of certain factors contained in the case, did not consider any of the facts in the case, but based its decision purely on a proposition of law, namely, the contstitutionality of the residence section of the Pauper Act. The Court held that an amendment passed by the legislature in 1939, requiring three years residence in a particular governmental unit, immediately preceding an application for relief, is not invalid.

In the same opinion the Court offered the following comments:

"P. 566—To construe the statute so as to preclude a temporary departure from the particular governmental unit by persons who have long resided there would impute a harsh and unconscionable intent to the legislature. Residence for a period of three years immediately preceding an application for relief and support does not mean, and

the law does not so ordain, that the applicant actually reside each day during the prescribed period in a governmental unit in order to be eligible for relief. The question of residence, this Court has many times announced, is largely a matter of intention. Determination of whether a particular applicant for relief meets the residence qualifications of the Pauper Act necessarily requires an inquiry into the facts and circumstances, including the applicant's own expressed intent, pertinent to the fact of actual residence."

"P. 567—The wisdom of the requirement, obviously, rests with the General Assembly, and, if persons deeming themselves aggrieved by this (residence) section, feel a shorter period is desirable resort must be had to the Legislature and not to the Courts."

After the decision in *The People* v. *Lyons* case *supra*, the Legislature of the State of Illinois saw fit in 1945 to amend the Residence Section of the Pauper Act, reducing the residence requirements of three years to one year.

It also amended the law as follows:

"A residence acquired under any of the provisions of this section for relief purposes shall continue until such person has acquired a new residence hereunder, a new residence outside the State or has remained outside the State for a continuous period of twelve (12) months, but such absence from the State for said period without intention on the part of such person to change his residence, shall not constitute a loss of residence hereunder."

The veteran returning home to Chicago, intending to find living quarters and finding none available, sets his family up in a place provided by the Chicago Housing Authority, in a project just outside the City. The living quarters he had expected to find within the City were, in many instances, occupied by non-veterans who migrated here during the war. It is not reasonable to assume that the veteran thereby loses his residence through no act of his own. The known fact that the structures were of temporary construction, designed to meet a serious situation for a very limited time only, would raise the presumption that there was no intention to establish residence outside of the City.

If the veteran does not lose his residence in Chicago, then Article 4, Sec. 4-6 of the new Public Assistance Laws does not apply to him.

For the reasons set up herein, we are of the opinion that veterans, residents of Chicago, returning from active service in the Armed Forces, who, because of the grave housing shortage, were unable to secure shelter for themselves and families, and for reasons of health and safety, moved to these veterans' temporary housing facilities, provided by the Chicago Housing Authority just outside the City limits, did not lose their Chicago residence for relief purposes and the City of Chicago Department of Welfare may accept applications for general assistance from these veterans who are residing at the said housing projects and it may continue assistance already granted to these Chicago veterans after the veterans have moved to the aforementioned projects and continued to reside there for more than six months.

DUTY OF SUPPORT BY WIFE

(No. 11291—Commissioner of Welfare—J. L. S.—April 18, 1950.)

We acknowledge receipt of your letter of March 21, 1950 in which you state that you could find no definite provision in the Illinois Statutes

for the responsibility of a wife to support a husband who is in need and you request our opinion on the following points:

1. Is a wife legally responsible for the support of her destitute husband?

2. If there is such legal responsibility upon the wife for the support of her husband, under what circumstances will this responsibility hold?

3. Where a couple live apart, may the Chicago Welfare Department deny assistance to the man whose wife has separate resources to support him?

In answer to your first question, Section 12 of "An Act to revise the law in relation to husband wife" (Ill. Rev. Stats. 1949, Chap. 68, Par. 15) provides as follows:

> "The expenses of the family and education of the children shall be chargeable upon the property of both husband wife, or either of them, in favor of creditors therefor and in relation thereto they may be sued jointly or separately."

In *Laughlin* v. *Dalton* (1916), 200 Ill. App. 342, the court said in discussing this statute, p. 346:

> "This statute makes the expense of the family chargeable upon the property of both husband and wife and provides that they may be sued therefor, jointly or separately."

In *Hughes* v. *Clark*, (1902), 109 Ill. App. 107. the court held that goods used by the family for their ordinary supplies are expenses of the family and the wife may be held responsible for such purchases by her husband. In *Hudson* v. *King Brothers*, (1888), 23 Ill. App. 118, p. 122, the court was more specific on this point:

> "* * * The construction as placed on this section of the statute by the authorities, *supra*, does not limit the liability of the property of the wife to expenditures for *necessary* family expenses; it applies to the expenses of the family without limitation or qualification as to kind or amount, and does not depend upon the wealth, habits or social position of the party. The husband is the head of the family. He determines primarily what is needed for it. He may buy, furnish, contract debts, all in his own name, for the support and welfare of the family. His wife's name need not be known, and his acts and agreements are alike obligatory upon both. The consent and action of both is not required, that goods purchased for any individual member of a family, and used by him exclusively, shall constitute a family expense within the meaning of this section. This construction of this section effectually disposes of the following points made by the counsel for appellant: 1st, that the goods purchased were not properly family expenses because the articles purchased were for the personal use of the husband; 2d, that the appellant is not liable unless the articles purchased were actual necessities, and purchased for the family with her consent."

Therefore, in view of Section 12 of an Act to revise the law in relation to husband and wife, it is our opinion that a wife is legally responsible for the support of her destitute husband and is responsible to creditors for such expenses as the husband has incurred within the meaning of "family expenses."

In regard to your second question—If there is such legal responsibility upon the wife for the support of her husband, under what circumstances will this responsibility hold,—it is our opinion that this responsibility is placed upon the wife for family expenses as set out in our discussion of your first question, and creditors of the husband may hold the wife's prop-

erty subject to payment for these claims. (*Hughes* v. *Clark,* 109 Ill. App. 107, and *Hudson* v. *King Brothers,* 23 Ill. App. 118.)

The court has determined in *Hughes* v. *Clark* that goods used by the family in their ordinary supplies are expenses within the meaning of family expenses. In *Smith* v. *Rubin,* 239 Ill. App. 191, the court has added as a family expense, a place to live, therefore the court has applied the wife's responsibility for her husband's expenses to such goods or articles as a family would normally use or consume in its usual manner of living.

In regard to the third question—Where a couple live apart, may the Chicago Welfare Department deny assistance to the man whose wife has separate resources to support him,—Section 1 of "An Act in relation to married men and women," Ill. Rev. Stats. 1949, Chap. 68, par 22, imposes equal liability upon a married woman for the support and maintenance of her husband when they live apart as that responsibility imposed upon a married man for his wife. This section provides as follows:

> "22. Support and maintenance.) § 1. Married men or women, who without their fault, now live or hereafter may live separate and apart from their wives or husbands, may have their remedy in equity, in their own names, respectively, against their said wives or husbands in the Circuit Court of the county where the wife or husband resides, for a reasonable support and maintenance while they so live or have so lived separate and apart; and in determining the amount to be allowed, the court shall have reference to the condition in life of the parties at the place of residence of the wife or husband, and the circumstances of the respective cases; and the court at any time after service of summons and proper notice to the wife or the husband may make such allowance of temporary alimony, attorney's fees and suit money as may appear just and equitable as in cases of divorce, and the court may refer the cause to a Master in Chancery or Special Commissioner to take and report the evidence with or without his conclusions as to the facts and the law as the court may direct. The court may, in its discretion, reserve the question of the allowance of attorney's fees and suit money until the final hearing of the case, and may then make such order with reference thereto as may seem just and equitable, regardless of the disposition of the case.
>
> The provisions of 'An Act concerning the interest of the State in the domestic relations of the people, and to provide for the establishment of agencies and instrumentalities to aid the courts in the protection of that interest in actions for divorce, separate maintenance an annulment of marriage, and to make appropriations therefor,' enacted by the 66th General Assembly shall, in all judicial circuits in which Divorce Divisions have been created pursuant to said Act, apply to and govern all proceedings under this Act; and said Act of the 66th General Assembly, and all amendments and modifications thereof, are hereby incorporated into and expressly made a part of this Act by reference. As amended by act approved July 29, 1949. L. 1949, B. B. No. 309, effective Dec. 1, 1949."

Therefore, the Chicago Welfare Department may impose the obligation upon the destitute husband to seek maintenance from his wife and so deny him support pending the outcome of such action.

APPROVAL OF SALARIES BY PUBLIC AID COMMISSION

(No. 11357—Commissioner of Welfare—F. P. K.—January 23, 1951.)

We have your letter of May 22, 1950 and note that the Illinois Public Aid Commission are making a study to ascertain the relationship between

positions in the City of Chicago Department of Welfare, the Public Assistance Division of Cook County Department of Welfare and other related positions.

We note that you have assisted the Commission in their study with considerable prepared information on all of your job classifications and have provided them with job specifications and duties and now have received a request to furnish the following:

"(a) Participation in the study by our Personnel Division Director.

"(b) An opportunity to discuss with our Supervisory staff the organization of their units and the specific duties assigned to certain jobs within them.

"(c) An opportunity to discuss individual assignments with incumbents where necessary.

"(d) Preparation of job descriptions by the incumbents if this appears necessary."

You refer to Chapter 23, Section 439-7 and Section 439-30, Public Assistance Code of Illinois, 1949, and to the Corporation Counsel Opinion No. 10845 dated March 23, 1945 and ask the following questions:

"We would like to know how far the jurisdiction of the Commission extends over this Agency concerning staff standards, personnel practices, job descriptions and organization of agency units. * * *

"We would appreciate it if you will render an opinion whether this section of the Code in any way limits the autonomy of the City of Chicago Department of Welfare and generally how far this agency must go in following the requests and demands of the Commission in the matters discussed above."

You get your authority as Commissioner of the City of Chicago Department of Welfare from Chapter 23, Section 439-7 Public Assistance Code, Illinois Revised Statutes 1949:

"In cities, villages and incorporated towns having a population of more than 500,000 inhabitants the City Council or Board of Trustees, as the case may be, shall provide by ordinance for the appointment of a Supervisor of General Assistance or like officer and for such other employees and assistants as may be necessary properly to relieve and support the needy persons lawfully resident therein. The compensation of such Supervisor or other office shall be fixed by the City Council or Board of Trustees, and the compensation of such other employees shall be fixed by such supervisor or officer subject to the approval of such City Council or Board of Trustees."

The Municipal Code of Chicago provides for your appointment as Commissioner and your powers and duties in that office:

Chapter 21-5: "There is hereby created the office of commissioner of welfare. He shall be appointed by the mayor by and with the advice and consent of the city council."

Chapter 25-4: "The head of a department * * * shall have the power to appoint and remove all subordinates * * * according to law."

Chapter 25-5: "The salaries * * * shall be determined and fixed by the city council in the annual appropriation ordinance."

Chapter 25-14: "Each * * * officer * * * shall execute a bond * * * commissioner of welfare $100,000.00 * * *."

Chapter 25-27: "The head of each department * * * of the city government shall prescribe such rules and regulations for the governance of his department * * * employees shall be subject to such rules and regulations so prescribed * * *."

In the Corporation Counsel Opinion of November 25, 1940, it was provided among other things as follows:

"The Chicago Relief Administration is a term commonly used to designate the activity of a department of city government directed by the Commissioner of Relief and subject to the control of the City Council. Any declaration of policy affecting the employment and compensation of the assistants and subordinates of the Commissioner of Relief must be made by the City Council subject to laws governing all city employees and the appropriation of public funds for payment of their salaries."

In 1944, in the case of *People* v. *Geary*, 323 Ill. App. 33, it was provided among other things:

"Employees and assistants of the Commissioner of Welfare of Chicago are employees of a department of the City and should be classified under civil service."

On May 23, 1945, a Corporation Counsel Opinion was rendered which provided:

"The Cities Civil Service Act makes no provision for the fixing of salaries by the Civil Service Commission for the Chicago Welfare Administration. The Commissioner can continue to fix the salaries of the Welfare Administration in accordance with Chapter 107, Section 17-A Illinois Revised Statutes 1943."

On July 26, 1945, a Corporation Counsel Opinion was rendered which provided:

"The employees of the Chicago Welfare Administration are employees of a 'Welfare Department' as mentioned in Senate Bill No. 197 passed and signed by the Governor and amending Section 11 of the Civil Service Act exempting from Civil Service employees of any Welfare Department."

From all of the foregoing, it is our opinion that you are the head of a department of the City government; that your compensation is fixed by the City Council; that you give a bond for the faithful performance of your duty; that you have the power of appointment and removal of all employees according to law; that you have the right to fix the compensation rates of your employees subject to the approval of the City Council; that you have the right to prescribe rules and regulations for the governing of your department and can subject your employees to such rules and regulations; that any declaration of policy affecting the employment of your assistants must be made by the City Council subject to laws governing City employees.

Your department having assisted the Illinois Public Aid Commission with considerable prepared information on all of your job classifications and having cooperated in providing job classifications and duties, has participated in the study as far as is feasible. There is a presumption in the law that a City employee must devote his entire time to the City during its regular business and working hours.

The Legislature in enacting Section 439-7 of the new Public Assistance Code, 1949 (quoted above) merely restated, with slight language improvements, the specific provision which was contained in Section 17-a of the former Pauper Act, 1947, whereby a method was provided for the fixing of the compensation for the Chicago Commissioner and his assistants subject to the approval of the City Council.

Section 438-30 of the Public Assistance Code of 1949 continues Section 2.7 of the former Relief of Needy Persons Act which provided that administration costs for General Assistance, exclusive of any compensation paid to the Supervisor of General Assistance from funds other than the general assistance funds, shall not exceed amounts which had been submitted to and approved by the Commission. This applies only to units receiving state or Federal funds for such purpose and added thereto is the following:

> "The compensation rates of all employees or other persons paid from General Assistance funds shall be subject to review and approval of the Commission."

This added provision is a general one which gives the Illinois Public Aid Commission the right to review and approve rates paid to employees in *all subdivisions throughout the state.* It is to be noted that the Legislature, when it added the General Provision to Section 439-30 did not attempt to change or amend Section 439-7 as it referred to Chicago. It must necessarily follow that it had in mind the difference between the problems of Chicago and the remainder of the state, as is pointed out in, *People* v. *Geary*, 323 Ill. App. 32 (1944) the Court on page 38 stated:

> "Neither can we give weight to respondents claim that the Chicago Commissioner of Relief is coordinate with the agencies established for towns and precincts. The latter agencies are created for governmental divisions of little population as compared with Chicago, and their problems and needs are dissimilar to those of a Commissioner of Relief in a metropolitan area. The difference between the problems of Chicago and Cook County and the remainder of the State has long been recognized by the Legislature and the courts and is evidenced by the number of statutes made applicable only to Chicago and Cook County by limiting them to cities or counties having a population in excess of 500,000."

A general provision included in the law under such circumstances will not take preference over the specific provision. Where two statutes successively enacted, with relation to the same subject, are seemingly repugnant, it is the duty of the Court to construe them, if possible, that the subsequent act will not repeal the antecedent one by implication, and, if two constructions are possible, that one will be adopted which operates to support rather than to repeal the earlier act by implication.

It is, therefore, our opinion that the specific provision contained in Section 439-7, wherein the compensation of the Commissioner *shall* be fixed by the City Council and that the compensation rates of his employees and assistants *shall* be fixed by the Commissioner subject to the approval of the City Council shall prevail and that insofar as Chicago is concerned, that the Illinois Public Aid Commission would review and then be obliged to approve the salaries and wages fixed in the Annual Appropriation Ordinance submitted by you for approval and passage by the City Council.

CREDIT FOR PRIOR COUNTY SERVICE

(No. 11444—Commissioner of Welfare—A. F. G.—November 15, 1951.)

We have your letter of November 1, 1951, in which you referred to the order passed by the City Council of the City of Chicago at the meeting of September 20, 1951, and recorded in the Journal of Council Proceedings on page 835 for that date, which reads as follows:

"ORDERED, That the order passed by the City Council of the City of Chicago on December 13, 1950 (Council Journal, pages 7271 and 7272) relating to vacations and sick leave authorized for City employees during the year 1951 be amended as follows:

'Adding the following paragraph after the words "and be it further" in line 44 of the righthand column of page 7271:

'ORDERED, All employees of the City of Chicago who have rendered service to the County of Cook, the Chicago Park District or the Sanitary District of Chicago shall have the right to have the period of such service credited and counted for the purpose of computing the number of years of service as employees of the City; and be it further.' "

Your letter states that the City of Chicago Department of Welfare has some employees who served with its predecessor agencies when those agencies dispensed relief in Chicago and elsewhere in the County of Cook between February 6, 1932 and July 1, 1936. You asked the question if such present Chicago Department of Welfare employees who were formally connected with the Cook County relief program are eligible to additional vacation allowances before December 31, 1951.

In February, 1932, the Illinois Emergency Commission was created by the legislature to provide relief to residents of Illinois. The life of the commission was limited to March 1, 1933, but was extended to June 30, 1936 and beyond. From February 6, 1932 to December 7, 1933, the relief program in Cook County was under the direction and administration of the Cook County Bureau of Public Welfare. From December 8, 1933 to June 30, 1936, the relief program in Cook County was under the direction and administration of the Cook County Relief Administration. From February 6, 1932 until June 30, 1936, funds for relief and administration of relief including salaries came from Federal and State funds and were allocated to Cook County.

In 1935, the Attorney General of the State of Illinois rendered an opinion that Cook County relief employees should be classified under State Civil Service.

Prior to July 1, 1936, the Cook County Bureau of Public Welfare was the agency through which the State administered relief within Chicago and Cook County. Since July 1, 1936, relief of residents of Chicago has been administered by the Chicago Relief Administration (now the Chicago Department of Welfare) under the direction of the Commissioner of relief.

Therefore, we are of the opinion that persons employed by Cook County during the period from February 6, 1932 until June 30, 1936 in the administration and dispensing of relief, who are now employees of the City of Chicago Department of Welfare should be eligible to additional vacation allowances before December 31, 1951, in accordance with the ordinance passed December 20, 1951, and referred to above.

ACCEPTANCE OF DONATION

(No. 11513—Commissioner of Welfare—A. F. G.—April 4, 1952.)

Your letter of March 21, 1952 is as follows:

"I have been approached by a civic minded citizen who is interested in making a gift to the City of Chicago Department of Welfare. To my knowledge, the purpose of the donor in making this grant is

completely charitable and altruistic; he has no business transactions with this Department and does not expect any financial gain as a result of this gift.

I would appreciate it if you will inform me whether there is anything in the State or local law which would prohibit the Department of Welfare from accepting this offer of either real estate, cash or other personal property without reservation or with certain well defined restrictions."

We do not believe the Department of Welfare of the City of Chicago, being a mere department of the city government, has power or authority to accept gifts or donations of money or property to be held in trust for public purposes within the range of its functions. However, we do not believe this inhibition would apply to the municipality itself or the corporate authorities of the city. The care and relief of poor and indigent persons is a corporate purpose of the city. The corporate authorities of the city may accept and hold in trust any gift or donation granted to aid the City in the duty of relieving poor and indigent persons.

The law is well settled that a municipal corporation may become the trustee of a charitable trust, created to aid some municipal or public purpose, charitable in its nature, concerning which there is an obligation resting upon the community to support. When the trust is accepted, the local corporation assumes the same burdens and is subject to the same regulations that appertain to other trustees of such trusts. The duty to administer the donation or charitable fund agreeably to the expressed wish of the donor or testator will be enforced in equity. (McQuillan, Municipal Corporations, Section 1128.)

The citizen who has offered the gift should formally in writing tender his gift to the city council requesting the City to accept the same, as trustee, for the purpose or purposes intended, which should be fully set out in the tender. If the offer is approved, the city council should enact an ordinance accepting the trust and setting out the manner of administering the trust, agreeable to the expressed desire of the donor.

CHAPTER IX — PUBLIC WAYS

A. DEDICATION AND VACATION

ALTERING BOULEVARD STATUS

(No. 11243—Chicago Plan Commission—J. F. G.—January 30, 1950.)

Reference is made to your letter of January 5, 1950 stating that the redevelopment of the South Central area of the city may necessitate vacation or change in character of existing thoroughfares, including "redesigning South Park Way between 22nd and 35th streets," altering it in this reach from its present boulevard status to a thoroughfare accommodating commercial vehicles and Chicago Transit Authority trolley buses as well as private passenger vehicles. Our advice is requested as to "the legal implications involved where the character of South Park Way to be changed as above outlined."

It is assumed that some work of reconstruction of South Park Way will become necessary for the uses intended or at least it will be necessary to erect trolley poles, wires and other electrical equipment to accommodate Chicago Transit Authority trolley buses. However, without disturbing the present design of South Park Way or erecting equipment for transmission of electricity along the boulevard, exclusive control of park boulevards and driveways is lodged in the Chicago Park District.

In *The People* v. *Chicago Motor Bus Co.* (1920) 295 Ill. 486 our Supreme Court held that the Lincoln Park Commissioners had " 'full and exclusive power' to direct, lay out and regulate said park and to pass ordinances for its regulation and government, and, except a police force, to possess and exercise all the power and authority conferred by law on the council of said city 'in respect to public squares and places in said city,' and to vacate or lay out streets and alleys in said park." A number of authorities were cited by the court, including *South Park Comrs.* v. *Chicago City Railway Co.*, 286 Ill. 504, and said "These decisions recognize the powers of the park commissioners with reference to the use and regulation of streets and boulevards under their control except as to street intersections, and that such powers are not concurrent with the powers of the city."

Chicago Park District succeeded to all the rights and powers of the Lincoln Park Commissioners and the South Park Commissioners, *Kocsis* v. *Chicago Park Dist.* 362 Ill. 24. There can be no question that the corporate authorities of the City of Chicago have no independent power to construct, alter or improve South Park Way or to control traffic on that boulevard.

The only limitation upon the power of the Chicago Park District affecting its control of the use of its boulevards and driveways is that it cannot exclude travel and traffic unless it is objectionable, which means that private passenger vehicles may not be excluded; and by act approved July 24, 1945 Chicago Transit Authority, without permission of the park district, is permitted to operate any standard type motor buses in the parks and upon the boulevards and driveways under the jurisdiction of the park district, but the park district may require the Authority to pay fair and

reasonable compensation for damage to or deterioration of the park district's pavements and other property due to such operations. This does not permit the Authority to operate trolley buses on the park district boulevards without the consent of Chicago Park District. The park district may also, by ordinance, grant the Chicago Transit Authority the right to operate any transportation facilities on South Park Way without compensation. Such ordinance would be subject to acceptance by the Authority. (Ill. Rev. Stat. 1949, Chapt. 105, Vol. 2, p. 376, par. 333.7).

We are of the opinion that the corporate authorities of the City of Chicago can accomplish the redevelopment plan described in your communication of January 5, 1950 only with the consent of Chicago Park District and Chicago Transit Authority.

COMMON LAW PLAT

(No. 11542—Commissioner of Buildings—J. DeM.—May 21, 1952.)

Your letter of April 30, 1952 requests our opinion as to the status of the streets and alleys in the area which lies east of the east line of Chippewa or Lakeside Avenue and south of the south line of 116th Street and which is legally described as follows:

> That part of the South half of the North West fractional quarter of Section 24, Township 37 North, Range 14, East of the Third Principal Meridian.

This land lies on the east side of Lake Calumet and west of Torrence Avenue.

According to a notation on the ante fire records of the Chicago Title and Trust Company there was filed in the Recorder's Office of Cook County on October 13, 1869 in Book of Maps 169 at page 174, a plat of subdivision entitled Allen's subdivision of the South Half North West Fractional Quarter of Section 24-37-14. The original record of this plat was destroyed in the fire of 1871 and neither the Recorder's Office nor the Chicago Title and Trust Company have a copy of this subdivision. However, a purported copy of said plat appears on page 1 of the Index Map to Volume 4 of the Atlas of the Village of Hyde Park, Cook County, Illinois, dated 1878, a copy of which map is to be found in the Map Department of the City of Chicago.

An examination of the purported copies of said Allen's subdivision fails to disclose that the plat conforms with the requirements of the Statutes of Illinois then in force and applicable thereto (Rev. Stats. Ill., 1858, Part 2, Cities and Towns, Div. (3), Sections 17 to 27). It appears from looking at the plat that it fails to comply with the statute:

(a) In that it does not bear the acknowledgement of the said Allen.

(b) That it was not certified by the surveyor, if any, who may have prepared the same, nor by the County Commissioners.

(c) That the said plat was not made by the surveyor of the then Cook County of Illinois, nor by the county surveyor of an adjacent county, nor was said plat ever certified by the county surveyor of said Cook County, nor was said certificate ever recorded in the Recorder's Office of the said Cook County.

(d) It further appears that Allen or the then County Commissioners of the said Cook County did not place at the time of the alleged surveying and laying out of said plat or plant or fix at a corner of the public ground,

if any, or at the corner of a public lot, or at the corner of one of the alleged private lots a good and sufficient stone or any stone of such size and dimension and in such manner as the surveyor may have directed for a corner from which to make future surveys, nor is the point or points where the same, if any, may have been designated on said plat, making it impossible for a surveyor to locate the various alleged streets and alleys in said plat.

We are therefore of the opinion that Allen's subdivision would fail to meet the requirements of a statutory plat and at most said plat constituted in law what is called and known commonly as a common law plat.

An examination of the area involved shows that it is swamp land covered with water, that in many spots would reach a depth of two or three feet. No streets were ever laid out within the area, no city sewers, no water or public untilities are any where within the area. The property has been fenced in and held adversely to all claimants since 1891.

A common law dedication of streets and alleys requires acceptance by the public before actually becoming streets and alleys. Since there is no evidence of acceptance by any municipal body of the streets and alleys within Allen's subdivision, it is our opinion that it would be hard for the City to exert any title or rights in the purported streets and alleys. We are therefore of the opinion that said permit for dumping can be issued covering the land described herein without taking into consideration supposed streets or alleys.

This opinion excepts 116th Street and Chippewa or Lakeside Avenue, as we are of the opinion that the City has some rights in both of these streets due to long and continued user.

Attention is called to Sections 99-36 and 99-36.1 of the Municipal Code of Chicago with regard to the dumping of refuse. The latter section provides that no permit shall issue without a certification by the Commissioner of Buildings that Section 99-36 has been complied with. This section provides that after an application for a permit has been filed with the wr tten consent of the owner of the property that the Commissioner of Buildings shall give notice in writing to the alderman of the ward in which said dumping is to be done. It is further provided that such application shall then be held in abeyance for ten days if no regular meeting of the City Council intervenes, or until the day following the next regular meeting of the City Council, if one is held within ten days of the time of making such application.

If the City Council fails to take action then the Commissioner of Buildings may issue the permit, if in his opinion the dumping privileges so requested will not constitute a nuisance and the applicant execute a bond w th good and sufficient security in the amount of $1,000.00, that the applicant will comply with the regulations of this code and the rules and regulations of the Commissioner of Buildings, pertaining to the dumping of the above-mentioned substances.

EASEMENT IN LIEU OF DEDICATION

(No. 11631—Committee on Local Industries—J. E. C.—December 22, 1952.)

With your letter of November 7, 1952 you submitted a proposed ordinance and an easement for the opening of N. Leoti Avenue, between N. Mendota Avenue and the first northeasterly and southwesterly public alley southeasterly thereof. You state the question was raised at the meeting

of the Committee of Local Industries, Streets and Alleys as to why the street should be provided for by easement rather than by dedication and you ask our opinion on this matter.

As to the query raised at the meeting, "why the street should be provided for by easement rather than dedication", we presume that the grantors desire to retain title to the land so that in the event the City vacates the street there will be no question as to the ownership of the land.

The easement permits the City to use the land for street purposes, which includes any and all uses the City may propose provided it is not inconsistent with the public's use of the streets. In the case of *Sears* v. *City of Chicago*, 247 Ill. 204, the court said, "Whatever title the city has in its streets and other public grounds is held in trust for the public, and this is true whether it owns the fee or only an easement."

It is our opinion that there is no objection to the acceptance of this easement, and therefore we are returning herewith the Council Order and easement, approved as to form.

ACCEPTANCE BY CITY

(No. 11630—City Council—J. D. M.—December 22, 1952.)

Your letter of December 19, 1952, requests our opinion as to the form and legality of a proposed ordinance which accepts a dedicated alley opening on Lake Street between Clark and Dearborn Streets, which dedication was included in an ordinance for the vacation of part of W. Couch Pl. opening on Clark St. between Randolph and Lake Streets.

The vacation of W. Couch Pl. was provided for in an ordinance passed May 29, 1941 (C. J. May 29, 1941, p. 4947-4948). The ordinance was passed provided for the dedication and opening of an eighteen foot alley with access into Lake Street. It also provided that the beneficiary pay to the City of Chicago the sum of $20,000.00 for benefits accruing to the beneficiary by the vacation of part of W. Couch Place. It was further provided that the beneficiary deposit with the City Treasurer sufficient moneys to pay for the costs of curbing and new sidewalks on W. Couch Pl. and for new sidewalks and curbing at the entrance to the new alley on Lake Street. All of these conditions, including the recording of the ordinance were to be accomplished within 120 days from May 29, 1941.

Within the allotted 120 days, on September 3, 1941, the beneficiary recorded in the Office of the Recorder of Deeds, as Document No. 12749898, a plat of dedication of an 18 foot alley and a copy of the said vacation as Document No. 12749899. On the same day there was paid by the beneficiary to the City of Chicago the sum of $20,000.00 for benefits accruing to it as a result of the vacation of W. Couch Pl. and a further sum of $900.00 which was ascertained to be the costs of the necessary curbing and paving was deposited with the City. The requirement that the alley was to be opened for public use was not complied with within the time allotted. The new alley opening into Lake Street was not opened for public use until sometime in 1952.

When the beneficiary paved the alley it was found that construction of a retaining wall was necessary to protect the public, which left 17 feet available for traffic. The paved 17 foot strip has been opened for public use as an alley.

We are of the opinion that it is within the prerogative of the City Council of the City of Chicago to waive, if it so desires, the requirement for the opening for public use of the dedicated alley within the prescribed time and it is also within the prerogative of the Council to accept a dedicated 18 foot alley with a 17 foot pavement.

We return herewith the original and the duplicate of the ordinance with our approval as to form and legality indicated thereon.

REPEAL OF VACATION ORDINANCE

(No. 11637—City Council—J. C. M.—January 20, 1953.)

In your letter of December 5, 1952 you request an opinion as to whether the City Council has the power to repeal by ordinance a prior ordinance passed on October 8, 1952 (C. J. pp. 3269-3270) providing for the vacation of portions of W. Armitage, N. Natchez, N. Nagle and N. Mulligan Avenues, together with adjacent alleys.

We have checked the records of the Recorder of Cook County and find that a certified copy of the ordinance of October 8, 1952 was recorded on November 12, 1952 as Document No. 15483506. The City Comptroller advises us that the consideration set forth in said ordinance, i. e., $20,000.00, was paid to the City on November 12, 1952.

Under the statute entitled "Vacation of streets, alleys and highways" (Chap. 24, Sec. 69-11) it is provided that streets, alleys and highways may be vacated by an affirmative vote of at least three-fourths of the aldermen of the City Council. The ordinance in question was passed by the requisite number of votes, (C. J. p. 3269). The ordinance subsequently became effective.

When a vacation ordinance goes into effect, the City Council loses jurisdiction to legally repeal the same. (See Opinion No. 9347, dated November 27, 1936, Vol. 19 Opinions of Corporation Counsel, p. 226). In that opinion we held that when a street was vacated title vested in abutting property owners in accordance with Chap. 24, Sec. 69-12, (*Counselman* v. *Wisconsin Lime and Cement Company*, 299 Ill. 84), and that a public street could not be restored by repealing the ordinance after it once becomes effective in law. (See *McQuillan on Municipal Corporations* (2nd ed.), Section 1538, and *A. T. & S. F. R. Co.* v. *Shaunee*, 183 Fed. 85).

Our Supreme Court in *People ex rel Alexander* v. *Mt. Vernon* (1949), 404 Ill. 58, held that where a public easement in a street is terminated by vacation, title to the land on which the street is located, with all incidents of ownership, becomes absolute in the adjacent lot owners and a repealing ordinance is void.

The vacation ordinance having been recorded and the consideration set forth in the ordinance having been paid to and accepted by the City, the conditions set forth in the ordinance are fulfilled.

STREET DEDICATION

(No. 11656—Commissioner of Public Works—J. D. M.—March 5, 1953.)

Your letter of February 24, 1953, requests our opinion as to whether or not the purported streets lying between W. Balmoral, W. Berwyn, N. Lincoln and N. Western Avenues are public streets.

We have considered this question only as to the rights of the City of Chicago in the purported streets. If the City, as trustees for the public, has no right, interest or claim to the streets in question, it is of no concern of the City as to who has title or in how many claimants the title vests.

Inspection of the property involved herein reveals that this is one large piece of land of approximately six (6) acres without any evidence whatsoever as to the location of any of the purported streets.

Examination of the records of the Recorder's Office was of no value as the office has no ante-fire records covering this property.

The records of the Chicago Title and Trust Company, which comprise the only ante-fire records concerning this property, discloses that originally the property involved herein was subdivided and platted by the Assessor's Office for tax purposes as follows:

> Assessor's Division of the S. E. ¼ of the N. E. ¼ N. E. ¼ and the N. E. ¼ of the S. E. ¼ N. E. Sec. 12-40-13

This plat which was recorded September 21, 1869 was not a subdivision of property made by an owner.

The Supreme Court has repeatedly held in speaking of a subdivision made by the Assessor's Office that the assessor does not have the authority to subdivide lands. As said by our Supreme Court in the case of *City of Chicago* v. *Borden* 190 Ill. 430 at page 446:

> "One of the circumstances referred to is the making in 1863 of the assessor's plat or subdivision, and marking what is called an alley thereon, as indicated in the statement preceding this opinion. A strip of ground ten feet in width is marked upon the map of this assessor's subdivision, open at the south end and closed at the north end, but there is nothing upon the face of the plat, which indicates that this strip was regarded as a public alley, or as an alley of any kind. But, however this may be, the assessor, in making the plat, did not represent the city of Chicago or the public, and could not, by any act of his, create a highway. No such authority was conferred upon him."

The records of the Water, Sewer and Street Departments show that there are no public utilities or paved streets in the purported streets within the subdivision.

The City can only acquire title by four methods: condemnation, statutory dedication, common law dedication or grant. Our conclusion is that the streets in question were originally created and laid out by the Assessor of Cook County. There is nothing in the record to indicate that the owners of the abutting property ever subdivided the land or dedicated any street within this purported subdivision.

The common law dedication is based upon the theory of an actual donation by the owners and an acceptance thereof by the municipality. The donation and the acceptance must be as real as in the case of a formal dedication spread of record, the difference in legal effect between the two is merely one of proof. In the case of a common law dedication, there can be no acceptance by the City without an offer first being made by the owners, *City of Chicago* v. *Borden*, 190 Ill. 430, at page 442:

> "In order to constitute a dedication at common law, it is essential (1) that an intention on the part of the proprietor of the land to donate the same to the publice use, and (2) an acceptance thereof by the public, be established by the evidence; and (3) that the proof as to these facts must be clear, satisfactory and unequivocal. (*City of Chicago* v. *Chicago Rock Island & Pacific Railway Co.*, 152 Ill. 561). * * *"

It is our opinion there is nothing in this case to indicate that the owners of the adjoining lots, to which is appurtenant the use of these streets for their own purpose, did any act or pursue any course of conduct that could be construed as a donation of the streets for public use.

There being nothing to indicate a common law dedication, the only remaining question to be considered is whether the strip was subsequently converted into a public street by prescription.

This method of creating a way for public travel is closely allied to a common law dedication and has some elements in common with it. As said by our Supreme Court in *City of Chicago* v. *Borden* (*supra*) at page 444:

> "In order to establish a way by prescription, the use and enjoyment of what is claimed must have been adverse, under a claim of right, exclusive, continuous, uninterrupted, and with the knowledge and acquiescence of the owner of the land, in or over which the easement is claimed. (*City of Chicago* v. *Chicago, Rock Island & Pacific Railway Co., supra;* Washburn on Easements, 131; *Toof* v. *City of Decatur*, 19 Ill. App. 204; *Daniels* v. *People*, 21 Ill. 439)"

While the use of a way for the purpose of public travel must, in addition to other requirements, necessarily be open and notorious in order to permit any claim to a prescriptive right by the public, investigation fails to reveal any evidence that this land was used as a public thoroughfare; nor has the City, during the many years this strip has been laid out, undertaken to exercise any power of control or dominion over it. However, the mere use for the purpose of public travel thereon would not be sufficient to change the character of this strip from a private to a public street.

It is, therefore, our opinion after a careful examination of the question submitted to us that the streets in question are not public streets and that the City of Chicago has no right, title or interest in and to the same.

STREET DEDICATION

(No. 11665—Commissioner of Public Works—J. D. M.—March 19, 1953.)

Your letter of January 26, 1953, requests our opinion as to whether or not S. Maryland Avenue is a public highway between 103rd Street and 104th Street and also whether or not the alleys which lie between S. Corliss Avenue and the purported S. Maryland Avenue and 103rd and 104th Streets are public alleys.

We have considered this question only as the rights of the City of Chicago in the purported streets. If the City, as trustee for the public, has no right, interest or claim to the streets in question, it is of no concern of the City as to who has title or in how many claimants the title vests.

Inspection of the property involved herein reveals that this is one large piece of land lying between 103rd and 104th Streets and east from S. Corliss Avenue for a distance of about 800 feet. It is directly across the street from the Electromotive Plant which covers the same approximate area north of 103rd Street and which has buildings built over S. Maryland Avenue, if S. Maryland Avenue was extended north of 103rd Street. There is revealed no semblance of either streets or alleys within the property involved. No pavements for either alleys or streets have ever been built on this property. The only physical evidence of any City domination over this property are curb returns for S. Maryland Avenue on 103rd Street and for the alley on S. Corliss Avenue.

Checking with the City Water and Sewer Departments show no water pipes within the area but extending north from 104th Street for about 125 feet on S. Maryland Avenue is a sewer which turns to the west and ends in the purported alley at approximately the same distance north of 104th Street. It is probable that this sewer was used for the building which at one time stood on the property.

The property herein is part of the land originally acquired by the Pullman Palace Car Company before 1900 when the company was erecting its model town for the housing of its employees. The Supreme Court in the case of the *People* v. *Pullman Palace Car Company*, 175 Ill. at page 125 held that the actions of the Pullman Company were *ultra vires* in that the charter of the company gave them no rights to own stores, schools, churches and property as contemplated by the company in the building of this model town. The court ordered the Pullman Company to cease and desist from these *ultra vires* acts and to dispose of the real estate.

Within ten years thereafter, the Pullman Company placed of record in the Recorder's Office two plats of subdivision covering part of the property which it had originally acquired for its model town. One of the subdivisions is now known as the Original Town of Pullman and the other as the First Addition to Pullman. The property herein involved does not fall within either of the two subdivisions, although the First Addition to Pullman lies directly south of the property herein involved in which S. Maryland Avenue is a dedicated public street between 104th and 106th Streets.

A check of the records of the Recorder's Office reveals that this property has never been subdivided. There is nothing to indicate that the owners ever subdivided the land or dedicated any street or alley within the tract herein involved.

The City can only acquire title by four methods: condemnation, statutory dedication, common law dedication or grant. Since the records reveal no plat of subdivision had ever been filed, the question of whether this was a statutory or common law dedication does not have to be given any consideration for the basis of either a statutory or common law dedication is the presumption that some sort of plat was originally placed of record.

There has never been a condemnation suit filed covering this property or does the record disclose that a grant was ever made to the City of Chicago covering the purported streets and alleys within the property.

There being nothing to indicate a common law dedication, the only remaining question to be considered is whether the strip was subsequently converted into a public street by prescription.

This method of creating a way for public travel is closely allied to a common law dedication and has some elements in common with it. As said by our Supreme Court in *City of Chicago* v. *Borden*, 190 Ill. at page 444:

> "In order to establish a way by prescription, the use and enjoyment of what is claimed must have been adverse, under a claim of right, exclusive, continuous, uninterrupted, and with the knowledge and acquiescence of the owner of the land, in or over which the easement is claimed. (*City of Chicago* v. *Chicago, Rock Island & Pacific Railway Co., supra;* Washburn on Easements, 131; *Toof* v. *City of Decatur*, 19 Ill. App. 204; *Daniels* v. *People*, 21 Ill. 439.)"

While the use of a way for the purpose of public travel must, in addition to other requirements, necessarily be open and notorious in order to permit any claim to a prescriptive right by the public, investigation fails to reveal any evidence that this land was used as a public thoroughfare; nor has the City, during the many years this strip has been laid out, undertaken to exercise any power of control or dominion over it. However, the more use for the purpose of public travel thereon would not be sufficient to change the character of this strip from a private to a public street.

It is, therefore, our opinion after a careful examination of the question submitted to us that the streets in question are not public streets and that the City of Chicago has no right, title or interest in and to the same.

B. USE OF STREETS, ALLEYS AND SIDEWALKS

SOUND TRUCKS

(No. 11215—Commissioner of Police—L. L. K.—December 1, 1949.)

This will acknowledge receipt of your letter of November 16, 1949, wherein you request an opinion concerning the action to be taken in the enforcement of the Municipal Code relative to sound trucks and you refer specifically to the complaint of William H. Miller, State Director of the Progressive Party.

In an opinion which we rendered to you on October 26, 1948, we referred to the decision of the United States Supreme Court in *Samuel Saia* v. *People of the State of New York*, 92 L. Ed. 1087, filed June 7, 1948, in which the court had criticized an ordinance of the City of Lockport, New York, which required a permit from the Chief of Police for the use of a loud speaker on a public way, and we stated that under the *Saia* opinion Section 99-56 of our Code might very well be held by that court to be violative of the right of free speech.

The opinion which you referred to *Kovacs* v. *Cooper*, 336 U. S. 77, was decided January 31, 1949. That case involved an ordinance of Trenton, New Jersey, which provided as follows:

> "4. That it shall be unlawful for any person, firm or corporation, either as principal, agent or employee, to play, use or operate for advertising purposes, or for any other purpose whatsoever, on or upon the public streets, alleys or thoroughfares in the City of Trenton, any device known as a sound truck, loud speaker or sound amplifier, or radio or phonograph with a loud speaker or sound amplifier, or any other instrument known as a calliope or any instrument of any kind or character which emits therefrom loud and raucuous noises and is attached to and upon any vehicle operated or standing upon said streets or public places aforementioned."

Kovacs was found guilty of violating the ordinance. The conviction was upheld by the New Jersey Supreme Court (135 N. J. L. 64, 50 A. 2nd 451) and was affirmed without opinion by the New Jersey Court of Errors and Appeals (135 N. J. L. 584, 52 A. 2nd 806).

The court held that the terms "loud and raucous" were sufficient to comply with the requirements of definiteness and clarity. The court accepted the New Jersey courts' conclusion that the ordinance applies only to vehicles with sound amplifiers emitting loud and raucous noises. It refers to the *Saia* case as recognizing that even the fundamental rights of the Bill of Rights are not absolute in that they there held that the hours and place of public discussion can be controlled and points out that the right of free speech does not extend so far as to justify invading the privacy of the individual by loud speakers which he is practically helpless to escape. The court said (336 U. S. 77):

"City streets are recognized as a normal place for the exchange of ideas by speech or paper. But this does not mean the freedom is beyond all control. We think it is a permissable exercise of legislative discretion to bar sound trucks with broadcasts of public interest, amplified to a loud and raucous volume, from the public ways of municipalities. On the business streets of cities like Trenton, with its more than 125,000 people, such distractions would be dangerous to traffic at all hours useful for the dissemination of information, and in the residential thoroughfares the quiet and tranquility so desirable for city dwellers would likewise be at the mercy of advocates of particular religious, social or political persuasions. We cannot believe that rights of free speech compel a municipality to allow such mechanical voice amplification on any of its streets.

The right of free speech is guaranteed every citizen that he may reach the minds of willing listeners and to do so there must be opportunity to win their attention. This is the phase of freedom of speech that is involved here. We do not think the Trenton ordinance abridges that freedom. It is an extravagant extension of due process to say that because of it a city cannot forbid talking on the streets through a loud speaker in a loud and raucous tone. Surely such an ordinance does not violate our people's 'concept of ordered liberty' so as to require federal intervention to protect a citizen from the action of his own local government. *Cf. Palko* v. *Connecticut*, 302 U. S. 319, 325. Opportunity to gain the public's ears by objectionably amplified sound on the streets is no more assured by the right of free speech than is the unlimited opportunity to address gatherings on the streets. The preferred position of freedom of speech in a society that cherishes liberty for all does not require legislators to be insensible to claims by citizens to comfort and convenience. To enforce freedom of speech in disregard of the rights of others would be harsh and arbitrary in itself. That more people may be more easily and cheaply reached by sound trucks, perhaps borrowed without cost from some zealous supporter, is not enough to call forth constitutional protection for what those charged with public welfare reasonably think is a nuisance when easy means of publicity are open. Section 4 of the ordinance bars sound trucks from broadcasting in a loud and raucous manner on the streets. There is no restriction upon the communication of ideas or discussion of issues by the human voice, by newspapers, by pamphlets, by dodgers. We think that the need for reasonable protection in the homes or business houses from the distracting noises of vehicles equipped with such sound amplifying devices justifies the ordinance."

In the concurring opinion of Mr. Justice Jackson, he points out that he agrees with Mr. Justice Black that this decision is a repudiation of the *Saia* opinion.

Our ordinance provides as follows:

"99-56. No person shall make, or cause, permit or allow to be made, upon a public way, or in such close proximity to a public way as to be distinctly and loudly audible upon such public way, any noise of any kind by crying, calling or shouting or by means of any whistle, rattle, bell, gong, clapper, hammer, drum, horn, hand organ, mechanically operated piano, other musical instrument, wind instrument, sound amplifier, or similar mechanical device; provided, that the said restrictions shall not apply to any licensed peddler crying or calling for the purpose of advertising goods, wares or merchandise when lawfully using any public alley in the city between the hours of 11 A. M. and 6 P. M.

[Amend. Coun. J. 12-21-39, p. 1396".]

Our ordinance, it will be noted, does not contain the words "loud and raucous" as did the ordinance in the *Kovacs* case. Our ordinance prohib-

its the making of "any noise of any kind." Whether this language by itself would be sustained by the United States Supreme Court, we are unable to say, but the prohibition of a sound amplifier might very well be sustained under this decision. In order to bring our ordinance squarely within the *Kovacs* opinion, on February 18, 1949, we submitted to the City Council a draft of a proposed amendment to Section 99-56. This amendment was, on March 16, 1949, (p. 3862, J. of Coun. P.) referred to the Committee on Health, where it is presently pending.

In the meantime, it is our opinion that this ordinance is valid and that the operation of sound amplifiers on public ways is properly prohibited.

SNOW REMOVAL—PRIVATE PROPERTY

(No. 11223—Commissioner of Streets & Electricity—C. N.—December 15, 1949.)

We have your memorandum of December 8, 1949 in which you state that you have received a request from Mr. John Sestak, Safety Director of the Post Office Department, Old Post Office Building, Chicago, for information concerning the removal of snow and ice from the steps and porches of residential property throughout the city. This request is prompted by the fact that mailmen are subjected to hazards, because of the presence of snow and ice, that results in a considerable loss in man hours.

Reference is made to our various opinions previously rendered for your department, dating back to our opinion No. 8954 of December 18, 1934, compiled by the undersigned, (a digest of which can be found at page 655, Volume XVIII Opinions of the Corporation Counsel and Assistants), in which we stated that the city cannot enforce ordinances requiring property owners to keep sidewalks clear of snow and ice. This, is enunciated in the case of *Gridley* v. *City of Bloomington*, 88 Ill. 557 (1878) is because the streets and sidewalks are one, part of the public way, and the duty to clear the walks of snow and ice is no more that of an adjacent property owner than of all the members of the community for whose use the public ways are intended. In more recent opinions we expressed the belief that ordinances calling upon licensees to keep adjacent walks clear of such obstructions were enforcible because of the relationship between the city and the recipient of a license or permit.

The city has no immediate jurisdiction over the steps and porches of privately owned premises, other than for measures relating directly to public health and safety. Negligence of the owner, resulting in injuries to others, would be subject to the general laws governing such instances, but it would be difficult to conceive of holding a property owner liable for temporary obstructions due entirely to weather conditions.

TRUCK OVERLOADING

(No. 11244—Commissioner of Police—A. F. G.—January 30, 1950.)

We acknowledge receipt of your letter of January 24, 1950 to which was attached a copy of a letter from Kirkland, Fleming, Green, Martin and Ellis, Attorneys, relative to a summons issued by your officers for alleged overloading of coal trucks.

The attorneys' letter states that a traffic violation ticket has been issued to one of the members of the Chicago Coal Merchants Association which their firm represents. The charge in this case, which is returnable February 6, is operating a truck on the city streets with a gross weight in execess of 32,000 but less than 36,00 pounds.

The attorneys have heretofore advised the Association that the gross weight of 4-wheel trucks may run up to 36,000 pounds provided the weight on any axle does not exceed 24,000 pounds. We think this advice is correct, and in conformity with section 27-76 of the Municipal Code of Chicago and section 131 of the "Uniform Act Regulating Traffic on Highways" (Ill. Rev. Stats., Chap. 95½, section 228).

The ordinance provides that the weight of any axle shall not exceed 24,000 pounds, provided that the gross weight of the vehicle and the maximum load of any self propelled four wheel vehicle shall not exceed 36,000 pounds.

Section 131 of the statute provides in paragraph (a) that upon any street in any city, village or incorporated town the gross weight on the road surface through any axle may exceed 16,000 pounds but shall not exceed 18,000 pounds per axle. In paragraph (b) of the same section it is provided that the gross weight of two axle motor vehicles shall not exceed 36,000 pounds.

Paragraph (c) authorizes cities of more than 50,000 population to permit by ordinance axle loads on two-axle motor vehicles 33⅓ per cent above those provided in this section, but the gross weight is not to exceed 40,000 pounds.

We suggest that you advise enforcement officers of these weight limitations and that a non-suit be taken in the pending case.

ABANDONED AUTOMOBILES

(No. 11267—City Council—A. F. G.—March 15, 1950.)

In your letter of March 9, 1950, you state your sub-committee has under consideration the matter of the removal, storage, etc., of abandoned automobiles. That at a recent meeting it was called to your attention that there are many cars parked on the streets of Chicago which are so-called derelicts as distinguished from abandoned automobiles. You request our opinion as to whether or not the Police Department can declare as a derelict a motor vehicle, identification of the ownership of which is rather impossible because of age and other contributing factors, and can legally remove same to the House of Correction or elsewhere for dismantling and eventually sell by the City Purchasing Agent as salvage.

On October 5, 1949, we answered a letter from the Commissioner of Police to which was attached a copy of a report from the Commanding Officer of the Stolen Auto Section of his department, which report discussed the difficulty of disposing of abandoned vehicles, etc.

The report stated that many of the wrecks abandoned on the public ways are without wheels, engines or identifying numbers and suggested therein that when junk of this type is found on city streets that all possible attempts be made to locate and notify the owners, to notify the Stolen Auto Section Officers, and to transfer the handling of such junk to the street department for disposal as other junk is disposed of, rather than handling these articles as motor vehicles. In reply to this letter we said:

"The provisions of both the state law and the city ordinance referred to above apply only to motor vehicles. The term 'motor vehicle' is defined in the State act to include 'automobiles, locomobiles, motor bicycles, tractors, traction engines, and all other vehicles propelled otherwise than by muscular power and including also vehicles or trailers or semi-trailers pulled or towed by a motor vehicle' * * *

"An automobile body standing alone, a chassis and radiator without wheels, or other separated parts of an automobile do not constitute 'motor vehicles' within the meaning of the statute or ordinance concerning abandoned vehicles, and in our opinion such junk may be handled as suggested in the report by the proper street official and need not be disposed of as provided by the statute or ordinance re abandoned vehicles."

However, where an automobile, reasonably intact, and reasonably capable of use as a vehicle is found abandoned on the streets and only the identifying numbers have been removed, such a vehicle should not be treated as junk, but should be disposed of as provided by statute and ordinance for the disposition of abandoned motor vehicles.

PARKING LOT DRIVEWAY PERMITS

(No. 11307—Department of Streets and Electricity—H. H. P.—June 13, 1950.)

We have your letter of June 7, 1950, in which you state that Park Lot Inc., operators of a parking lot at the northwest corner of Lake and Dearborn Streets, in maintaining driveways and using a public alley for ingress and egress to its premises without having secured a council order, maintenance permit, or posted a bond for said use. You desire to know if the "Parking Lot License" of Park Lot Inc., can be revoked and if your department can barricade the drieways because of the stated violations.

There is no license called "Parking Lot License," and Park Lot Inc. is operating under a public garage license, class 2 (Municipal Code of Chicago, section 156-17). Section 156-24 provides in part as follows:

"No person shall use any alley as a driveway for ingress and egress to any public garage without first obtaining a permit therefore * * *

Section 156-27 provides as follows:

"The mayor shall have the right to revoke the license of any such public garage for the violation of any of the previsions of this chapter, and may withhold the issuance of any new license on account of any conviction thereunder."

The public garage license ordinance was held valid in *City of Chicago* v. *Ben Alpert, Inc.*, 383 Ill. 282 (1938). If Park Lot Inc. has not obtained a permit to use the alley for ingress and egress to its premises in conformity with section 156-24, it has violated a provision of the ordinance and under section 156-27 the mayor can revoke its public garage license.

Sections 33-14 to 33-22 of the Municipal Code of Chicago govern driveways. Section 33-15 provides that driveways of the type being maintained by Park Lot Inc. cannot be so used "without first obtaining an order so to do from the city council and a permit so to do as hereinafter provided." Other sections provide for submission of plans to the commissioner of streets and electricty, posting of a bond, etc.

In *Wilmot* v. *City of Chicago*, 328 Ill. 552 (1928), the City's driveway ordinance was held valid. The court said that the maintenance of a driveway without first having complied with the terms of the ordinance is an illegal and unauthorized act that may be prevented by the City.

In v. 13, Opinions of the Corporation Counsel, p. 607, it is held that a driveway may be closed when the bond required by the ordinance is permitted to lapse. This is analogous to no bond.

We cannot find anything in the driveway ordinance conferring upon your department authority to erect barricades. In the *Wilmot* case, above, the police prevented Wilmot from building a driveway without first obtaining a council order and permit, and it was to restrain the City and its officials from interfering with the construction of the driveway that he brought his suit. The court upheld the City's interference. We are of the opinion that the police department can erect barricades and that the City under section 33-21 "may proceed to remove same (the driveway)."

Under section 33-22, Park Lot Inc. may be prosecuted for maintaining a driveway without a permit.

BRIDGE CLOSINGS

(No. 11312—Commissioner of Public Works—A. F. G.—June 21, 1950.)

This will acknowledge receipt of your letters of May 31, 1950 and June 7, 1950 both having reference to requests for the closing of Michigan Avenue Bridge on certain days and at certain hours for the purpose of parades. To your letter of May 31, you attach a copy of a letter from J. P. Campbell, Lt. Col., Corps of Engineers, District Engineer, re closing of said bridge from 1:30 P. M. to 4:30 P. M. for the annual Memorial Day Parade, the second paragraph of which is as follows:

> "The Department of the Army will interpose no objection to the closure of the Michigan Avenue Bridge across the Chicago River, Mile 0.87, to navigation from 1:30 P. M. to 4:30 P. M. on Tuesday, May 30, 1950, on the understanding that the City shall have notified navigation interests by an advertisement in the press, and that this waiver does not effect the liability of the City for any damages that may arise by reason of the closure."

You state that you have requests to close the bridge for parade purposes as follows:

June 15 6:30 P.M. to 10:00 P.M. Chicago Junior Association of Commerce and Industry.

June 24 10:00 A.M. to 12:00 A.M. The Chicago Fair of 1950.

July 27 10:00 A.M. to 2:00 P.M. Lions International.

You call attention to the bridge closed hours over the main branch of the Chicago River which are from 7:30 A. M. to 10:00 A. M. and from 4:00 to 6:30 in the evening.

You state that your department believes that these delays are excessive and will impose an undue hardship on the navigation interests and will undoubtedly result in loss of revenue, in which case the statement of U. S. District Engineer to the effect "that this waiver does not effect the liability of the city for any damages that may arise by reason of the closure" becomes especially significant. You ask our advice in the matter.

An ordinance of the City of Chicago designating periods of the day when the bridges over the Chicago River should be closed, and providing that at certain other periods should not be left open for a longer time than ten minutes in order to permit the passage of a vessel, was sustained by the United States Supreme Court in *Escanaba Company* v. *Chicago* 107 U. S. 678 (1882). In that case the court pointed out that the power of regulating local traffic by means of the construction and regulation of bridges, being local in its nature, could not be held paramount to the power of Congress to prescribe suitable and proper regulations for vessel traffic on navigable waters; that this latter was necessarily a matter of more than local concern and must be held to be paramount. The city, by virtue of power delegated by the State to regulate roads, bridges, highways etc., may make such regulation as it sees fit and as in the circumstance may seem reasonable and necessary concerning the opening and closing of bridges, but this power is apt to be superseded at any time by Federal enactment or by order or regulation of the War Department. The Federal power lies dormant until exercised and until its exercise the local authorities may establish such regulations as may be required. A municipal ordinance designating periods of the day when the bridges shall remain closed is properly authorized if not in conflict with Federal regulations, but such an ordinance is always subject to the test of reasonableness the same as any other general police ordinance.

The closing of bridges for an unreasonable period of time, which may cause damage to navigation interests might make the city liable for such damages. However, we are unable to find any case in which the city has had to respond in damages under such circumstances.

We think it might be well to require any organization requesting the closing of a bridge for an extended period of time for the purpose of conducting a parade to furnish a bond indemnifying the city against any loss or damage resulting from such closing order.

TRANSPORTATION OF FLAMMABLE LIQUIDS

(No. 11320—City Council—W. H. S.—July 25, 1950.)

We have the letter of Mr. William Harrah, Committee Secretary, transmitting a copy of an ordinance introduced in the city council by Alderman Hoellen and referred to the committee on traffic and public safety which amends certain sections of chapter 129 of the Municipal Code of Chicago regulating the transportation of flammable liquids over city streets.

The letter states that the subcommittee referred the draft of the proposed ordinance to the acting corporation counsel for a report as to its form and as to its validity if passed.

We have examined the form of the proposed amendatory ordinance and transmit herewith a substitute draft which follows the sequence of the code numbering of the sections to be amended.

Please note that our redraft does not include the proposed amendment of section 129-72 for the reason that the power of the city council to fix the fine is limited to $200.00 for one offense. (Ill. Rev. Statutes, 1949—page 508, (section 23-106).)

We also call your attention to section 129-1, which reads as follows:

"129-1. Nothing contained in this chapter shall be construed as applying to the transportation of any article or thing shipped in conformity with regulations prescribed by the interstate commerce commission, nor as applying to the military or naval forces of the United States."

In this connection we refer to the decision of the Supreme Court of the United States, in *Hendrick* v. *Maryland*, 235 U. S. 610 (1915). The plaintiff in error alleged the invalidity of the Motor Vehicle Law of the state of Maryland relating, among other things, to speed, rules of the road, accidents, signals, penalties and fines, etc. and sought to reverse a fine which had been entered against him for a violation of that law.

The court said (at page 622):

"In the absence of national legislation covering the subject a State may rightfully prescribe uniform regulations necessary for public safety and order in respect to the operation upon its highways of all motor vehicles—those moving in interstate commerce as well as others. * * * This is but an exercise of the police power uniformly recognized as belonging to the States and essential to the preservation of the health, safety and comfort of their citizens; and it does not constitute a direct and material burden on interstate commerce. The reasonableness of the State's action is always subject to inquiry in so far as it affects interstate commerce, and in that regard it is likewise subordinate to the will of Congress. (Citing cases.)

"In *Smith* v. *Alabama, supra,* (124 U. S. 465), consideration was given to the validity of an Alabama statute forbidding any engineer to operate a railroad train without first undergoing an examination touching his fitness and obtaining a license for which a fee was charged. The language of the court, * * *, in reply to the suggestion that the statute unduly burdened interstate commerce and was therefore void, aptly declares the doctrine which is applicable here. He said (p. 480):

'But the provisions on the subject contained in the statute of Alabama under consideration are not regulations of interstate commerce. It is a misnomer to call them such. Consider in themselves, they are parts of that body of the local law which, as we have already seen, properly governs the relation between carriers of passengers and merchandise and the public who employ them, which are not displaced until they come in conflict with express enactments of Congress in the exercise of its power over commerce, and which, until so displaced, according to the evident intention of Congress, remain as the law governing carriers in the discharge of their obligations, whether engaged in the purely internal commerce of the State or in commerce among the States.' "

See also *City of Chicago* v. *Waters*, 363 Ill. 125, 134.

The letter requests our opinion as to the validity of the amendatory ordinance if passed by the city council.

In our opinion the general assembly by the Revised Cities and Villages Act, chapter 24, Illinois Revised Statutes has granted to cities broad express powers to regulate the use of streets (section 23-10), to regulate traffic upon the streets (section 23-17), to regulate all vehicles conveying loads within their corporate limits (section 23-53), to regulate and prevent the storage of combustibles (section 23-75), and to pass and enforce all necessary police ordinances (section 23-105).

In the case of *Spiegler* v. *City of Chicago*, 216 Ill. 114 (1905) the Supreme Court sustained the validity of an ordinance of the City of Chicago regulating the licensing the business of oil peddlers.

Section 2 of the state act regulating the storage, transportation, sale and use of gasoline and volatible oils (paragraph 352, chapter 38, Illinois Revised Statutes, 1949) exempts cities having regulatory ordinances upon the subject from the regulations adopted by the state department of public safey pursuant to said act. The city of Chicago is such a city. (See *Fligelman* v. *City of Chicago*, 348 Ill. 294 (1932).)

Section 127 of the Motor Vehicle Law (Illinois Revised Statutes, 1949, chapter 95½, page 246) authorizes the use of semi-trailers and permits a truck tractor semi-trailer to draw one trailer, provided the prescribed over-all dimension of the combination of vehicles is not exceeded. It should be noted that this act as implied by its title is one regulating traffic, whereas chapter 129 of the Municipal Code of Chicago is designed to minimize the hazards of explosion and fire met with in the transportation over the streets and public places of flammable liquids, which hazards are materially increased when such vehicles are operated in combination. As a measure calculated to cope with such hazards within a metropolitan city, our opinion is that the validity of your draft of amendatory ordinance if passed by the city council would be upheld by the courts, notwithstanding the fact that the Motor Vehicle Law regulating traffic generally permits a truck tractor semitrailer to draw one trailer.

JAGGED FENDERS

(No. 11330—Alderman, 5th Ward—A. F. G.—August 15, 1950.)

In your letter of August 11, 1950 you inquire if an ordinance prohibiting the operation of a motor vehicle with jagged fenders on the public ways would be legal.

To your letter you attached a copy of a letter from the corporation counsel of the District of Columbia, which contained a section of an ordinance of the District which is as follows:

> "No motor vehicle shall be operated with fenders, running boards, or bumper bars or brackets showing sharp or ragged edges or a condition that might snag or cause to be snagged any person or object, cloth or clothes, while being operated on the streets and highways. No motor vehicle shall be operated on the streets and highways if fenders, running boards, bumper bars or any body part shall extend beyond the original margin or width of the fender lines."

The City's power or regulation over motor vehicles is not unlimited. In 1935 the State legislature enacted "An Act in relation to the regulation of traffic. "the short title of which is the "Uniform Act Regulating Traffic on Highways." The Act is comprehensive in its scope and the evident intent of the legislature was to withdraw from municipalities all authority theretofore exercised, except the powers specifically designated in the Act, relative to traffic regulation and to substitute for all local laws a uniform State code upon the subject.

Section 25 of the Act provides:

> "The provisions of this Act shall be applicable and uniform throughout this State and in all political subdivisions and municipalities therein, and no local authority shall enact or enforce any rule or regulation in conflict with the provisions of this Act unless expressly authorized herein. Local authorities may, however, adopt additional traffic regulations which are not in conflict with the provisions of this Act."

The Uniform Act has no requirement concerning fenders and an ordinance of the city similar to the District ordinance quoted above would not be inconsistent or in conflict with the Uniform Act, and in our opinion would be a valid enactment.

If you desire a draft of a proposed ordinance along the lines of the District ordinance we shall be pleased to prepare such a draft. As you know the council committee on Traffic and Public Safety has before it a comprehensive revision of the traffic regulations, and we suggest that any amendment to the traffic regulations should be made to the new ordinance rather than to Chapter 27 as it now appears in the code.

SOUND AMPLIFIERS

(No. 11363—Commissioner of Police—J. B. P.—February 9, 1951.)

We have your letter of January 19, 1951 transmitting the communication of Frank J. Heimoski, Commanding Officer of the Industrial Detail. Mr. Heimoski suggested that the Corporation Counsel's office clarify the matter of the effect of the recent decision of the Supreme Court of the United States in the *Kuns* case upon the ordinances of the city of Chicago and the practices of its police department relative to parade and open air meetings and to the use of sound amplifiers.

On January 15, 1951 the Supreme Court handed down three decisions dealing with freedom of speech: *Niemotko* v. *Maryland, Kunz* v. *New York,* and *Feiner* v. *New York.* In the *Niemotko* case, the City of Harve de Grace, Maryland, was without an ordinance regulating public meetings. The City allowed the use of its park for public meetings, but by custom only a permit of the park commissioner was required. Niemotka and Kelley, Jehovah's Witnesses, requested permits to use the park. They were questioned about their views on the flag salute, the Catholic Church, service in the Armed Forces and other matters which in no way are related to public order. The permit was refused. When Niemotka and Kelley attempted to hold their meetings without the permit, they were arrested for disturbance of the peace. Their convictions were a denial of the equal protection of the law. The court stated that:

> "In the instant case we are set with no ordinance or statute regulating or prohibiting the use of the park; all that is here is an amorphous 'practice', whereby all authority to grant permits for the use of the park is in the park commissioner and the city council. No standards appear anywhere; no narrowly drawn limitations; no circumscribing of this absolute power; no substantial interest to the community to be served. It is clear that all that has been said about the invalidity of such limitless discretion must be equally applicable here."

In the *Kunz* case, New York City had a licensing ordinance pursuant to which the police commissioner might refuse an application for a license for street preaching if he found the applicant was likely to ridicule or denounce religion. In 1946, after hearings before a deputy police commissioner, Kunz' license was revoked because he had ridiculed and denounced religion. In 1947 and 1948, he was refused a license on the sole ground of the determination made in 1946. He attempted to speak without a license and in September, 1948, was arrested for speaking at Columbus Circle without a license. The Supreme Court considered the ordinance unconstitutional on its face. It failed to guide the licensing officials and left them free to revoke or refuse a license for reasons based entirely upon the past conduct of the applicant. The court stated that:

"It is noteworthy that there is no mention in the ordinance of reasons for which such a permit application can be refused. * * * We have here, then, an ordinance which give an administrative official discretionary power to control in advance the right of citizens to speak on religious matters in the streets of New York. As such, the ordinance is clearly invalid as a prior restraint on the exercise of First Amendment rights."

The *Feiner* case concerned reliance by the city of Syracuse, New York upon the State's breach of peace statute. Feiner made a speech from atop a wooden box located on the parking area between the sidewalk and the street, using a sound amplifier attached to an automobile. The crowd gathered about him was large and passers-by were forced to walk out onto the city streets to avoid the traffic congestion. He called the mayor a "champagne-sipping bum"; called President Truman a "bum"; called the American Legion "Nazi Gestapo agents"; and in an exciting manner challenged that Negroes, not having equal rights, should rise up in arms. Throughout his speech, Feiner used offensive language and fighting words. The crowd grew restless and a riot threatened. The police officer "stepped in to prevent it from resulting in a fight." The court, in upholding Feiner's conviction for breach of the peace, explained that the right to freedom of speech does not include the right to create disturbances and incite riots; and that "when a clear and present danger of riot, disorder, interference with traffic upon the public streets or other immediate threat to public safety, peace or order, appears, the power of the State to prevent or punish is not restricted."

These three cases serve to clarify the position taken by the Supreme Court of the United States in a series of recent decisions involving freedom of speech, beginning with *Davis* v *Massachusetts*, 166 U. S. 43, and including *Hague* v. *C. I. O.*, 307 U. S. 496; *Cantwell* v. *Connecticut*, 310 U. S. 396; *Cox* v. *New Hampshire*, 312 U. S. 569; *Chaplinsky* v. *New Hampshire*, 315 U. S. 568; *Saia* v. *New York*, 334 U. S. 558; *Kovacs* v. *Copper*, 336 U. S. 77; and *Terminiello* v. *Chicago*, 337 U. S. 1. It was established in the *Davis* case, that licensing speech is invalid where the licensing standard does not demonstrate a purpose that is consistent with the maintenance of public order. *Hague* v. *C. I. O.*, served to rededicate parks, streets and public grounds to the making of public addresses. The *Cantwell* case crystalized the principle that in enforcing provisions against common law breaches of the peace, speech alone cannot be in breach of peace unless it creates a clear and present danger to the community. *Cox* v. *New Hampshire* again made it clear that the Constitution does not deny localities the power to devise licensing systems if the systems provide officials with appropriately defined standards. The *Chaplinsky* case defined limits to public speech by holding that abusive words and fighting language such as "damned racketeer" and "damned Facist", are not protected by the First Amendment.

The *Saia* case held that sound amplifiers are indispensable to effective public speech and cannot be treated separately from the treatment accorded the speaking involved; but this case was modified by the *Kovacs* case, which, like the *Chaplinsky* case, had placed abusive and fighting words beyond the protection of the First Amendment, also placed loud and raucous noises resulting from the use of the sound amplifiers, beyond the protection of the First Amendment. The *Terminiello* case is important for deciding the question of whom police should arrest for disturbance of peace where as a result of speech-making riot and disturbance has occurred. The key to the *Terminiello* case is found in words expressed in the concurring opinion of Justice Frankfurter in the *Niemotka* case, when he stated that "Where conduct is within the allowable limits of free speech, the police are peace officers for the speaker as well as for his hearers."

The position taken by the United States Supreme Court on the issues involved in freedom of speech, may be outlined in the following manner:

(1) *To what extent may freedom of speech be regulated?* It may be regulated only in the exercise of good faith, to maintain the public peace, to assure the availability of streets for their primary purpose of passenger and vehicular traffic, and for other equally indispensable ends of our modern community life.

(2) *What method may be used in regulating public speech?* There should be a licensing standard set out in a law or ordinance which directs the official to the end that he does not censor in advance of speech nor arbitrarily or discriminatorily deny the right to speak. In the absence of adequate express standards these laws, ordinances, customs, and practices, are invalid.

(3) *What kind of speach may be regulated?* A speaker's views can be of no concern to either licensing or arresting officials. His rights to denounce other religious, other political views and even to *advocate* views as commonly unpopular as is Communism is a right guaranteed by the Constitution. When he goes beyond the mere expression of his views or the advocacy of his principles and uses abusive, insulting, obscene and fighting words which normally would incite listeners to physical acts of violence, he has exceeded the protection of the Constitution.

(4) *May sound amplification be prohibited or regulated?* A sound truck may be found to affect the public peace in a manner that normal speech does not. The flat prohibition against the use of sound amplification, since it would prohibit careful and inoffensive as well as offensive use, would violate freedom of speech. In the interest of public peace and order, the regulation of the time, place and volume of amplification to the end that the public be not disturbed by raucous and loud noises is within the police power of the state. It is noted that sound amplification for the purpose of carrying voices to the extent of an audience is indispensable to modern effective speaking, whereas sound amplification for the purpose of attracting an audience involves an entirely different problem,—one with which the Supreme Court has not dealt clearly yet.

(5) *Where may free public speaking take place?* The place generally includes streets, parks, sidewalks, steps to public buildings and street corners. This is not conclusive in all cases for the city in placing limitations upon the use of public places for public speaking has the right to take into consideration the location and size of the park, the customary use of the street, esthetic and contemplated uses of the public structure, the exclusive use of a street for traffic purposes as well as other community interests.

The Supreme Court's decisions of January 15, 1951, do not warrant changes in the recent opinions directed from this office to the Commissioner of Police on this subject. On Aug. 6. 1948 the Corporation Counsel issued an opinion stating that our section 56 of chapter 99 of the Municipal Code in the light of the *Saia* case, was invalid because it contained an absolute prohibition of the use upon any public way within the City of any sound amplifier and advised that it no longer be enforced. Although the decisions of the Supreme Court since the *Saia* case, have served to modify that case, they have not so modified it as to reinstate constitutionality in our ordinance. Section 56, of chapter 99, of the Code, is still in need of revision.

On October 26, 1948 an opinion was directed by this office to the Commissioner of Police to the effect that section 56 of our chapter 99 of the Code could not be used to prevent the issuance of a permit to the then candidate for Senator of the United States, Paul H. Douglas, to use sound equipment on a jeep in the Loop area.

The recent January 15, 1951 decisions of the Supreme Court have done nothing to preclude the advisability of following this opinion in the future.

On February 18, 1949 in an opinion to the Commissioner of Police it was suggested that the *Kovacs* case made no change in the effect of the *Saia* case upon prohibition of the use of sound amplifiers pursuant to section 56 of chapter 99 of our Code. The *Kovacs* case, recognizing the authority of the City to regulate the use of sound amplifiers in the interest of the public peace and order, has served to make it possible to apply section 1 of chapter 193 of our Code in prohibiting the raucous and offensive use of sound amplifiers. The *Feiner* case lends strength to the position taken by the Court in the *Kovacs* case.

Mr. Heimoski raised questions concerning the enforcement of section 31, chapter 36, of our Code, the handling of pro-Communist meetings, and the correctness of certain practices of the police department.

Section 31, of chapter 36, of the Municipal Code, "parade and open-air meetings", is constitutional. This section provides, in concise language, three grounds upon which a license may be refused. If, after investigating the applicant, it is found that (1) the applicant has not falsified his application, (2) the purpose is not unlawful, (3) the occasion will not unreasonably interfere with public use of the public way, then the permit may be issued without fee or charge. A purpose, to be unlawful, must be in violation of some statute or ordinance. Each of these restraints is embraced by the Court's "respect for the interest of the community in maintaining peace and order on its streets". Our opinion does not sanction the imposition of any prior restraint upon the free expression of views and opinions.

Since permits may not be refused except for the reasons set out above and no prior restraints can be imposed, it follows that enforcement in this field necessarily must rest with the peace officer at the scene. It is his responsibility to act within the bounds of care and circumspection in enforcing the laws for the prevention of public disorer. The Supreme Court, in the *Feiner* case, reiterated its "clear and present danger" test as applying to any serious threat to the public peace and order. It is the peace officer who must administer this difficult test. He must distinguish between the expression of views, however unpopular, which are within the bounds of peaceful persuasion on the one hand and, on the other hand, language which is so inflammatory in nature and delivered under such circumstances as is likely to result in public disorder.

The practices followed by the police department such as requiring that public meetings not seriously impede pedestrian or vehicular traffic, that they not unduly interfere with the entrances to establishments or to transportation systems that they regard esablished zones of quiet, and that if street corner meetings they be distributed as evenly as possible among the many street corners rather than be allowed to create unnecessary hardship upon any given corner, are commendable practices which will go far toward assuring the City that it is carefully regarding the freedoms of speech, religion and assembly while at the same time performing the governmental function of preserving public peace, order, morals and safety.

SIDEWALK OBSTRUCTIONS

(No. 11437—Commissioner of Streets and Electricity—L. L. K.—October 24, 1951.)

This will acknowledge receipt of your letter of October 22, 1951, in which you discuss the problems confronting you and the Bureau of Sanitation in connection with the removal of household furnishings, etc. and

other items which obstruct public ways, and you ask for an opinion concerning your duties in the matter and the proper procedure to be followed.

This office has heretofore rendered opinions on this subject. On June 18, 1915, in an opinion to the Superintendent of Streets (Volume 9, Opinions of the Corporation Counsel and Assistants, p. 96) and again on April 14, 1939, in an opinion rendered to an Alderman (Volume XX, p. 22), we pointed out that the presence on public ways of furniture or other personal belongings is a nuisance at common law and that the ordinance, now appearing as Section 34-2 of the Municipal Code, authorizes the Commissioner of Public Works to order the removal thereof, and if the owner, after notice, fails to remove same, then the Commissioner of Public Works is directed to remove the obstructions to some suitable place to be designated by him. We also pointed out that the ordinance requires publication and sale if the value of the articles removed is sufficient to pay the expenses thereof and we concluded the 1915 opinion as follows:

> "However, if it is not of sufficient value to pay the expense of removal and advertising, then you may regard it as common nuisance and dispose of it as such; but before so doing, you should itemize the same carefully, giving a detailed description of each piece of furniture, and preserve said list for identification in the event of future litigation."

We believe that the foregoing opinions contain the answer to your questions.

NOISE PROHIBITIONS

(No. 11500—Commissioner of Police—C. P. H.—March 19, 1952.)

We have your letter of March 8, 1952 wherein you request our opinion as to whether or not section 99-56 of the Municipal Code of Chicago should be enforced in view of the recent decision of Honorable John V. McCormick, one of the judges of the Municipal Court of Chicago, holding the section unconstitutional.

Section 99-56 provides as follows:

> "No person shall make, or cause, permit or allow to be made, upon a public way, or in such close proximity to a public way as to be distinctly and loudly audible upon such public way, any noise of any kind by crying, calling or shouting or by means of any whistle, rattle, bell, gong, clapper, hammer, drum, horn, hand organ, mechanically operated piano, other musical instrument, wind instrument, sound amplifier, or similar mechanical device; provided, that the said restrictions shall not apply to any licensed peddler crying or calling for the purpose of advertising goods, wares or merchandise when lawfully using any public alley in the city between the hours of 11 a.m. and 6 p.m."

In the case entitled *City of Chicago* v. *Charles McCord*, to which you refer, the defendant was charged with violating the above section by using, on the public ways of the City, a sound amplifier mounted on an automobile to announce in a loudly audible manner public meetings of the Civil Rights Congress. Judge McCormick, on March 4, 1952, discharged the defendant and held the above section invalid in that it violated the constitutional right of free speech. This decision is binding only in this particular case. It is a well established principle that the decision of one branch of a court is not binding on other branches of the same court

having coordinate jurisdiction. (*Hughes* v. *Hughes*, 336 Ill. App. 473 (1949); *Parker* v. *Parker*, 335 Ill. App. 293 (1948); C. J. sec. 311, p. 923; C. J. S. sec. 200, p. 351.) It therefore necessarily follows that this decision of Judge McCormick, in and of itself, will not preclude the enforcement of the above section of the Code.

With reference to Judge McCormick's recommendation that the above section be amended, in former opinions of this office, we have repeatedly stated that such action should be taken in the light of recent decisions of the United States Supreme Court. (Opinions of the Corporation Counsel to the Commissioner of Police dated, August 6, 1948, December 1, 1949, and February 9, 1951; Opinion of the Corporation Counsel to the City Council dated February 18, 1949.) In support of our position we relied upon the cases of *Saia* v. *New York*, 334 U. S. 558; 92 Law Ed. 1574 (1948); *Kovacs* v. *Cooper*, 336 U. S. 77; 93 L. Ed. 513 (1949).

In the *Saia* case the court had under consideration the constitutionality of a municipal ordinance which prohibited the use of ampplifying devices casting sounds upon streets and public places, except with the permission of the chief of police, without prescribing standards for the exercise of his discretion. The court held the ordinance invalid in that it violated the constitutional right of freedof of speech. In the *Kovac* case the vilidity of a city ordinance which prohibited the operation upon the streets of sound amplifiers or other instruments which emitted 'loud and raucous noises" and attached to vehicles operating or standing on streets was under attack. The court sustained the ordinance against the objections that it was lacking in definiteness and that it infringed upon the constitutional right of free speech.

Our ordinance, it will be noted, does not contain the words "loud and raucous" as did the ordinance in the *Kovacs* case. Our ordinance prohibits the making of "any noise of any kind." Whether this language by itself would be sustained by the United States Supreme Court, we are unable to say, but the prohibition of a sound amplifier might well be sustained under this decision. In order to bring our ordinance squarely within the *Kovacs* decision, on February 18, 1949, we submitted to the City Council a draft of a proposed amendment to section 99-56. This amendment was, on March 16, 1949 (Council Journal, page 3852), referred to the Committee on Health, where it is presently pending. (Opinion of the Corporation Counsel to the Commissioner of Police December 1, 1949). A copy of the proposed amendment is transmitted herewith. We suggest that you request the Committee on Health to give favorable consideration to this amendment.

In the meanwhile, it is our opinion that section 99-56 of the Code is valid and should be enforced.

SEARCHLIGHTS

(No. 11514—Department of Streets—E. R. H.—April 4, 1952.)

We acknowledge your letter of recent date, asking our opinion, "regarding Searchlight equipment on City streets," and attached copy of a letter from Hon. Ernst Buehler, attorney for Mr. Jerome Pile, doing business as A.A.A. Searchlight Advertising, addressed to Department of Streets, and which states that his client operates a "searchlight and generator equipment mounted on a truck as a complete unit which is moved to a spot where the services of searchlight advertising or spectacular lighting is furnished. The equipment is permanently affixed to the truck and the

lights are permanently attached to the truck. * * * If by the negligent operation of the equipment my client should cause damage, there could be no liability against the City of Chicago. The requirement of a permit and indemnity bond is apt to put the City in the position where it would assume responsibility in such a case."

Our information is that when this truck, "is moved to a spot where the services of searchlight advertising or spectacular lighting is furnished," it would stand there in the public highway for several hours.

Section 8-13 of the Municipal Code of Chicago provides:

"The commissioner of public works may direct the removal of any article or thing whatsoever, which may encumber or obstruct any public way in the city."

Section 34-2 provides:

"The commissioner of public works is hereby authorized to order any article or thing whatsoever which may encumber or obstruct any public way, public landing, wharf or pier within the city to be removed. If such article or thing shall not be removed within six hours after notice to the owner or person in charge thereof to remove the same, or if the owner cannot be readily found for the purpose of such notice, the commissioner of public works shall cause the same to be removed to some suitable place, to be designated by the said commissioner. The owner of any article so removed shall be subject to a penalty of not more than ten dollars, in addition to the costs of such removal.

Any article or thing which may be removed in accordance with this section, if of sufficient value to more than pay the expenses thereof, shall be advertised ten days and, unless the same shall be reclaimed and the penalty and costs paid by the owners thereof, shall be sold by the department of public works. The proceeds of such sale shall be paid into the city treasury, and the balance, if any, after deducting the penalty and costs, shall be paid to any person furnishing satisfactory proof of ownership."

Section 27-125 as amended, provides:

"No person shall stand or park any truck, tractor, semi-trailer, trailer or bus on any street in the city for a longer period than sixty minutes or for such time as is necessary for the reasonably expeditious loading or unloading of such vehicle, except that such standing or parking shall not be permitted on the days, during the hours and in the sections of streets designated in section 27-128, and except that a driver of a bus may park such bus in a designated bus stand as is provided elsewhere in this chapter.

Any vehicle parked in violation of this section is hereby declared to be a nuisance which may be abted by any police officer by removing such vehicle to the city vehicle pound or to an authorized garage." (Council Journal—October 31, 1951)

Section 27-173 as amended, provides for the removal and impounding of vehicles violating Section 27-125 as amended.

Definitely, the standing of the truck as referred to in Attorney Buehler's letter, would constitute an obstruction in the public highway, and it could be a liability hazard to the City of Chicago.

In our opinion, the use of the searchlight equipment referred to in your letter and in the copy of Attorney Buehler's letter would be a violation of the above quoted sections of the Municipal Code and should not be permitted.

SOUND AMPLIFIERS—AIRPLANES

(No. 11517—Alderman, 5th Ward—E. R. H.—April 18, 1952.)

We acknowledge your letter of April 8, 1952, enclosing a copy of an advertising letter or circular you received from the American Sky Advertising Company, advertising the contemplated operation of "Talking Airplanes," presumably over the City of Chicago.

The ordinance you refer to in your letter is an amendment of Chapter 56 of the Municipal Code, known as Section 36-28-3, C. J., June 14, 1951, Page 401, and provided in part:

> "No person while operating any type of Aircraft over the city shall use, cause, permit or allow to be used any sound amplifier or similar mechanical device for the purpose of advertising goods, wares or merchandise."

The operations you referred to would, of course, be a violation of the ordinance, subjecting the violator to a fine of not more than $30.00 and the American Sky Advertising Company would be presumed to have notice of the ordinance. It may be that it does not have actual notice of the ordinance and if it had actual notice it would not violate it.

However, no action can be taken in anticipation of violations. When the violation occurs it should be prosecuted by our enforcement departments.

SIDEWALK JURISDICTION

(No. 11617—City Council—J. F. O.—November 24, 1952.)

In your letter of November 21, 1952, you transmitted for our approval as to legality, a proposed ordinance. Said ordinance authorizes the Chicago Park District to assume jurisdiction, improve and maintain as a part of the boulevard roadway surface that portion of the sidewalk area of the upper level of North Michigan Avenue therein described.

We find the jurisdiction of the City of Chicago over the width of sidewalks succinctly expressed in *Campbell* v. *City of Chicago,* 119 Federal Reporter, page 1014, at page 1016 where the court says:

> * * * "Consequently an abutting owner can have no vested right to have continued maintenance of the sidewalk at any one specified width. If public necessity requires that a greater portion of the street be given over to vehicular travel and a lesser to pedestrians it is no affair of plaintiff but rather the exercise of the municipality's discretion in determination of the proper use of its streets."

In our opinion said ordinance is legal and we return same herewith, with our approval indicated thereon.

NEWSSTAND NEAR LIBRARY PROPERTY

(No. 11669—Librarian, Chicago Public Library—C. P. H.—March 24, 1953.)

We have your letter of March 19, 1953, wherein you request an opinion relative to the maintenance of newspaper stands adjacent to the Chicago Public Library building located on Michigan Avenue between Randolph and Washington Streets. We also have the diagram transmitted with your communication. It appears that some of the newspaper stands are located on the City's sidewalks on Randolph and Washington Streets. It also appears that other newspaper stands are located on vacant land lying between the sidewalks on Randolph and Washington Streets and the building lines of the Chicago Public Library building. Before answering your specifice questions it becomes necessary to determine whether the City of Chicago or the Board of Directors of the Chicago Public Library has jurisidiction over the vacant land referred to herein.

Under the provisions of par. 5, chap. 81, Ill. Rev. Stats. 1951, the Board of Directors of the Chicago Public Library has exclusive control, supervision, care and custody of the buildings, grounds and rooms set apart for library purposes. The vacant land under consideration here is not used for library purposes. It is immediately adjacent to the sidewalks on Randolph Street and on Washington Street and is being maintained and operated by the City as part of the public sidewalk system and is held out to and is being used by the general public as such. Title to this vacant property and the land on which the Chicago Library building is located is vested in the City of Chicago. We so held in an opinion dated November 8, 1927 (Opinions of the Corporation Counsel, Volume 16, page 14). It follows that jurisdiction over the vacant land referred to herein, which is part of the publice sidewalk system, is vested in the City of Chicago under par. 23-20, chap. 24, Ill. Rev. Stats. 1951, which grants the City power to regulate the use of sidewalks.

Your first question is as follows: "What rights do the owners of these stands now have in reference to operating in these locations."

Section 38-8 of the Municipal Code of Chicago provides that it shall be unlawful, for any person to erect, locate, construct or maintain any newspaper stand on any public way or other public places without obtaining a permit therefor. Section 34-9 provides that the permit shall state thereon the name and address of the permittee and the location for which said permit is granted. Section 34-10 provides that the application for permit for a newspaper stand shall be made to the commissioner of streets and sanitation upon such form as shall be provided by him.

Pursuant to these provisions of the Code the commissioner of streets and sanitation has issued permits to the following named persons to operate newspaper stands on the sidewalk of the City of Chicago adjacent to the Chicago Public Library building:

Stanley Mika, to operate a newspaper stand at the southwest corner of Michigan Avenue and Randolph Street on Saturday evenings only.

Louis Hershstein, to operate newspaper stands at the northwest corner and the southwest corner of Michigan Avenue and Washington Street during evening hours only.

Anthony Sozzolino, to operate a newspaper stand at the southwest corner of Michigan and Randolph Street on Sunday morning only.

Tony Pacelli, to operate newspaper stands at the northwest corner, southeast corner and southwest corner of Michigan Avenue and Randolph Street during evening hours only.

In answer to your first question, it is our opinion that by virtue of these permits the permittees have been authorized to operate newspaper stands at the locations and during the time specified therein.

Your second question reads as follows: "What rights does the Library have in regard to controlling the condition and size of these stands."

Section 34-11 provides that newspaper stands shall be constructed in accordance with the general design therefor to be approved by the commissioner of streets and sanitation. This section also sets forth the demensions of newspaper stands to be maintained on the City's Streets. Section 34-12 provides that the maintenance of newspaper stands upon public streets shall be under the direction and supervision of the commissioner of streets and sanitation.

In view of these provisions of the Code, it is our opinion that the commissioner of streets and sanitation has absolute jurisdiction over the maintenance of newspaper stands on the sidewalks of the City of Chicago. It, therefore, necessarily follows that the Board of Directors of the Chicago Public Library has no control over the condition and size of the newspaper stands located on the City's sidewalks adjacent to the Chicago Public Library building located on Michigan Avenue between Randolph and Washington Streets.

The commissioner of streets and sanitation, however, has promulgated rules and regulations relative to the maintenance and operation of newspaper stands on the streets of Chicago. The object and purpose of these rules are regulations are to prevent such stands from being a public hazard or nuisance. If you have any complaints with reference to the manner in which the newspaper stands in the vicinity of the Chicago Public Library are being operated, we suggest that you communicate with Honorable Lloyd M. Johnson, commissioner of streets and sanitation, Room 721, City Hall, Chicago.

"SNORKEL" BANKING SYSTEM

(No. 11703—Commissioner of Streets and Sanitation—M. I. W.—June 26, 1953.)

We have your request of June 4 for our opinion as to the legality of the use of the public ways for a method of bank depositing known as "snorkel banking." This system, as described in the pamphlet you attached, calls for the construction of an upright structure, probably made of metal, located near the curb. A portion of the ground underneath is excavated to provide room for a clerk and appropriate equipment. Customers drive up along the curb and by a system of mirrors are able to be seen by the teller, with whom they will conduct the transaction. A "dumb waiter" is installed which raises and lowers money, pass book, deposit slips, and other documents.

The power given to city councils over streets and sidewalks is very broad. *Jacobs* v. *City of Chicago*, 244 Ill. App. 132. The city council may regulate the use of streets and alleys to the extent that it may require sidewalks exclusively reserved for use by pedestrians. *City of Chicago* v. *Collins*, 175 Ill. 445. Specifically that power includes among others

authority "to prevent and remove encroachments or obstructions upon the streets and other municipal property." Chap. 24, Sec. 23-11 Ill. Rev. Stat. (1951).

In the exercise of this power the city council has enacted the section 34-3 of the Municipal Code which provides as follows:

> "No person shall erect or place *any* building *or other structure*, in whole or in part, upon any public way or other public grounds within the city, and every person that violates or fails to comply with the provisions of this section shall be fined not less than twenty-five dollars nor more than two-hundred dollars for each offense." (emphasis added)

There is no question that a sidewalk is a public way. The only question which might be raised would be whether or not the depository would be a "structure" within the meaning of the above ordinance.

We have held that a grease rack fell within an ordinance covering "any building or structure." Op. Corp. Coun. 234 (June 9, 1923). In that opinion we cited as authority the case of *Farro* v. *State*, 46 S. W. 932, 39 Tex. Cr. R. 452, 73 Am. St. Rep. 950 wherein the court said:

> " 'Structures' is defined to be that which is built or constructed; an edifice or a building of any kind; in the wildest sense, any production or piece of work, artifically built up or composed of parts and joined together in some definite manner; *any* construction."

In *Brown* v. *City of Decatur*, 188 Ill. App. 147, 151, the court said:

> "The word 'structure' commonly means anything that is built or constructed. * * *"

We are therefore of the opinion that the type of depository used in "snorkel banking" is a structure and as such, erection or placement upon any public way is prohibited by section 34-3 of the Municipal Code.

It is further our opinion that even in the absence of this provision of the code this type of structure would be prohibited and that any attempt to grant permission by ordinance for such use would be invalid.

In the case of *People* v. *Wolper*, 350 Ill. 461, (1932) the Illinois Supreme Court declared an ordinance void which granted permission for the erection and maintenance of curb gasoline pumps, as the vending of gasoline, through such pumps constituted a use of the street for private gain. The fact that such pumps were alleged to be a convenience to the motor public did not bring them within the bounds of a public use.

The reasoning of the court is found in the following language:

> "A permanent encroachment upon streets for private use is a purpresture and is in the law a nuisance. *Hibbard & Co.* v. *City of Chicago*, 173 Ill. 91; *Driggs* v. *Phillips*, 103 N. Y. 77; *Smith* v. *State*, 23 N. J. L. 712.) Power of a city to authorize the use of public streets for private purposes has been uniformly denied by this court. When a public street is once established all beneficial uses vest in the public. These include the uninterrupted and unobstructed use of any portion or part of such public highway. These rights of the public are inconsistent with the right of a private citizen to encroach upon the streets by the erection of a permanent structure. Streets are held in trust by the municipality for the benefit of the public and may not be given away by ordinance. *People* v. *Corn Products Co.* 286 Ill. 226; *Tolman* v. *City of Chicago*, 240 id. 286; *People* v. *Atchison, Topeka and Santa Fe Railway Co.*, 217 id. 594; *People* v. *Harris*, 203 id. 272; *Snyder* v. *City of Mt. Pulaski*, 176 id. 379). *Any permanent* structure or purpresture which materially encroaches upon a public street and impedes travel is a nuisance *per se* and may be abated notwithstanding space is left for the passage of the public." (p. 466 ibid.)

In your letter you expressed concern that if this type of use were legal it could be extended to practically any business desiring to render curb service and thus hamper your efforts toward removing as many curb interferences as possible through the use of off-street parking and loading facilities.

This concern was apparently also felt by the court in the *Wolper* case (*supra*) which, while striking down the curbside use of gasoline pumps, said at page 468:

> "It might be as well argued that because automobile drivers by stopping along the curb could purchase their daily supply of groceries without leaving their cars a grocery store could be conducted in the public highway."

It is apparent that the court did not think well of this future possibility.

In summary, it is our opinion that the type of installation required for "snorkel banking" is prohibited by ordinance, would be prohibited even in the absence of an ordinance, and could not be made lawful by the enactment of an ordinance.

GUARD RAIL IN PUBLIC ALLEY

(No. 11758—Commissioner of Streets and Sanitation—H. A. C.—October 29, 1953.)

With your letter of October 27, 1953 you attached a letter from Mr. T. H. Barkow, Post Office Inspector, addressed to Alderman A. J. Cilella and a blueprint indicating a proposed guard rail to be constructed in a public alley. The correspondence attached to your communication indicates that a Mr. Paul Calistro is the owner of a parcel of property which is located directly across from 4834 Armitage Avenue, Chicago, Illinois and occupied by the Cragin Substation of the United States Post Office. Trucks bringing mail to the station have damaged Mr. Calistro's property and has resulted in a suit filed by him against the government for damages to his building.

The Post Office Department and Mr. Calistro have agreed that a barrier be erected by the Post Office Department along side and against Mr. Calistro's building and it is proposed to punch holes in the concrete alley, sink 6′ long 7″ steel "I" beams imbedded in concrete as posts to hold two 8″ wide by ⅜″ thick steel bands. The proposed guard rail will prevent trucks from further damaging Mr. Calistro's building. The Post Office Department advises that Mr. Calistro will consent to such barrier.

You request an opinion as whether the City may issue a permit for the installation of the guard rail as indicated on the plan. Section 34-1 of the Municipal Code of Chicago substantially provides:

> "No person shall construct or maintain any bay window, bridge, wire, pipe or other structure or device under any public way * * * without first having obtained specific authority by ordinance passed by the City Council authorizing such special privilege.
>
> "Any person violating any of the provisions * * * shall be fined not less than $25.00 nor more than $200.00 for each offense. A separate and distinct offense shall be held to have been committed each

day any person * * * fails or refuses to cause the removal of such unauthorized structure within such time as may be fixed by the Superintendent of Compensation * * *."

We are of the opinion that the City may properly issue a permit for the guard rail, provided that the City Council passes an ordinance authorizing the same. We suggest that before the ordinance is submitted to the City Council, that a written application for the construction of the guard rail be executed by Mr. Calistro and the Post Office Department. We further suggest that it would be advisable to obtain a bond from the Post Office Department conditioned that the United States Post Office Department will save and keep the City free and harmless from any and all loss or damage, or claim of damage, arising from or out of the construction of and the maintenance of the guard rail.

C. ADVERTISING AND HANDBILLS

SIGNS ON STATE STREET

(No. 11108—Alderman, 38th Ward—A. F. G.—April 29, 1948.)

Recently you transmitted a mimeographed draft of a proposed ordinance regulating, for the present, signs projecting over public property and prohibiting them after July 1, 1951. The draft limits the ordinance to State street between Wacker drive and Congress street. We are advised the proposed ordinance is sponsored by the State Street council.

We have examined the draft and except for the provision limiting its operation to a single street, we find nothing legally objectionable in it.

The rule of law laid down by McQuillen in his work on the Municipal Corporation is

> "Where ordinances are designed to apply only to certain districts or designated parts of the territorial limits of the authority enacting them, to be valid, it must appear that such districts are so situated as to require peculiar and exceptional provisions." (Vol. 3, Sec. 700).

By Section 34.1-1 of the proposed ordinance it is made applicable to the following described public property:

> "That part of N. State Street and S. State Street between a line connecting the south lines of E. Wacker Drive and W. Wacker Drive and a line connecting the north lines of E. Congress Street and W. Congress Street".

The area above described is one of the streets of the city devoted largely to the sale of merchandise at retail. It has a few office buildings and five or six theaters, but in the main it is a shopping center. While State street is perhaps more generally devoted to shopping than any other street, other streets such as Wabash avenue, Randolph, Washington, Madison and all of the east and west streets from Dearborn street to Michigan avenue are very similar in character. In fact many of the leading stores on State street have frontages on these other streets sometimes in excess

of their frontage on State street, for instance Marshall Field & Company fronts on State, Randolph, Washington and Wabash, more than two-thirds of its street frontage being on streets other than State street. The same is substantially true of Mandels, Carsons, Stevens, the Boston Store, the Fair, and other State street stores. Pedestrian traffic is extremely heavy on all of the aforementioned streets, in fact they all carry as much traffic as the width of the sidewalk will accommodate. If this ordinance were made applicable to the "loop" rather than to a single street in the loop its validity would not be in much doubt, as ordinances applicable only in the loop district have been sustained in *City of Chicago* v. *McKinley*, 344 Ill. 320 and *City of Chicago* v. *Rhine*, 363 Ill. 619.

If the purpose of the proposed ordinance were to relieve traffic congestion on State street and it could be shown that State street presents a traffic problem different from any of the streets adjacent to it, the ordinance would probably be held not discriminatory. Ordinarily, projecting signs erected on buildings ten or twelve feet above the street grade do not affect or in any manner interfere with free use of the sidewalks by pedestrians. So we must conclude that for some purpose other than the regulation of traffic actuates the sponsors of the ordinance.

Under the proposed ordinance, no sign except such as is permitted therein could be placed on the State street frontage of the Marshall Field building, but any sign permitted by the general sign ordinances of the city could be placed on the Randolph and Washington street and the Wabash avenue fronts of the same building. We are of the opinion that there is not that difference in the character of these streets, or the volume of traffic thereon, which would justify such discrimination. Again, illuminated signs on theaters in State street would be required to be discontinued after January 1, 1951, while a theater on Madison street, around the corner from State street, could continue the use of signs which its competitors on State street would not be permitted to maintain. We doubt if the courts would look favorably on this apparent discrimination.

Although the power to regulate the use of streets has been conferred upon the Chicago city council, the legislature has not specified the precise manner in which it shall be exercised, and therefore the reasonableness of the exercise of the power is open to inquiry by the courts. (*Haggenjos* v. *City of Chicago*, 336 Ill. 573).

Ordinances similar to the one under consideration have been sustained in other jurisdictions. *Oppenheimer Apparel Corp.* v. *Cruise*, 194 N. Y. S. 183; *New Orleans* v. *Kaufman*, 138 La. 697; *Lenon* v. *Porter*, 65 Pa. Super. Ct. 94. In each of these cases the legislature had conferred on the municipality power to pass ordinances of a specific and defined character. The courts held that an ordinance passed pursuant to such specific power cannot be impeached because it would have been regarded as unreasonable if passed under the incidental powers of the corporation or under a grant of power general in its nature. What the legislature distinctly says may be done cannot be set aside by the courts because they deem it unreasonable or against sound policy. But where the power to legislate on a given subject is conferred, and mode of its exercise is not prescribed, then the ordinance passed in pursuance thereof must be a reasonable exercise of the power, or it will be pronounced invalid. 1 Dillon on Municipal Corporations; sec. 328; id. sec. 319 and authorities cited.

In the New York case cited above, an ordinance prohibiting electric signs on a certain street between two points, but permitting them on places of amusement was held valid. The city charter gave broad power to the city council in this particular. The court said:

> "The Board of Aldermen are thus the judges as to what ordinance they will pass to carry out and preserve the interests of the municipality and unless an ordinance passed by them is wholly arbitrary and unreasonable it should be upheld. The necessity and advisability of the ordinance is for the legislative power to determine.

The presumption is in favor of the ordinance. The contention of plaintiffs that the ordinances are unconstitutional because they discriminate against people located on the specified streets and avenues in favor of all other localities cannot be upheld. It is disposed of by the failure of the plaintiffs to show that the ordinances were arbitrary or unreasonable and unlawfully discriminatory in favor of all other localities of the city."

In *City of Lake View* v. *Tate*, 130, Ill. 247 (1889) the validity of an ordinance of that city was the only contention. Two lines of railway and two only run through the city, viz: The Chicago and North Western and the Chicago and Evanston, both in a north and south direction and nearly parallel to each other and about half a mile apart. Ashland avenue, a north and south street, was situated about midway between the railroads. Both roads were engaged in the business of transporting passengers from the town of Evanston to the city of Chicago, large numbers being transported daily. The two roads were rival and competing lines. An ordinance of the city established an east and west railroad district. That part of the city east of Ashland avenue was the east railroad district in which the Chicago and Evanston road operated, and the part of the city west of Ashland avenue in which the North Western Road operated was designated the west railroad district. The ordinance restricted the speed of passenger trains in the east district to 10 miles per hour, while trains in the west district were subject to no speed limitation.

It was found that in suburban transportation speed is a matter of prime importance and the railway company that is able to offer to the public the speediest transportation, thereby acquires a very important and and manifest advantage over its competitors. In discussing this aspect of the case and in holding the ordinance discriminatory, the court said:

"That said ordinance constitutes an important discrimination between said lines of railway does not admit of serious question. Its validity, then must depend upon whether the special circumstances, as shown by the evidence, are such, that in the interest of public safety, such discrimination is necessary and therefore warranted. Undoubtedly the circumstances of two lines of railway running through the same city may be such as to justify or even necessitate the imposition of different measures of restraint upon the speed of their trains. One may run through a portion of the city which is densely populated and where a high rate of speed would be extremely dangerous to persons and property, while the other may run through a portion of the same municipality where there are but few inhabitants, and where it is extremely improbable that injury will happen to any person who is in the exercise of ordinary care. In such case a discrimination could hardly be said to be unreasonable.

In the case before us, no such disparity of circumstances seems to be shown. Part of the line of both railways is through thickly settled portions of the city and part through sections where there are but few inhabitants. It may be fairly inferred from the evidence that the number of persons and vehicles ordinarily crossing the track of the Chicago and Evanston Railway at the street crossings of the city within a given time is somewhat greater than the number of those crossing the track of the Chicago and North-western Railway during the same time, but it appears that the number crossing the tracks of both railways is very large, and that the disparity is not so great as to necessitate or even justify different regulations as to the speed of trains. We are of the opinion then that no justification for the discrimination is shown, and that the ordinance therefore must be held to be invalid."

If the sponsors of this ordinance can show that in the regulation of the use of streets, or in the exercise of the police power, the area fixed in the ordinance is so situated as to require peculiar and exceptional treatment not required in the immediate adjacent area, the reasonableness of the ordinance may be sustained.

BENCHES ON PUBLIC PROPERTY

(No. 11143—City Council—M. H. F.—May 10, 1949.)

Under date of May 5, 1949, you forwarded to us a copy of a proposed ordinance introduced at the April 22d meeting of the City Council and referred to your committee. You request our opinion as to whether or not such an ordinance would be valid if passed.

The ordinance is one under which the Commissioner of Streets and Electricity (described in the draft as Commissioner of Streets) would be authorized to grant permission, under revokable permits, to persons, firms or corporations to install and maintain benches upon the public ways of the city, for the accommodation of persons awaiting public transportation and others, and to place advertising matter and signs upon the benches. The size of the benches is prescribed, the permit fee fixed at $2.00 per year for each bench, and when application is made after July 1st at $1.00. The person installing the benches is required to post an indemnity bond conditioned to protect the city against claims for death or injury resulting from the installation or maintenance of the benches, and the Commissioner is authorized to control the exact location of the benches in the interest of convenience to the traveling public, and to cause removal of the benches in case they obstruct passage along a public way or create hazards to persons traveling thereon. No regulations are incorporated as to the character of the advertising matter or signs except to the extent of inhibiting the use of words such as "stop", "damage", "drive in", or other such words which might tend to cause traffic confusion.

In its main features the ordinance is a delegation of authority to a municipal official to grant permits to private persons to make an extraordinary use of the public ways for the pecuniary gain of the permittees in the advertising business, under the cloak that the benches upon which the signs and private advertising matter are to be placed may be of some accommodation to "persons awaiting public transportation and others." Obviously, the obtaining of financial profit through the sale of advertising space on the benches furnishes the basic reason why the permittees might be willing to install and maintain the benches at their cost and expense, and not the altruistic purpose of affording the public places for rest and relaxation. Under the ordinance the city receives no share of the profits derived through the sale of the advertising space and no revenue except the permit fees.

Manifestly the benches would have to be securely anchored to the sidewalk or parkway portion of the public way to prevent them from being moved into the vehicular portion of the street or carried off. They would therefore be permanent obstructions or what the law terms purprestures upon the public way. A permanent encroachment upon the public way for private use is a purpresture and is in law a nuisance. *Hibbard & Co.* v. *City of Chicago* (1898), 173 Ill. 91.

In and by the Revised Cities and Villages Act, Chapter 24, Illinois Revised Statutes, the city has been granted many and broad powers over streets. Among such powers are the following: To prevent and remove encroachments or obstructions upon the streets and other municipal property (section 23-11); to regulate the use of the space over the streets, alleys, other municipal property, and public places of the city, and upon payment of the proper compensation, to be fixed by ordinance, to permit the use of the space more than twelve feet above the level of such streets, alleys, property or places, except for purely private uses (section 23-15); to regulate and prevent the use of streets, sidewalks, and public property for signs, sign posts, awnings, awning posts, telegraph poles, watering places, racks, posting handbills and advertisements (section 23-21); to license street advertising by means of billboards, sign boards and signs; and to regulate the character and control the location of billboards, sign boards, and signs upon vacant property and upon buildings (section 23-22).

It will be noted that the power conferred by section 23-15 to permit the use of space above the level of streets specifically excepts the use for purely private purposes, and that the authority given by section 23-22 to license street advertising by means of billboards, sign boards and signs refers to the licensing and regulation of street advertising by means of signs upon vacant property and upon buildings. It will also be noted after examination of all the powers conferred with reference to streets that the great majority of grants are those designed to preserve and protect the streets for street purposes and to prevent their use for purely private purposes.

In the case of *The People* v. *Wolper* (1932), 350 Ill. 461, a case involving the validity of a curb gasoline pump license ordinance, whereby the city sought to authorize the erection and maintenance of curb pumps and to exact license fees for their use, the court declared the pumps to be purprestures upon the streets for private use, nuisances per se, and held that they might be abated as such.

Should the proponents of the ordinance in this opinion considered claim that there is a public use or function involved in the maintenance of the benches for accommodation of the public and that the joining of a private use with the public use is authorized, such claim may readily be shown to be untenable. It is answered by the decision of the Supreme Court of Illinois in *The People* v. *Clean Street Co.* (1907), 225 Ill. 470. That case involved an ordinance authorizing certain officials of the City of Chicago to enter into a contract under which the contractor was given the privilege of placing upon the highways of the city, at street intersections and other convenient and suitable places, refuse boxes or receptacles for the deposit of waste paper and other litter. The refuse was to be removed by the contractor without cost to the city. The contractor was given the privilege of selling advertising space and placing advertising signs on the boxes, and was required to pay to the city a portion of the money collected by it from patrons for the use privilege of having their advertisements placed upon the boxes. It was contended on behalf of the contractor that the city in the exercise of its control over its streets had the power to place refuse receptacles upon its streets and that it was proper to join a private use with a public use of such obstructions without the boxes constituting nuisances or purprestures. The court disposed of the contention and observed that by the contract the Clean Street Co. was authorized to use the streets and public places of the city for the purpose of advertising the private business of any person, a right or privilege the city authorities had no power to grant.

There is a distinction made between street obstructions which are in aid of travel and traffic control and those which are for the private use and benefit of certain persons. The former comprise curbs, safety islands, lighting fixtures, signs displaying street names and indicating no parking zones, and traffic control structures and signals. These may be permitted as they do not impair the right of the public to the use of the streets, but may be regarded as in aid of such public use. On the other hand rights in streets for private purposes are condemned in repeated decisions of the courts holding that a municipal corporation can grant no right therein not of a public nature. It is not seen that it could be seriously contended that rights given to permittees under the proposed ordinance to place advertising matter and signs upon benches for their private pecuniary gain in the advertising business, would be for the benefit of the public generally, or would be in furtherance of the right to use the streets for their primary purpose of travel.

Furthermore, the display of advertising matter and signs upon benches installed at street intersections might well be condemned on the score of hazards to traffic and safety. Surely distracting the attention of motorists and the reading of advertisements would not contribute to safe driving or give protection to pedestrians.

Similar proposals to the one now discussed have been heretofore examined by this department and commented upon in its opinions. See opinion to the Commissioner of Streets and Electricity dated February 21, 1944, relative to sale of advertising space on traffic control signals; also opinion concerning advertising on street refuse boxes, Volume XIII, page 127; also on last mentioned subject, Volume IV, page 80.

Our opinion therefore is that the proposed ordinance would not be valid if passed.

HANDBILLS ON AUTO WINDSHIELDS

(No. 11389—A. M.—May 21, 1951.)

Your letter dated May 9, 1951, addressed to the Honorable Martin H. Kennelly, Mayor of the City of Chicago, has been referred to this Department for attention and reply. You state that, frequently, upon returning to your automobile which you had left parked in a public street, you find that someone had inserted some advertising matter under the windshield wiper of your car. From the sample submitted with your letter, it appears that these circulars occasionally take the form of handbills soliciting patronage to night clubs featuring scantily-clad female dancers and "strip-tease" performers. Your inquiry is whether the dissemination of such material in this manner is prohibited by the city ordinances. The answer is "yes".

Section 29 of Chapter 36 of the Municipal Code of Chicago provides as follows:

> "36-29. No person shall hand circulars, handbills, folders or other advertising matter to the occupants of automobiles operated or standing in the public way, or place or thrust such circulars, handbills, folders or other advertising matter into or upon or under the windshield wiper of an unoccupied automobile standing in the public way. Any person violating any of the provisions of this section shall be fined not less than two dollars nor more than ten dollars for each offense."

Inasmuch as the aforementioned ordinance specifically prohibits the placement of advertising matter of whatever nature under the windshield wipers of unoccupied cars, we need not pass upon the question whether or not the subject matter of the circular submitted with your letter renders its distribution unlawful under other provisions of the Municipal Code.

Prosecutions for a violation of city ordinances may be initiated by the filing of a complaint by any person having knowledge of the violation and of the identity of the person committing the violation.

ADVERTISING ON PARKING METERS

(No. 11464—City Council—A. F. G.—January 2, 1952.)

With your letter of December 18, 1951, you transmitted draft of a proposed ordinance to amend section 36-30 to permit the use of parking meter standards for advertising purposes. You ask our opinion as to the right of the city to authorize such use.

This office has been called on over the years to furnish opinions on similar proposals and has uniformly held that the city was without authority to permit the use of the streets for private purposes.

One of the latest of such opinions involving a very similar proposal: an ordinance to permit advertising on top of traffic control signals (stop and go lights) is published in full in Volume XXII Opinions of the Corporation Counsel at page 469. In another opinion in the same volume at page 457 we held that the city had no authority to enter into contract leasing the side of waste paper cans as sites for advertising posters. In both of these opinions we cited the case of *The People* v. *The Clean Street Company*, 1907) 225 Ill. 470.

In that case the court had under consideration an ordinance of the City of Chicago authorizing certain of its officials to take such steps as they might deem effective to prevent casting of litter upon the streets, to provide for the erection in the streets of suitable boxes for such litter, and to enter into contracts for the purpose of accomplishing such object. A contract based upon the ordinance, was made with the Clean Street Company to provide and service the boxes, under the terms of which the company was given control and authority over the outside surface of the boxes to rent or sell the space for advertising purposes at such prices as it might see fit, accounting to the city for a certain per cent of its profits. This contract was later assigned to one Jenney. Suit was filed in the name of the People, upon the relation of the state's attorney against the company and the city, praying that the contract be declared void and that the boxes be declared to be a nuisance and ordered removed from the streets. The lower court dismissed the suit for want of equity and the case was taken to the Supreme Court which latter court reversed the decree. The Supreme Court held the ordinance and contract void, and beginning on page 482 of its opinion said:

> "By this contract he was authorized to use the streets and public places of the city for the purpose of advertising the private business of any person or corporation and have exclusive control over the same. The city authorities had no power to grant or delegate any such right or privilege. While the title to the streets and alleys of a city is vested in the city and it has full power and control over them, yet it has full power and control over them, yet this authority must be exercised according to well established rules of law. The public authorities are merely the custodians or trustees for the public, which must be given the full use and enjoyment of all such streets without obstruction, and without authority of the city council to use or encroach upon them, or authorize others to do so for purely private purposes. By the ordinance and contract the city authorities sought and attemped to turn over the use of certain portions of the street for the exclusive benefit of private individuals, and their action in this regard must be held illegal and void."

In the following opinions we were compelled to hold the corporate authorities were without power to permit the use of the streets for private purposes:

Advertising on lamp posts	Vol. II p. 583
Advertising on refuse cans	Vol. 13 p. 127
Use of newspaper stands for advertising	Vol. 18 p. 677

It is our opinion therefore that the council is without power to permit the use of parking meter stands for advertising purposes as proposed in the ordinance submitted.

D. TRAFFIC AND PARKING REGULATIONS

FEDERAL EMPLOYEES

(No. 11160—Chief of Traffic—S. R. D.—July 15, 1949.)

An opinion has been requested from this office as to whether federal employes are subject to Loop parking regulations and particularly on the streets surrounding the United States Court House.

This question involves the fundamental principles of whether or not a government employe is subject to traffic regulations of the city or state. McQuillin on Municipal Corporations, 2nd Edition, Vol. 2, Par. 835 on page 1024 states the general principles of the law as follows:

> "Local police regulations which do not impose restraints upon interstate or foreign commerce and which do not conflict with the power of the Congress under what is called the "Commerce Clause" of the Constitution of the United States will be sustained."

It has been held that drivers of government mail motor vehicles must comply with local regulations. The principle of law is stated in 60 C.J.S., Par. 21 on page 131 as follows:

> "Such a driver, however, must comply with local traffic regulations in instances where no inconsistent rule of conduct has been prescribed for him by congress or by the postmaster-general and he may be held responsible where he himself has been guilty of negligence."

An early case dealing with this subject is that of *United States* v. *John Hart* (1817) 1 Peters Circuit Court Reports 390. The defendant was indicted in the Federal Court for knowningly and willfully retarding the passage of the mail. He was a constable of the City of Philadelphia and stopped the passage of a coach going at an immoderate rate so as to endanger the lives and safety of the citizens. The defendant was also charged with stopping the passage of a mail coach because the stage had runners but no bells were placed on the horses. The defendant justified his conduct under an ordinance of the City of Philadelphia which subjected every person to a fine who should drive at an immoderate rate in the city so as to endanger the citizens thereof and who should drive a carriage on runners without bells on the horses. The defendant was found not guilty, the court saying (page 393):

> "We are of opinion that it [Act of Congress] ought not to be so construed as to shield the carrier against this preventive remedy, because a temporary stoppage of the mail may be the consequence. Suppose the officer had a warrant against a felon who had placed himself in the stage, or that the driver should commit murder in the street in the presence of an officer, and then place himself on the box; could it be contended, that the sanctity of the mail would extend to protect those persons against arrest, because a temporary stoppage of the mail would be the consequence?—we think not. It could not be said in any of those cases, that the act amounted to a wilful stoppage of the mail."

In *Commonwealth* v. *Closson* (1918) 299 Mass. 329, 118 N. E. 643, the defendant, a mail carrier, was arrested for violating a city ordinance regulating the mode of turning at the corners of streets. The defendant was found guilty and the conviction was sustained by the Supreme Court of Massachusetts which said (118 N. E. 654):

"The use of the streets by travelers of every description is not prohibited. It is only the mode of operation by drivers of vehicles which is regulated, and being reasonable, because well adapted for the security and protection of all travelers, the rules are constitutional, and their violation is punishable as a criminal offense."

In *People* v. *Department of Sanitation* (1948) 86 N.Y.S. 2d 437, the defendant, the registered owner of a vehicle was charged that the said vehicle was parked for twenty minutes in front of the premises 57 Pine Street, Manhattan, a restricted area where parking was prohibited as indicated by police signs. The court held the defendant guilty saying (page 440):

"It is no defense that the vehicle here involved was being used "on official business" while parked in front of the office of the Department of Investigation. It would be discriminatory to exempt a public owned vehicle from the provisions of the laws regulating the use of public streets by motor vehicles or to permit a publicly owned vehicle the use of a street denied to the public, except, of course, such extraordinary use by emergency vehicles required by a true emergency.

"It is hornbook law that the highways and the streets are dedicated solely to public use and the passing and repassing of the public upon the entire width of the highway or street unobstructed and uninterrupted. The parked automobile, regardless of ownership, repeatedly has been characterized in the cases as "a public nuisance", "a menace to public safety," "a threat to the safe control of vehicular traffic", "an interference with the progress of a City's commercial activities". The automobile, too, regardless of ownership, has been described as "an intrinsically dangerous vehicle". Regulations respecting its use upon the highways and streets became most essential for the public welfare. The result is the Vehicular and Traffic Laws and Regulations governing the use and operation of motor vehicles on the streets and highways.

"Those laws and regulations apply to all vehicles, publicly owned and privately owned alike.

"The New York State Vehicle and Traffic Law charges police authorities with its enforcement strictly and impartially."

In *Hail* v. *Commonwealth* (1921) 105 S. E. 551, the defendant was fined for operating a government truck along a public street at an unlawful rate of speed. The court in a very extensive opinion reviewing all of the cases on the subject throughout the country sustained the finding of the trial court and said (page 554):

"So far as appears from the record of the case before us, "the United States has not spoken" on the subject of the speed at which it was the duty of the accused to travel in such way as to make the provisions of the Virginia statute in question in any way interfere with the performance of the Federal duties of the accused.

The case will therefore be

Affirmed."

In *Johnson* v. *Maryland* (1920) 254 U. S. 51 the court said (page 56):

"Of course an employee of the United States does not secure a general immunity from state law while acting in the course of his employment. That was decided long ago by Mr. Justice Washington in *United States* v. *Hart*, Pet. C. C. 390. 5 Ops. Atty. Gen. 554. It very well may be that, when the United States has not spoken, the subjection to local law would extend to general rules that might af-

fect incidentally the mode of carrying out the employment—as, for instance, a statute or ordinance regulating the mode of turning at the corners of streets. *Commonwealth* v. *Closson,* 229 Massachusetts, 329."

From the foregoing cases it is our opinion that federal employes are subject to Loop parking regulations.

FOREIGN CONSULATES

(No. 11165—Commissioner of Police—J. L. S.—August 5, 1949.)

We acknowledge receipt of your letter of July 11, 1949 attaching a report dated July 8, 1949, from the Chief of Traffic, in which he requests our opinion as to what action should be taken by your office in regard to persistent violation of the Traffic Rules and Regulations governing the parking of automobiles in Restricted Areas by members of the foreign Consulates in Chicago.

Your inquiry raises the questions of whether foreign consuls are subject to the traffic rules and regulations of a city or state and whether they are immune from arrest and service of process in the state courts. The power of the various states to enact police regulations for the health, welfare and safety of their respective communities comes within the powers reserved to the states. This power must be reasonable and not in conflict with any of the expressed or implied provisions of the Constitution. The Court, in *Commonwealth* v. *Closson,* (1918) 118 N. E. (Mass.), 653, at page 654 said:

> "The use of the streets by travelers of every description is not prohibited. It is only the mode of operation by drivers of vehicles which is regulated, and being reasonable, because well adapted for the security and protection of all travelers, the rules are constitutional, and their violation is punishable as a criminal offense."

In the case of *People* v. *Department of Sanitation,* (1948) 86 N. Y. S. (2d) 437, where a department of sanitation vehicle on official business, was parked in a restricted area, the court held (p. 440):

> "It is no defense that the vehicle here involved was being used on 'official business' while parked in front of the office of the Department of Investigation. It would be discriminatory to exempt a public owned vehicle from the provisions of the laws regulating the use of public streets by motor vehicles or to permit a publicly owned vehicle the use of a street denied to the public except, of course, such extraordinary use by emergency vehicles necessarily required by a true emergency."

Therefore, it is seen that the police powers of a state extend to all those residing within its geographical boundaries unless specifically exempted by the Constitution or federal law. Ambassadors and ministers of state are specifically immune from the police powers.

Bouvier's Law Dictionary (3rd Rev.), at page 185, states the general rule of law as follows:

> "The person of an ambassador is inviolable. He is exempt from both the criminal and civil jurisdiction of the country to which he is sent."

This rule, however, is limited to ambassadors and ministers of state and does not include consuls. In *Amer.* v. *Costa,* D. C. Mass (1938), 23 Fed. Supp. 22, the court says (p. 22):

> "Consuls of foreign countries are not entitled to the immunities from suit accorded to ambassadors and ministers by statute."

International law gives to consuls and like diplomats no immunity from civil or criminal process. In Ops. of Corp. Coun., Vol XVIII, p. 451, sec. 8461, we held:

> "Foreign consuls in the United States in their private capacity are entitled to no immunities beyond those enjoyed by any other foreigners in this country, except that of suing and being sued exclusively in the federal courts. Such consuls must look for protection of their personal and property rights to the laws of the state in which they reside."

It is our opinion that consuls are subject to traffic rules and regulations of the cities and states and cannot claim the same privileges and immunities as extended to ambassadors and ministers of foreign states.

The second question is the jurisdiction of our courts over foreign consuls.

Title 28, United States Code, Judiciary and Judicial Procedure, ch. 646, Public Law 773, sec. 1351, p. A 88, states:

> "The district courts shall have original jurisdiction, exclusive of the courts of the states, of any civil action against consuls or vice consuls."

The phrase "exclusive of the courts of the states" when read with section 1352 of the same act, means that the state courts are shut out and cannot take jurisdiction. Section 1352 grants the district courts original jurisdiction concurrent with the state courts in any action on a bond executed under any law of the United States. This section would indicate that if Congress intended the state courts to have jurisdiction in civil actions against consuls or vice consuls it would have used the term "concurrent with" rather than "exclusive of" as it does in section 1352. The exclusive jurisdiction of the district courts in matters pertaining to suits against consuls and vice consuls is limited to civil actions (sec. 1351).

The next question is whether or not the violation of an ordinance comes within the meaning of the term "civil proceeding". Ruling Case Law, Vol. 8, sec. 4, p. 53, holds:

> "At common law and independent of statutory enactments, punishments for the violation of municipal ordinances were treated as civil actions, the imprisonment, after the noncompliance with the order of the court imposing the payment of a fine, being looked on not in the light of a punishment, but as a means of compelling a compliance with the order of the court and of enforcing payment, and such is the general view at the present time. Whether or not they are to be regarded depends to a great extent on whether such offenses are made punishable by the general law as crimes or misdemeanors. If such violations are not made crimes by the general law the proceedings to enforce or for a violation of such ordinances are civil in their nature. If such offenses are made crimes or misdemeanors by the general law of the state, the proceedings must be considered as criminal in their nature. The distinction appears to be correct, for many of the offenses which are punishable under municipal ordinances are not offenses against the state, either by the common or the statute law, and are made so only by the ordinance in the particular case in question, and for this reason they have been termed quasi criminal. However, there is authority that under a particular statute or the constitution of a state a violation of a municipal ordinance may be a crime; or, as it is sometimes stated, a quasi crime."

The following cases indicate that suits to recover for violations of an ordinance are quasi criminal in nature but in the form of a civil proceeding in Illinois. In *Baldwin* v. *City of Chicago,* (1873), 68 Ill. 418, the court said (p. 418):

> "inasmuch as a suit for the violation of an ordinance was a civil proceeding in form, and only *quasi criminal* in its character, the city as well as the defendant, had the right of appeal."

In *Tully* v. *Northfield,* (1880) 6 Ill. App. 356, the court held (p. 356):

> "The Criminal Court of Cook County has jurisdiction of an appeal from a justice of the peace imposing the penalty prescribed by the statute for obstructing a highway. Actions to recover a statutory penalty are in their nature *quasi* criminal."

The court defines what is a quasi crime, as follows (p. 359):

> "A *quasi* crime does not embrace an indictable offense, whatever be its grade, but simply forfeitures for a wrong done to the public, whether voluntary or involuntary, where a penalty is given, whether recoverable by civil or criminal process."

In *City of Chicago* v. *Knobel,* (1907) 232 Ill. 112, the court said:

> "A proceeding by a city to recover a penalty for violation of an ordinance is not a criminal proceeding but a civil suit."

In *City of Chicago* v. *Streeter,* (1910) 152 Ill. App. 463, appears this statement:

> "An action to recover a penalty for violation of a municipal ordinance is not a criminal prosecution but a civil suit."

To the same effect are *City of Chicago* v. *Shreffler,* (1912) 175 Ill. App. 547; *City of Kewanee* v. *Puskar,* (1923) 308 Ill. 167, 168; and *City of Chicago* v. *Terminiello,* (1948) 400 Ill. 23, 29, where the court held on review that prosecution for the violation of the Revised City of Chicago Code of 1939, ch. 193, par. 1 (1) was a civil nature.

Summarizing the above discussion, we are of the opinion that (1) foreign consuls are subject to the traffic rules and regulations of the city; (2) that since the federal courts are given exclusive jurisdiction in civil matters pertaining to consuls and vice consuls by federal statute, the state courts are without jurisdiction and suits, if any, should be filed in the United States District Court.

LOOP DELIVERIES

(No. 11166—Commissioner of Police—H. H. P.—August 10, 1949.)

In your letter dated August 1, 1949, you inquire whether the motor vehicles of the Manz Corporation, which consist of five Chevrolet Business Coupes and one Plymouth Business Coupe, and which are used for making deliveries, should be allowed the same parking privileges as commercial vehicles in the Loop area and elsewhere.

Attached to your letter is a copy of a letter from Charles G. O'Regan, Chief of Traffic, to you, in which he states that the Manz Corporation is concerned only with parking in the Loop area. Chief O'Regan's letter sets forth the provisions of section 27-29 of the Municipal Code of Chicago

wherein passenger vehicles are allowed not more than three minutes for parking to load and unload passengers; and commercial vehicles are allowed not more than thirty minutes "for the reasonable expeditious loading, unloading and delivery and pick-up of materials,"

We will confine our opinion to an interpretation of section 27-29.

It appears to us that a determination of the question involves the definition of "commercial vehicles." Black's Law Dictionary, 3rd ed., p. 359, defines "commercial" as:

"Relating to or connected with trade or commerce in general."

If the Manz Corporation actually uses the foregoing motor vehicles for the loading, unloading, delivery and pick-up of materials used in its business then we are of the opinion that they fall within the definition and should be regarded as commercial vehicles.

FOREIGN CONSULS

(No. 11175—Commissioner of Police—J. L. S.—September 9, 1949.)

We acknowledge receipt of your letter of August 9, 1949 attaching a report dated August 6, 1949 from the Acting Chief of the Traffic Bureau in which he requests our opinion as to whether Eduardo L. Rosal, Vice Consul, Philippine Consulate, is immune from arrest for disobedience to a traffic signal, whether the arresting officer acted within his rights when he took action for a hazardous traffic violation; and whether the traffic bureau should petition the Chief Justice of the Municipal Court to void the summons in question.

In our letter of August 5, 1949, in answer to your request for our opinion as to what action should be taken by your office in regard to persistent violation of the traffic rules and regulations governing the parking of automobiles in restricted areas by members of the foreign consulates in Chicago, we concluded:

1. Foreign consuls and vice consuls are subject to traffic rules and regulations of the City; and

2. Since the Federal courts are given exclusive jurisdiction in civil matters pertaining to consuls and vice consuls by Federal statute, and an action to recover a penalty for violation of a municipal ordinance is a civil matter, the state courts are without jurisdiction.

Therefore we are of the opinion that Eduardo L. Rosal, Vice Consul, Philippine Consulate, can claim no immunity to arrest for disobedience to a traffic signal and that the arresting officer acted within his rights when he took action for a hazardous traffic violation. However, as the Municipal Court has no jurisdiction over the matter, we suggest that the traffic bureau petition the Chief Justice of the Municipal Court to void the summons in question and that if you desire to prosecute the matter further, suit then must be instituted in the United States District Court.

GENERAL TRAFFIC POWERS

(No. 11249—City Council—A. F. G.—February 10, 1950.)

In your letter of February 7, 1950 you request our opinion on several matters connected with your consideration of recommendations of The Traffic Institute for amendment of existing traffic regulations.

First, you ask whether the city has power to require railroad companies to post clearance distances on all railroad underpasses in Chicago?

Our answer is in the negative. Since the enactment of the Public Utility Act all powers of cities over the operation, maintenance and equipment of railroads have been taken away and vested in the Illinois Commerce Commission. By Section 57 of the Public Utility Act, the Commerce Commission has jurisdiction to require railroad companies to "maintain its equipment or other property in such manner as to promote and safeguard the health and safety of * * * the public * * * and to require the performance of any other act which the health or safety * * * of the public may demand."

You then ask our opinion as to whether the city has the legal right to prosecute speeding violations under section 27-38 of the Municipal Code of Chicago rather than under section 49 of the Uniform Act Regulating Traffic.

In a recent opinion to the Commissioner of Police (December 22, 1949) in response to his inquiry whether speeding violations may be booked under section 27-38 of the Code instead of under section 49 of U. A. R. T., we said:

> "Since section 26 (Motor Vehicle Law) provides that ordinances limiting or restricting the speed of motor vehicles or motor bicycles 'are hereby declared to be of no validity or effect' we are of the opinion that section 27-38 of the Municipal Code is void and arrests thereunder would be illegal."

You next cite a proposed recommendation which reads as follows:

> "(b) This section shall not operate to relieve the driver of any authorized emergency vehicle from the duty to drive with due regard for the safety of all persons using the highway."

You ask "whether in the event this proposed regulation was enacted, the City would be liable for accidents caused by representatives of the Fire Department while on duty."

It is our opinion the adoption or rejection of the proposed regulation would not affect the liability of the City. That liability is fixed by statute. Section 1-13 of the Revised Cities and Villages Act, is as follows:

> "1-13. Liability for injuries caused by firemen. In case any injury to the person or property of another is caused by the negligent operation of a motor vehicle by a member of a municipal fire department while the member is engaged in the performance of his duties as fireman, and without the contributory negligence of the injured person or the owner of the injured property or the agent or servant of the injured person or owner, the municipality in whose behalf the member of the municipal fire department is performing his duties as fireman shall be liable for that injury. But in no case shall a member of the municipal fire department be liable in damages for any injury to the person or property of another caused by him while operating a motor vehicle while engaged in the performance of his duties as a fireman."

By the foregoing provision the municipality is made liable for injuries or damage caused by the negligent operation of a motor vehicle by a member of the fire department in the performance of his duties as fireman, where there has been no contributory negligence by the person injured or damaged, and the fireman is granted immunity from liability for his negligence in operating a motor vehicle in the performance of his duties as fireman.

Finally you submit three proposed sections dealing with forms and records of traffic violations; disposition, record and cancellation of notices and complaints of traffic violations, etc., and inqquire if the proposed regulations would be legal or in conflict with the Municipal Court Act.

Section 44 of the Municipal Court Act provides that forms for summonses, bond, attachment writs and other necessary papers for use of the parties to suits in that court, shall be prescribed by the chief justice of that court. Your proposed ordinance in paragraph (a) of Section 190.1 provides that forms of traffic violations, notices and complaints shall be "in the form prescribed and approved jointly by the judges of the Municipal Court of Chicago and the commissioner of police." In view of said section 44 we are of the opinion that the word "judges" in the next to last line of paragraph (a) should be stricken and the words "chief justice" inserted in lieu thereof.

TEMPORARY CARDBOARD NO-PARKING SIGNS

(No. 11296—Commissioner of Streets and Electricity—H. H. P.—May 3, 1950.)

Your letter of April 24, 1950 requests our opinion upon the following questions:

1. Does the placing, by the Bureau of Sanitation, of cardboard signs reading, "No Parking from 6:30 A.M. to 4 P.M., this block being cleaned by mechanical sweeper—City of Chicago—Bureau of Sanitation," on several posts in the affected block on the day previous to the day of cleaning, authorize the police department, under section 27-3 of the Municipal Code of Chicago, to arrest the owners of cars parked in said block during the time designated on said signs?

2. If the answer to question No. 1 is no, can an ordinance be passed by the city council authorizing such action?

Section 27-3 provides as follows:

> "The department of streets and electricity is hereby empowered to make regulations necessary to make effective the provisions of this chapter and to make and enforce temporary regulations to cover emergencies or special conditions."

Since section 27-3 is in the chapter entitled "Traffic," the provision in said section that it is for the purpose "to make effective the provisions of this chapter," can only refer to a traffic situation. The Bureau of Sanitation, created under section 14-11 of the Municipal Code of Chicago, was established for "the cleaning of public ways and the removal of garbage, refuse and waste." The problem at hand arising under section 14-11 prevents section 27-3 from applying.

Aside from the fact that section 27-3 appears to apply to a traffic rather than a sanitation situation, we are of the opinion that even if section 27-3 could be construed to cover the situation under discussion, it would be void as an unauthorized delegation of legislative power to an executive authority.

In *People* v. *Clean Street Co.*, 225 Ill. 470 (1907), which case involved an ordinance of the City of Chicago, it was held that an ordinance authorizing three ctiy officials to take such steps as they might deem effective to prevent the casting of waste paper and other litter on the streets, in

violation of existing ordinances, and to contract for a term not to exceed 15 years for the purpose of accomplishing such object, was void as an unauthorized delegation of power. The court said (p. 479):

> "It will be seen that the control over the streets and alleys of a city or village, under this statute, (Section 62 of the City and Village Act, which authorized city authorities to provide for the cleaning of streets etc.) is very broad, and absolute power over them is vested in the municipality. But the authority is not vested in the mayor, chairman of the committee on finance or commissioner of public works, but is conferred upon the legislative branch of the city government. In other words, it is vested in the city council, and can only be exercised by it through ordinances duly passed. The ordinances may, of course, be enforced or carried into effect after they are so passed, by the mayor or other officials designated for the purpose. It is a well known rule of law that the city council cannot delegate to any of its officers discretionary authority which is vested by statute or charter in it."

Section 13 of article 23 of the Revised Cities and Villages Act (Ill. Rev. Stat. 1949, ch. 24, par. 23-13) confers authority on the City of Chicago as follows:

> "To provide for the cleaning of streets and other municipal property."

We are of the opinion that under paragraph 23-13 an ordinance, specifically covering the problem under discussion, can be enacted.

FAULTY TRAFFIC SIGNALS

(No. 11309—Commissioner of Streets and Electricity—S. A.—June 16, 1950.)

We have your letter of May 15th in which you request an opinion as to what constitutes a reasonable exercise of corporate duty in restoring inoperative traffic control signals to normal operation. This inquiry is prompted by the decision handed down recently by the Appellate Court in the case of *Matilda Johnston* v. *City of East Moline*, a municipal corporation, 405 Ill. 640 (1950).

In order properly to understand the operation of the electrical department in its handling of emergency repair work, two members of the Department of Streets and Electricity were invited to a conference held in L. Louis Karton's office. Present at this conference, in addition to Mr. Karton and the undersigned, were Ralph Michel and Michael Robinson. The question of what constitutes a reasonable period of time before repairs are made was discussed quite thoroughly in addition to the question of what would constitute a safe intersection after a traffic signal knock-down. It was decided to hold a second conference to obtain the opinions of men closely connected with this work. Present at this second conference, in addition to Mr. Michel, Mr. Robinson and the undersigned, were the following members of the Department of Electricity: Arthur M. Krause, Joseph Fleischer, and Fred Snyder. After a complete discussion of the aforementioned problems, the following plans were developed:

(1) That emergency crews should be provided for night service so that prompt attention can be given to repair of damage traffic lights and the intersection rendered safe for traffic.

(2) In order to make the intersection safe for traffic where normal operation cannot be immediately restored, the red lights to be flashed on and off through the other signals still operating as a warning to approaching motorists.

(3) Where the signal light system will not permit the method suggested in No. 2 and it is not practical to place a lighted warning sign at the intersection, then all the traffic lights at the intersection to be put out of operation until proper repairs can be made and normal service restored.

In answer to your question as to what is a reasonable period of time to make the necessary repairs we can only say that this is a question of fact for a jury to decide. In some cases that have been tried against the City the courts have held that a couple of hours is sufficient time, depending upon the facts and circumstances in each case.

We respectfully submit that adoption of the above plans would, we believe, decrease traffic hazards and possible liability.

POWER TO ACQUIRE PARKING SITES

(No. 11342—City Council—A. F. G.—October 17, 1950.)

As chairman of the Joint Subcommittee on Parking, of the Committee on Traffic and Public Safety and of the Committee on Finance you state that your joint committee has under consideration the "Parking Plan for the Central Area of Chicago," prepared by the Chicago Association of Commerce and Industry. The Plan recommends initially seven off-street parking projects, two of which are located east of Michigan avenue on property controlled by the Chicago Park District.

One of the proposed sites is from E. Monroe street north to approximately E. Randolph street, the other from E. Van Buren street to E. Congress street, both to occupy an underground structure in that part of Grant Park, between the east line of S. Michigan avenue and the right of way of the Illinois Central Railroad.

You ask our opinion as to the power of the City of Chicago or a parking authority to acquire by lease or otherwise properties as above described now controlled by the Chicago Park District, on which it is proposed to establish parking projects; and also an opinion as to the power of the city or a parking authority to negotiate and contract with the Chicago Park District for the purpose of expanding and increasing the present parking facilities now owned and operated by the Chicago Park District.

Under section 1 of Article 52.1 of the Revised Cities and Villages Act, the city is authorized to: "Acquire by purchase or otherwise, own, construct, equip, manage, control, erect, improve, extend, maintain and operate motor vehicle parking lot or lots, garage or garages, parking meters, and any other revenue producing facilities necessary or incidental to the regulation, control and parking of motor vehicles * * * as the corporate authorities may from time to time find the necessity therefor exists, * * *" etc. The section continues that land may be acquired by various means, including eminent domain, and that its purchase may be accomplished by the issue and sale of bonds. The Act granting this authority and an ordinance of the City of Kankakee adopted thereunder were held valid in a recent case by our Supreme Court in *Poole* v. *City of Kankakee*, Docket No. 31540—Agenda 42—May, 1950.

Title to Grand Park is in the City of Chicago subject to the restriction that no buildings shall be erected thereon, (*City of Chicago* v. *Ward*, 169 Ill. 392, 415.) But by two ordinances of the City of Chicago (July 27, 1896 Special Ordinances, pp. 254-258 and July 20, 1903 Council Journal, pp. 936-937) authority was given to the South Park Commissioners (now Chicago Park District) to take, regulate, control and govern the area between E. Randolph street and Park Row and Michigan avenue and the lake, in the same manner as it may govern other parks and boulevards under its control, subject to certain reservations.

By virtue of An Act in relation to the transfer of real estate owned by municipalities, approved July 2, 1925, as amended, a method of making transfers of real estate from one municipality to another, which covers park districts and cities, is provided. By that Act the City Council by ordinance may declare that the area involved is necessary or convenient for it to use, occupy or improve in the making of any public improvement or for any public purpose and the Chicago Park District may then exercise the power, by a resolution passed by a vote of two-thirds of all the park commissioners, to transfer all of its right, title and interest in and to said land.

As the proposal is only to occupy the underground space in the area described and the proposed underground parking lot would in no wise interfere with the use of the park for park purposes, we do not anticipate any difficulty in securing the co-operation of the Chicago Park District in furthering this essential public purpose.

In answer to your second question whether the city has power to negotiate and contract with the Chicago Park District for the purpose of expanding and increasing any present parking facilities now owned and operated by the Chicago Park District, it is our opinion the city has such power, subject to the consent and approval of the Park District.

PEDESTRIAN TRAFFIC SIGNS

(No. 11367—Chicago Street Traffic Commission—E. R. H.—March 5, 1951.)

We acknowledge your letter of February 19, 1951, asking our opinion on the necessity of erecting traffic signs to warn pedestrians of traffic regulations. We presume you refer to traffic regulations of the Municipal Code.

Valid ordinances have the same force and effect as State statutes and all persons or corporations within the boundaries of a municipal corporation are required by law to take notice of the provisions of its ordinances.

The general rule of law is stated in 62 Corpus Juris Secundum at pages 854-55, paragraph 443.

> "* * * Ordinances or by-laws authorized by the character of the municipality enacting them and not in contravention of organic or statutory law have the same force and effect within the municipal territory as acts of the legislature as long as they stand unrepealed. They are only in form local enactments, and may correctly be said to be in force by the authority of the state. They have the local force and authority of a State statute whether originally authorized or subsequently ratified by the general assembly.

Persons and corporations within the corporate territory are bound to take notice of its ordinances when duly enacted and promulgated and to obey them * * *."

McQuillan on Municipal Corporations, 2nd Edition, Revised Volume 2 at page 677, paragraph 674, the rule of law is stated:

"Valid ordinances of municipal corporations are as binding on the corporators and the inhabitants of the place as general laws of the state upon the citizens at large. * * *"

At page 719, paragraphs 789-90 it is stated:

"Notices of the existence of ordinances is required to be taken by all upon whom they have a binding effect, as the inhabitants of the municipal corporation which enacted them; for the law will presume that they know the provisions of their ordinances. * * * So strangers coming within the corporate limits, and bound by the ordinances, are chargeable with notice thereof. Lastly, as all persons bound by the ordinances are charged with constructive notice of valid ordinances, no one when prosecuted for violation of an ordinance will be be permitted to show that he did not know if its existence."

This is the rule of law in Illinois. In the case of *Gammon and Company* v. *Standard Trust and Savings Bank*, 327 Ill. 489, the violation of a zoning ordinance of the City of Chicago was involved and the Supreme Court said at page 493:

"Both parties must be presumed to have known of the existence of the ordinance."

(Citing):

Mason v. *City of Shawneetown*, 77 Ill. 533.

Mather v. *City of Ottawa*, 114 Ill. 659.

Hope v. *City of Alton*, 214 Ill. 102.

The case of *City of Chicago* v. *Borband*, 297 Ill. App. 617, involved the question of the power of the City of Chicago to require by ordinance a taximeter test and a taxicab license of the owner of a taxicab whose place of business is in the City of Evanston and who makes a contract there for taxicab service to be rendered in the City of Chicago.

The Appellate Court stated at page 626:

"Municipal ordinances are binding on all persons within the territorial jurisdiction of the City in and for which they are enacted and since, as has been shown, the following ordinances are in effect in the City of Chicago regulating and licensing taxicabs, owners of such subject themselves to the provisions of said ordinances if they use their taxicabs for the transportation of passengers for hire within the limits of said city."

Section 27-24 of the Municipal Code of Chicago provides:

"The commissioner of streets and electricity shall place and maintain traffic control signs, signals, and devices when and as required under the traffic ordinances of this city to make effective the provisions of said ordinances, and, with the concurrence of the Chicago street traffic commission, may place and maintain such additional traffic-control devices as he may deem necessary and as may be authorized by the City Council to regulate traffic under the traffic ordinances of this city or under the State law, or to guide or warn traffic."

Section 27-28 provides:

"No provision of any traffic ordinance for which signs are required shall be enforced against an alleged violator if at the time and place of the alleged violation an offical sign is not in proper position and sufficiently legible to be seen by an ordinary observant person. Whenever a particular section does not state that signs are required, such section shall be effective even though no signs are erected or in place."

It is mandatory that the Commissioner of Streets and Electricity "place and maintain traffic-control signs, signals and devices when and as required under the traffic ordinances of this city." Signs need not be erected unless specifically required by ordinance.

Section 27-28 of the Code quoted above plainly provides:

"Whenever a particular section does not state that signs are required, such section shall be effective even though no signs are erected or in place."

Section 27-98 of the Code provides that pedestrians shall be subject to traffic-control signals as declared in section 27-29 and said section 27-29 defines the procedure of the pedestrian at traffic signals. No other signs are required by these sections and none need be placed. The law will presume that the pedestrian knows the provisions of the Code.

The pedestrian's rights and duties are defined by sections 27-98 to 27-106 inclusive and no warning signs need be erected as above stated, other than those specifically required.

BUILDING PARKING FACILITIES ON PARK DISTRICT PROPERTY

(No. 11369—Alderman, 29th Ward—A. F. G.—March 7, 1951.)

On February 21, 1950 you transmitted by messenger drafts of two bills, to which were attached a letter from Randall H. Cooper, President, State Street, Council, in which he stated the bills had been prepared by the North Michigan Avenue Association and reviewed by Chapman & Cutler.

One of the bills authorizes the Chicago Park District to:

"1. Construct, own and equip parking facilities under the surface of land belonging to the park district, as the corporate authorities from time to time find the necessity therefor exists.

2. Maintain, improve, extend and operate any such parking facilities and charge for the use thereof.

3. Enter into contracts dealing in any manner with the objects and purposes of this Act.

4. Borrow money and issue and sell bonds in such amount as the corporate authorities may determine for the purpose of acquiring, completing, erecting, constructing, equipping, improving, extending, maintaining or operating any or all such parking facilties, and refund and refinance the same from time to time at maturity or pursuant to redemption provisions or at any time before maturity with the consent of the holders thereof, as often as it shall be advantageous and in the public interest to do so."

The bonds provided for in the bill are payable solely and only from revenues to be derived from the operation of any such parking facilities acquired or constructed in whole or in part with the proceeds of such bonds, and shall be secured by a pledge of the revenue of any such parking facility so acquired or constructed.

The bill provides that the corporate authorities of the park district desiring to issue bonds for the said purpose shall adopt an ordinance describing in a general way the contemplated project and refer to plans and specifications therefor, which shall be kept on file ond open to the inspection of the public. Such ordinance shall state the estimated cost of such project fix the amount of the revenue bonds proposed to be issued, the maturity, the interest rate and all details in respect thereto. Such ordinance shall contain such covenants and restrictions as may be deemed necessary or advisable by the corporate authorities.

When bonds are issued it is the duty of the authorities to establish charges and fees for the use of the parking facilities sufficient at all times to pay maintenance, and operation costs and principal of and interest on such bonds, and all revenue shall be set aside as a separate fund.

Other provisions in the bill are intended to provide protection for bondholders. Section 8 authorizes the park district to make all reasonable rules and regulations not in conflict with the laws of the State or the ordinances of the district regarding the management and control and use of such parking facilities. The last section prohibits the park district from engaging in any proprietary activity at or with such parking facilities other than the parking of motor vehicles, but permits in cases of national emergency the use of such parking facilities as bomb shelters.

The other bill authorizes the Chicago Park District to lease subsurface rights under land of said District for the purpose of providing underground parking facilities for motor vehicles under such terms and conditions as the Park District may prescribe, subject to the following conditions:

The lease shall be for a period of years not exceeding ..... and shall not be renewable. Upon termination of all rights under such lease all improvements made on and to the premises shall revert to the Park District.

No lessee shall be permitted to use any subsurface rights so leased for any purpose other than for the underground parking of motor vehicles.

That the use of the subsurface rights so leased will not interfere with the use of the surface thereof, and any rights disturbed by the construction of such sub-surface parking facilities shall be restored so far as possible to their original state.

The last section is the same as the last section of the first bill.

It is our opinion that the program of the State Street Council in so far as the program provides for the use of the two parcels of Park District property on the east side of Michigan Boulevard between E. Randolph street and E. Congress street, and designated Project Nos. 4 and 5, could be carried out under either of these bills, but the consent and approval of the Chicago Park District would have to be secured in either case.

We might add that since receiving the drafts herein discussed, identical bills have been introduced in each legislative branch, being Senate Bill 137 and House Bill 210. These bills embody in one bill substantially all that is contained in the two drafts referred to, also they are in the form of amendments to the Chicago Park District Act instead of in the form of new laws as is provided in the submitted drafts.

We think the program referred to above could be carried out as well under the bills introduced as under the drafts submitted.

PRIVATE CROSSING GUARDS

(No. 11370—Chicago Street Traffic Commission—E. R. H.—March 8, 1951.)

We acknowledge your letter of February 19, 1951 in which you advise that at the January 17th meeting of the Street Traffic Commission, Leslie J. Sorenson, City Traffic Engineer, stated that requests had been made by

> "certain business houses to use guards at crossings adjacent to their plants after they had been screened and schooled by the Police Traffic Bureau. This was approved by the Former Police Commissioner, John Prendergast, but Captain Conlisk thought there was an inadequacy of statutory authority for such guards,"

and asked our opinion on the matter.

Chapter 173 of the Municipal Code of the City of Chicago provides in part:

> "173-3. An application of any person showing the necessity of appointment as a special policeman shall be made to the commissioner of police. The commissioner of police shall have power to appoint and swear in any number of special policemen to do special duty at any fixed place in the city, or at any of the necessary places for the protection of persons, passengers, and property being transported in interstate or intrastate commerce within the city, at the expense and charge of the applicant."

> "173-11. Every special policeman shall conform to and be subject to all the rules and regulations governing police officers of the city, and to such additional rules and regulations as the commissioner of police may make concerning special policemen. Special policemen shall possess all the powers of the regular police patrol at the places for which they are respectively appointed or in the line of duty for which they are engaged."

This office has rendered several opinions upon this section of the Code and all of these opinions assert the validity of this section of the Code based upon statutory authority.

(CITING):

Vol. 18, Opinions of the Corporation Counsel, pp. 105-106, Nos. 7145-8891.

Vol. 19, Opinions of the Corporation Counsel, p. 28, 9500.

Vol. 20, Opinions of the Corporation Counsel, pp. 20-21, Nos. 9793-9931.

Vol. 21, Opinions of the Corporation Counsel, p. 162, No. 10646.

In an opinion of this office upon Section 3744 of the Municipal Code of 1931, the provisions of which were similar to the provisions of Section 173 of the present Code, it was stated:

> "The Commissioner of Police may appoint special police to do special duty at any fixed place at the request of private individuals, at their charge and expense, but the place must be definitely and clarly circumscribed." (Opinions of the Corporation Counsel, Vol. 18, p. 106, No. 8891.)

In the case of *Komorowski* v. *Boston Store of Chicago*, 263 Ill. App. p. 88, the status of a private detective who was also a special patrolman,

appointed by the Superintendent of Police of the City of Chicago by virtue of a similar City Ordinance then in effect, was involved. The Court said at page 92:

> "Sullivan was not a regular police officer employed by the City of Chicago, but was a special patrolman appointed by the Superintendent of Police at the request of and employed by the McGuire and White Detective Agency. A regular City Policeman is appointed from an eligible list under Civil Service rules, received his compensation from the City, and may be discharged only under Civil Service regulations. Persons appointed as special patrolmen for special services are not in regular police service of the City."

In our opinion the Commissioner of Police has the power under the above section of the Municipal Code to appoint special police upon proper application for use as guards at crossings adjacent to the applicant's plant or place of business, provided that the area to be so guarded is definitely circumscribed by the Commission of Police.

PARKING PRIVILEGES FOR DOCTORS

(No. 11373—Commissioner of Police—H. H. P.—April 4, 1951.)

We have your letter of March 22, 1951, together with a Right of Way permit, dated August 26, 1924, issued to Dr. Robt. D. McCormick of 10008 S. Leavitt St., Chicago, Illinois.

You state that Dr. McCormick has inquired about parking privileges for doctors when making professional calls; that he claims that it is impossible at times for such doctors to find a place to park without doing so illegally; and that the doctors have been getting traffic tickets. You request an opinion on this subject and advice on the position your department should take in the matter.

The Right of Way permit does not provide for any parking privileges and the ordinance under which it was issued has been repealed so that at the present time there is no authority for any City Official to issue such a permit. Also, there is no ordinance touching upon an exception in favor of doctors in connection with illegal parking and police officers are charged with enforcing the law equally against all violators.

Perhaps an ordinance embodying a parking exemption in favor of doctors is the solution although it has been held that:

> "A municipal corporation cannot confer power upon one person to do an act which is prohibited to another having an equal right to do the same act, and ordinances cannot favor or discriminate against any person or class of persons, but must be uniform and of general operation within the corporate limits."

(*Hibbard & Co.* v. *City of Chicago*, 173 Ill. 91 at page 98 (1898).)

FEES FOR OVERNIGHT PARKING

(No. 11384—Commissioner of Subways and Superhighways—C. P. H. —April 30, 1951.)

We have your letter of March 21, 1951 wherein you request our opinion as to whether or not the city has power by ordinance to exact fees for

the privilege of parking motor vehicles overnight on the city's streets. You state that the purpose of the proposed ordinance is to obtain revenue to purchase, equip and operate parking lots for the storage of motor vehicles.

Under sections 23-10 and 23-27 of the Revised Cities and Villages Act, the city has express power to regulate the use of streets and the traffic thereon. (Ill. Rev. Stat. 1949, ch. 24, pars. 23-10 and 23-27.) In the case of *City of Bloomington* v. *Wirrick*, 381 Ill. 347, (1943) the court held that by virtue of these regulatory police powers, municipalities have the implied power to charge fees for the privilege of parking motor vhicles on the city's streets. In the course of the opinion the court stated that the fees assessed were to cover the cost of supervision and control of parking and were not levied for the use of the streets. The court also pointed out that the city cannot rent the streets for a private purpose. This latter rule was reiterated by the court in the cases of *Village of Lombard* v. *Illinois Bell Tele-Phone Company*, 405 Ill. 209 (1950); *City of Chicago Heights* v. *Western Union Telegraph Company*, 406 Ill. 428 (1950); and *City of Chicago Heights* v. *Public Service Company of Northern Illinois*, 408 Ill. 310 (1951).

While the city has the power to charge fees for the privilege of parking motor vehicles on the streets to cover the cost of supervision of parking, it is well established that the city cannot, under the guise of an exercise of a police power, impose license fees for revenue purposes. (*Lamere* v. *City of Chicago*, 391 Ill. 552 (1945); *City of Chicago* v. *R & X Restaurant, Inc.*, 369 Ill. 65 (1938).) It is therefore our opinion that the city does not have power to adopt an ordinance to exact fees for the privilege of parking motor vehicles overnight on city streets for the purpose of raising revenue to purchase parking lots to store motor vehicles.

However, it is established beyond doubt that the power to control public streets is vested in the legislature and that such power of control may be delegated by the legislative body to municipalities of the state. The legislature of the state represents the public at large and has in the absence of special constitutional restraint full and paramount authority over all public ways and public places. (*Herder's Storage Co.* v. *City of Chicago*, 235 Ill. 58 (1908).) Therefore, the legislature may in its discretion grant power to the city to impose fees for the privilege of parking motor vehicles overnight on the city's streets for the purpose of raising revenue to purchase and operate parking lots.

We also direct your attention to sections 52.1-1 to 52.1-10 of the Revised Cities and Villages Act which authorize municipalities to acquire by purchase motor vehicle parking lots, garages, parking meters, and any other revenue producing facilities necessary or incidental to the regulation, control and parking of motor vehicles. These provisions of the act also authorize the city to borrow money and issue and sell bonds for this purpose. (Ill. Rev. Stat. 1949, ch. 24, pars. 52.1-1 to 52.1-10.)

TRUCK PARKING

(No. 11393—City Council—C. P. H.—June 7, 1951.)

We have your letter of April 6, 1951 wherein you request our opinion as to whether or not the City has power by ordinance to prohibit the parking of motor trucks on the City's streets, except for a period of time not to exceed one hour for the purpose of loading and unloading merchandise and material without the necessary of placing signs on the streets.

Under sections 23-10 and 23-27 of the Revised Cities and Villages Act, the City has express power to regulate the use of streets and the traffic thereon. (Ill. Rev. Stat, 1949, ch. 24, pars. 23-10 and 23-27.) It is well established that by virtue of these express regulatory police powers, municipalities have the implied power to regulate the parking of motor vehicles on the city streets. (*City of Bloomington* v. *Wirrick*, 381 Ill. 347 (1943)).

In the case of *Haggenjos* v. *City of Chicago*, 336 Ill. 573, (1929), the court had under consideration the validity of the ordinance prohibiting all parking in the Loop district at any time during business hours of any business day. The court in holding the ordinance unreasonable and invalid because it amounted to a prohibition of motor vehicles in the various parts of the territory described for the transaction of business or the receipt and delivery of goods in the ordinary way, stated at page 576:

> "* * * It is not open to question that the legislature has conferred upon the city the power to regulate the use of the streets and the traffic upon them—that is, the passage of persons and vehicles back and forth upon them—and to prevent obstruction of them. Although this power of regulation has been conferred upon the City Council, the legislature has not specified the precise manner in which it shall be exercised, and therefore the reasonableness of the exercise of the power by the Council is open to inquiry by the Courts * * *."

In the case of *City of Chicago* v. *McKinley*, 344 Ill. 297 (1931), the court again had under consideration the same ordinance after it had been amended to permit the stopping of vehicles for not more than three minutes for loading or unloading as to passenger cars, and thirty minutes as to commercial vehicles. The court in holding that this ordinance was valid as it was a reasonable exercise of the power to regulate parking by the City Council and was not subject to the same criticism as the former ordinance stated at page 306:

> "It is the province of the council to decide in what streets or parts of streets, during what hours and for what length of time limitation of the right to park or allow a vehicle to remain standing on the street is necessary to a proper regulation of traffic, and we are not justified in holding those contained in the ordinance to be unreasonable unless they are clearly so, and in our judgment this cannot be said of them."

In view of the foregoing, it is our opinion that the City Council has power to adopt an ordinance to prohibit the parking of motor trucks on all of the City's streets, provided the ordinance specifies a reasonable period of time for the parking of motor trucks for the purpose of loading and unloading materials and merchandise. If the City Council should adopt such an ordinance, the period of time provided in the ordinance for the parking of motor trucks for the purpose of loading and unloading, whether it be for one hour as suggested in your communication or for any other period, would be open to inquiry by the courts.

With reference to whether or not it would be necessary to post signs giving notice of the time allowed for the parking of motor trucks in the event the City Council adopted an ordinance regulating the parking of suck trucks, we have taken into consideration section 26 of Article I of the Uniform Act regulating traffic on highways which provides as follows:

> "(a) The provisions of this Act shall not be deemed to prevent local authorities with respect to streets and highways under their jurisdiction and within the reasonable exercise of the police power from—
>
> 1. Regulating the standing or parking of vehicles;

2. Regulating traffic by means of police officers or traffic control signals;

3. Regulating or prohibiting processions or assemblages on the highways;

4. Designating particular highways as one way highways and requiring that all vehicles thereon be moved in one specific direction;

5. Regulating the speed of vehicles in public parks;

6. Designating any highway as a through highway and requiring that all vehicles stop before entering or crossing the same or designating any intersection as a stop intersection and requiring all vehicles to stop at one or more entrances to such intersections;

7. Restricting the use of highways as authorized in Article XVI of this Act.

"(b) No ordinance or regulation enacted under subdivisions (4), (5), (6), or (7) of this section shall be effective until signs giving notice of such local traffic regulations are posted upon or at the entrances to the highway or part thereof affecting as may be most appropriate." (Ill. Rev. Stat. 1949, ch. 95½, par. 123.)

The above section makes it mandatory that local authorities post signs giving notice of any traffic regulations enumerated in subdivisions (4), (5), (6), or (7), before any such regulations shall be effective. However, the section does not require local authorities to post signs giving notice of any parking regulations set forth in subdivision (1) before any such regulations shall be enforced. It is therefore our opinion that if the City Council enacted an ordinance regulating the parking of motor trucks it would not be necessary to provide in the ordinance for the posting of signs giving notice of the period of time allowed for the parking of such trucks for the purpose of loading or unloading.

SNOW PARKING ORDINANCE

(No. 11475—Commissioner of Police—A. F. G.—February 1, 1952.)

In your letter of January 29, 1952 you quote in full a letter from an attorney, who has received a ticket for parking in violation of section 27-126 of the Municipal Code of Chicago. You ask our advice in the matter.

Your correspondent admits he received a ticket for parking on a bus line street on January 26 at 3 A. M., on a clear day with no snow on the street. We are of the opinion the ticket was properly issued as the parking took place within the months and within the hours prescribed in the first part of section 27-126. If he had received a ticket for parking on November 1, at 3 A. M. on a clear day with no snow on the street, we would say the ticket was improperly issued, as November 1, is not within the time in which such parking is prohibited. However, in the latter case if on November 1, at 3 A. M. snow had fallen to a depth exceeding one inch he properly would have been ticketed, as the second part of 27-126 prohibits parking at any time of the year or any hour of the day after snow begins falling and exceeds a depth of one inch.

We think the purposes of the section are clearly stated. They are two fold. First, parking is prohibited on through streets, or any street upon which a street railway or motor bus line is operated, between the

hours of 1 A. M. and 7 A. M. after the 15th day of November and before the first day of April of each year. Snow falls are always imminent during the months designated. The hours designated are the hours when people are usually in bed or not available to remove parked cars. If a heavy fall of snow occurs during the night, morning finds the main highways obstructed with cars buried in snow, making nearly impossible the use of snow removal equipment. Anticipating that this can happen at any time during the winter months the city council has ordered that parking shall be prohibited entirely during the periods set out in the first part of the ordinance. Secondly, parking is prohibited on these same streets, during any month and at any hour, after snow begins to fall, and for 8 hours thereafter if the snow exceeds 1 inch in thickness. Likewise, the purpose of this parking restriction is to facilitate the removal of snow, so that the two million people who use public conveyances daily, can be expeditiously transported.

We are of the opinion your correspondent has misconstrued the ordinance.

FLAMMABLE LIQUIDS TRUCKS

(No. 11494—Commissioner of Streets and Electricity—A. F. G.—March 5, 1952.)

In your letter of February 27, 1952 you call our attention to the following situation:

> "On November 8, 1951, the City Council passed an ordinance providing for specific routes for carriers of flammable liquids. Part of Section 129-55.4, Zone 'D,' provides that such vehicles shall use Damen Avenue between 87th Street and 59th Street, thence over 50th Street to Western Avenue and north on Western Avenue from 59th Street to the north city limits.
>
> On January 10, 1952, page 1659, the City Council passed an ordinance limiting the tonnage on Damen Avenue between 49th Street and 67th Street to a maximum of five tons.
>
> Since the two ordinances are in conflict and are posing a difficult problem of enforcement and at the same time causing operational difficulties for the oil companies, we request an immediate opinion as to which ordinance is in effect, to the end that the carriers might know what route to use to comply with the Municipal Code."

The ordinance of November 8, 1951 is city wide in its scope and was enacted after long study by traffic experts and the industry affected by its provisions. It divides the city into zones and provides in each zone routes for trucks transporting flammable liquids.

The ordinance of January 10, 1952 which is merely local in its effect, takes out of the north-south route in Zone "D", that portion of Damen Avenue, between W. 59th Street and W. 67th Street, a distance of one mile.

Unless a detour is available or an alternate route can be provided in the November ordinance to eliminate the gap created by the January ordinance, the route set up in Zone "D" is effectively destroyed.

The two ordinances are hopelessly repugnant, one permits trucks to use Damen Avenue between W. 59th and W. 67th Street, the other prohibits them from doing so. The ordinances cannot be reconciled.

The rule of law is if two acts are positively repugnant and to such an extent that they cannot be reconciled and made to stand together by any fair and reasonable construction, then the one last enacted will control and repeal the earlier one. Black on Interpretation of Laws p. 113. This doctrine has been repeatedly upheld by the Supreme Court of this State. In *Pavey* v. *Utter*, 132 Ill. 489, the court said:

> "But if the two acts are so inconsistent that they cannot stand together, the latter must prevail"

and in *Illinois & Michigan Canal* v. *City of Chicago* 14 Ill. 334, the court said:

> "If two statutes are clearly repugnant to each other, the one last enacted operates as a repeal of the former."

It is our opinion, therefore, that the ordinance of January 10th, is in effect and the provision in the November ordinance in conflict therewith has been repealed.

UNLOCKED CARS—IGNITION KEYS

(No. 11519—Alderman, 5th Ward—E. R. H.—April 21, 1952.)

We have your letter of April 8, 1952, to which was attached a letter from Judge Dunne of the Juvenile Court in which he suggests some amendments to the Municipal Code of Chicago to prevent the easy stealing of automobiles, particularly by juveniles. You ask if the proposed amendments are within the power of the City to enact.

Judge Dunne's first suggestion in the enactment of an ordinance "making it a misdemeanor for an owner to leave his car unlocked, or with the keys in the lock, or with doors and windows unlocked."

Section 92(a) of the Uniform Act Regulating Traffic on Highways (Paragraph 189, Chapter 95½, Ill. Rev. Stats. 1951, Vol. 2) reads as follows:

> "No person driving or in charge of a motor vehicle shall permit it to stand unattended without first stopping the engine, locking the ignition and removing the key, or when standing upon any perceptible grade without effectively setting the brake thereon and turning the front wheels to the curb or side of the highway."

Section 27-82 of the Traffic Regulations of the City of Chicago is substantially the same as the State law.

Section 26 of the U. A. R. T. which is Paragraph 122 of Chapter 95½, Motor Vehicles, Ill. Rev. Stats. 1951, Volume 2, p. 231 is as follows:

> "Sec. 25: Provisions of Act uniform throughout state. The provisions of this Act shall be applicable and uniform throughout this State and in all political subdivisions and municipalities therein, and no local authority shall enact or enforce any rule or regulation in conflict with the provisions of this Act unless expressly authorized herein. Local authorities may, however, adopt additional traffic regulations which are not in conflict with the provisions of this Act."

If we were to amend Section 27-82 of our code to require a motorist in addition to stopping his engine, locking the ignition and removing the key, also to lock his car, remove the key from the lock and lock the doors

and windows, our ordinance would be in conflict with Section 92(a) of the Uniform Act, and probably would be held beyond the power of local authorities to enact.

In *Ostergard* v. *Frisch*, 333 Ill. App. 359 (1948), the Appellate Court cited with approval *Ross* v. *Hartman*, 139 F. (2nd) 14, in which the Court said:

> "The evident purpose of requiring motor vehicles to be locked is not to prevent theft for the sake of owners or the police, but to promote the safety of the public in the streets."

and in a dissenting opinion in the same case Niemeyer, P. J., in discussing Section 92(a) said:

> "This is a traffic regulation and not an anti-theft measure, and is designed to reduce the likelihood of parked cars being set in motion without the intervention of a human agency, or by children or other intermeddlers."

In our opinion the proposed amendment should be to Section 92(a) and not to the ordinance and should be directed to the General Assembly.

Municipalities have no power to license or regulate used car dealers, *Bullman* v. *City of Chicago*, 367 Ill. 217 (1938). Regardless of how carelessly automobiles are handled in used car lots the City has no power to legislate with regard to them.

With parking lots it is different. Parking lots are open air garages and are subject to license and regulation by the City. *Stearns* v. *City of Chicago*, 368 Ill. 112 (1938). Parking lots could not successfully be operated without attendants being always on hand to receive and release cars. We doubt if many of the thefts by juveniles to which the Judge refers occur in parking lots. In operating an open air garage, cars constantly are required to be shifted on the lot in order to release cars which were parked earlier and behind which other cars have been parked.

It is our opinion that before the Garage chapter of the code is amended as suggested that you confer with garage owners associations to the end that thefts be prevented without imposing unreasonable requirements on garage owners which would interfere unduly with the proper and customary operation of this business.

PEDESTRIAN WARNING SIGNS

(No. 11701—Commissioner of Public Works—M. I. W.—June 17, 1953.)

In your letter of March 22nd, you inquire whether or not warning signs must be erected before a program of patrolling mid-block crossings of pedestrians is begun. You also request our opinion as to whether signs painted on the sidewalk will suffice or whether such signs must be erected.

Chapter 95½, sec. 172, Ill. Rev. Stat. 1951, provides in paragraph (c) as follows:

> "Between any intersections whenever the Department or local authorities shall determine upon the basis of an engineering or traffic investigation upon any street under their respective jurisdictions, that crossing between intersections should be prohibited in the interest of public safety, pedestrians shall not cross at any place except

in a marked crosswalk or an unmarked crosswalk at an intersection, and that such prohibition shall be effective when appropriate signs giving notice thereof are erected."

Prior to 1947 the prohibition found in the statute was much broader reading:

"Between adjacent intersections at which traffic control signals are in operation pedestrians shall not cross at any place except in a marked crosswalk."

The revision of this proviso must be read as clearly expressing the intention of the legislature that the enforcement of the prohibition against mid-block crossing by local authorities must be preceded by (1) a finding on the basis of an engineering or traffic investigation that such crossing between any particular intersections should be prohibited in the interest of the public safety and (2) erection of appropriate warning signs.

Section 27-103 of the Municipal Code provides in part as follows:

"(a) Between adjacent intersections at which traffic control signals are in operation, pedestrians shall not cross at any place except in a crosswalk.

"(b) No pedestrian shall cross a roadway other than in a crosswalk in any business district."

Paragraph (a) above consists of an exact duplication of the language found in the statute cited above prior to the 1947 amendment. There has however been no corresponding change in the ordinance and the two are therefore in conflict. A similar conflict exists in regard to paragraph (b).

Section 122 of Chapter 95½, Ill. Rev. Stat. (1951) provides that:

"The provisions of this Act shall be applicable and uniform throughout this State and in all political subdivisions and municipalities therein and no local authority shall enact or enforce any rule or regulation *in conflict with the provisions of this Act* unless expressly authorized herein. Local authorities may however, adopt additional traffic regulations *which are not in conflict with the provisions of this Act.*" (Emphasis added).

Since, as we have seen above, such a conflict appears to exist the requirement of the state law must prevail.

It is therefore our opinion that warning signs must be erected before a program of patrolling mid-block crossings is begun.

Before such signs may be posted the other requirement of the statute must be met, that is, there must be a determination by "local authorities . . . on the basis of an engineering or traffic investigation" that the prohibition of mid-block crossing on any particular street is in interest of public safety.

Section 108 of Chapter 95½ defines "local authorities" as used in the Uniform Traffic Act as:

"Every county, municipal, and other local board or body having authority to adopt local police regulations under the constitution and laws of this State."

In Chicago this body is the city council and so it appears that an ordinance of the city council based on an engineering or traffic investigation will be necessary to prohibit mid-block crossings at those locations intended to be covered by your program.

As to the final question you raise with regard to whether the warning signs may be painted on the sidewalk, we are confronted with the use in

the statute of the word "erected." We have searched the authorities for an interpretation of "erected" which would permit the broad construction you have in mind. Unable to find any precedent permitting such usage we must turn to the plain obvious meaning of the word. Webster's International Dictionary (2d. ed.) defines erect as:

"1. Upright or having a vertical position . . . *not prone* . . .

"2. Directed upward . . ." (Emphasis added.)

It is therefore our opinion that painted signs on the sidewalk will not suffice for this program.

PARKING ON CENTER PARKWAY

(No. 11742—Commissioner, Streets and Sanitation—C. P. H.—September 21, 1953.)

We have your letter of September 3, 1953, wherein you state that it has been proposed that the 70' median strip of Stony Island Avenue from 69th Street to 72nd Street be used as a parking lot. It is suggested that this area be used for long time parking periods extending up to 24 hours. The parking lot would be regulated by coin operated toll gates.

You request our opinion as to the legality of such parking at this location.

Under sections 23-10 and 23-27 of the Revised Cities and Villages Act, the city has express power to regulate the use of streets and the traffic thereon. (Ill. Rev. Stat. 1951, ch. 24, pars. 23-10 and 23-27). In the case of *City of Bloomington* v. *Wirrick*, 381 Ill. 347, (1943), the court held that by virtue of these regulatory police powers, municipalities have the implied power to charge fees for the privilege of parking motor vehicles on the city's streets. In the course of the opinion the court stated that the fees assessed were to cover the cost of supervision and control of parking and were not levied for the use of the streets. The court also pointed out that the city cannot rent the streets for a private purpose. This latter rule was reiterated by the court in the cases of *Village of Lombard* v. *Illinois Bell Telephone Company*, 405 Ill. 209 (1950); *City of Chicago Heights* v. *Western Union Telegraph Company*, 406 Ill. 428 (1950); and *City of Chicago Heights* v. *Public Service Company of Northern Illinois*, 408 Ill. 310 (1951).

While the city has the power to charge fees for the privilege of parking motor vehicles on the streets to cover the cost of supervision of parking, it is well established that the city cannot, under the guise of an exercise of a police power, impose license fees for revenue purposes. *Lamere* v. *City of Chicago*, 391 Ill. 552 (1945); *City of Chicago* v. *R & X Restaurant Inc.*, 369 Ill. 65 (1938).

In an opinion addressed to the Commissioner of Subways and Superhighways dated April 30, 1951, we had occasion to pass upon this question. We there held that the city does not have power to adopt an ordinance to exact fees for the privilege of parking motor vehicles overnight on the city's streets for the purpose of raising revenue. What was said in that opinion applies with equal force to the question presented here for our determination since that part of Stony Island Avenue described herein is owned, operated and maintained by the city as a part of its public highway system. A copy of that opinion was transmitted to you with our letter dated August 24, 1951, which dealt with the same subject.

In view of the foregoing it is our opinion that the city of Chicago does not have the power to charge parking fees for the privilege of parking motor vehicles for periods up to 24 hours in the 70′ median strip of Stony Island Avenue from 69th Street to 72nd Street.

PARKING ON SIDEWALK

(No. 11762—City Council—A. F. G.—November 5, 1953.)

Your secretary, Mr. Kopec, brought into this office an original letter from Police Commisioner O'Connor, dated October 27, 1953 to which was attached copies of memos from Chief of Traffic Ahern and Captain John H. Scherping in which they recommend an amendment to section 27-122 (10) of the Traffic Code.

That section enumerates 18 places where parking is prohibited. Paragraph (10) of that section prohibits parking "on any sidewalk." Section 27-1 of the Traffic Code provides in the first paragraph: "Whenever in this chapter the following words and phrases are used they shall have the meanings respectively ascribed to them in this section;" then follows numerous definitions, among them the following definition of the word "sidewalk":

> "Sidewalk. That portion of a public way between the curb lines or the lateral lines of a roadway, and the adjacent property lines, intended for the use of pedestrians."

As "the parking area" is a part of a public way between the curb lines and the property lines it is, therefore, included in the foregoing definition of a "sidewalk," and in our opinion no amendment to section 27-122 (10) is necessary in order to charge a motorist parking his vehicle in the parking area with violating paragraph (10) of section 27-122 of the Traffic Code.

We might add that section 12(f) of the Uniform Act Regulating Traffic on Highways (Chapter 95½, paragraph 109(f) Ill. Rev. Stats. 1953,) defines "sidewalk" exactly as that word is defined in section 27-1 of the Traffic Code, and section 90(a) 1 of the same act (Chapter 95½, paragraph 187(a) 1 Ill. Rev. Stats. 1953) prohibits parking "on a sidewalk" just as such parking is prohibited in section 27-122 (10) of the Traffic Code.

OVERNIGHT PARKING—BUSSES AND TRUCKS

(No. 11769—Alderman, 17th Ward—M. I. W.—November 16, 1953.)

We have your letter of October 28, in which you request our opinion as to whether busses and trucks parked overnight in a gasoline station at the intersection of 69th Street and Normal Boulevard are parked legally.

Section 27-125 of the Municipal Code of Chicago reads as follows:

> "No person shall stand or park any truck, tractor, semi-trailer, trailer or bus *on any street* in a residential district for a longer period than is necessary for the reasonably expeditious loading or unloading of such vehicle . . ." (emphasis added.)

The prohibition of this section applies to parking on a "street" and does not act to prohibit such parking on private property.

Section 2 of the Chicago Zoning Ordinance defines "any land used or intended to be used for the storage or parking of three or more trucks, tractors, truck tailers and commercial and industrial vehicles, while not loading or unloading, exceeding two tons in capacity" as a "truck lot;" and categorizes a truck lot as a "special use".

In the absence of approval of such special use under the procedure set forth in Section 24 of the Chicago Zoning Ordinance, any lot on which three or more trucks of over two-ton capacity are parked in the manner described in the police report you attach is being used in violation of the ordinance and is subject to penalties.

Section 21 of the ordinance designates the Commissioner of Buildings as the official charged with enforcement of the zoning ordinance. It is therefore respectfully suggested that this matter be brought to his attention for further action.

CHAPTER X — PUBLIC UTILITIES

A. RAILROADS

RAILROAD CROSSING COMPENSATION

(No. 11339—Superintendent of Compensation—J. D. M.—October 9, 1950.)

Your letter of December 16, 1949, requests our opinion in regard to the payment of compensation for several railroad crossings of the Chicago Rock Island & Pacific Railroad, at 105th and 106th Street, situated between Torrence Avenue and Muskegon Avenue.

Examination of available records pertaining to the railroad tracks and city streets involved in this matter discloses that the railroad received from one Edward Sorin and others a conveyance of a 50 foot right-of-way through land which is now known as the Notre Dame Addition to South Chicago. This deed of conveyance by Sorin and others in title was recorded on July 16, 1875, and appears in Book 450 at Page 126 of the Recorder's Office in Cook County.

Subsequently, on December 29, 1876, Edward Sorin and others laid out Notre Dame Addition to South Chicago and established streets which crossed the previously deeded right-of-way of the railroad. The railroad never joined in the dedication of the Notre Dame Addition to South Chicago. This plat was recorded in Book 12, Page 39 in book of plats, and shows the railroad right-of-way on the plat of dedication.

The railroad built upon its right-of-way two tracks which crossed 105th and 106th Street.

On November 9, 1920, The Rock Island Railroad entered into an agreement by which the City authorized and permitted, pursuant to ordinance, the building of two additional tracks across 105 and 106 Street and required the railroad to pay an annual fee of $300.00 for the period of 20 years. In 1940 an additional ordinance was passed, giving to the Rock Island Railroad a further right to connect its lines with those of the Chicago Western Indiana Railroad for which a like fee of $300.00 was established. The railroad paid the compensation until time for the renewal of the latter ordinance, at which time the railroad asserted that in view of the fact that its title was acquired prior to the dedication of the streets, it could not be made to pay for the use of is own property.

It is the opinion of this office that where the Rock Island Railroad crosses 105th and 106th Street within its own 50 foot right-of-way it would not be liable to pay compensation to the City of Chicago for any additional tracks which it has built on its right-of-way.

Under the authority of the *City of Geneseo* v. *Illinois Northern Utilities Company*, 378 Illinois 506, (1941), the City may license that portion of the Street which is not within the Railroad right-of-way and charge a fee for such use. In that case the Court said:

> "It is our view that the power vested in cities to permit or refuse a license or franchise to a public utility has not been re-

pealed by the provisions of the Public Utilities act, and anything said to the contrary in *City of Geneseo* v. *Illinois Northern Utilities Company, supra,* or *Chicago Motor Coach Company,* v. *City of Chicago, supra,* is not adhered to."

A survey submitted to this office by the Rock Island Railroad shows that its western track, which crosses 105th Street, is off of the right-of-way about a foot, for a distance of 7 feet; that its track which connects with the Chicago and Western Indiana Railroad near the intersection of Manistee Avenue and 105th Street, is not entirely within the right-of-way, but is off 2 feet for a distance of 20 feet, and that the switch track which leads from the western tracks on 105th Street to the Chicago and Western Indiana Railroad's right-of-way, is not within the right-of-way where they cross 105th Street. Since these tracks do not fall within the Rock Island Railroad's right-of-away, we are of the opinion that the Rock Island Railroad must secure Council authorization to permit these tracks to remain in their present location.

SWITCHTRACK COMPENSATION

(No. 11374—City Comptroller—C. P. H.—April 10, 1951.)

We have your communication of March 5, 1951, transmitting letters from the Chicago River and Indiana Railroad Company and the Chicago Junction Railroad Company returning warrants for compensation for the maintenance of switch tracks across certain streets in the City of Chicago. You request our opinion as to whether or not the reasons assigned by the companies for failure to pay these warrants have any legal foundation.

Warrant No. F 2312, issued to the Chicago River and Indiana Railroad Company under date of January 24, 1951 in the amount of $646.00 is for compensation for the maintenance of a switch track in Benson Street south of W. 31st Place for the period from December 23, 1950, to December 22, 1951. The maintenance of this switch track was authorized for a period of twenty years by an ordinance passed June 28, 1933, C. J., p. 661. This ordinance expires December 22, 1952. The Company contends that the City has no authority to collect this warrant on the ground that no power has been granted to the City to enact the ordinance in the light of "recent decisions" of the Supreme Court of Illinois. This contention has no merit.

We have examined the cases relied upon by the railroad in support of its position. In *Village of Lombard* v. *Illinois Bell Telephone Company,* 405 Ill. 209 (1950), and in *City of Chicago Heights* v. *Public Service Company of Northern Illinois,* 408 Ill. 310 (1951), the court held that no power has been granted to municipalities by the General Assembly authorizing the levy of a gross-receipts tax, or to rent the streets of municipalities for a rental based on gross receipts of utilities occupying parts of the streets. In *City of Chicago Heights* v. *Western Union Telegroph Company,* 406 Ill. 428 (1950), the court held that a municipality cannot, under the guise of an exercise of a police power, impose a tax on utilities based on the number of poles and wires of utilities located in the streets of municipalities.

These decisions do not invalidate the switch track ordinance under consideration here. The ordinance does not levy a tax nor does it rent or lease the street to the railroad to the exclusion of the public. It is a

contract ordinance between the city and the railroad for switch track privileges granted in consideration of the payment of compensation for the use of the street.

Warrant No. F 2222, issued to the Chicago Junction Railway Company under date of November 17, 1950 in the amount of $43,332.00 is for compensation for the maintenance of 14 switch tracks across S. Robey Street, for the period from February 5, 1936 to February 4, 1950. The maintenance of the said switch tracks for a period of 20 years was authorized by an ordinance passed April 4, 1917, C. J., p. 4250. This ordinance expired February 4, 1936. The warrant is for compensation for the maintenance of switch tracks for a period after the contract ordinance expired and thus there is no legal ground upon which to predicate the issuance of the warrant.

Warrant No. 2230 and the statement attached thereto issued to the Chicago River and Indiana Railroad Company under date of November 17, 1950 in the amount of $7,200.00 is for compensation for the maintenance of two switch tracks across W. 43rd Street and W. 47th Street east of S. Western Avenue for the period from January 11, 1932 to January 10, 1950. The maintenance of the said switch tracks for a period of twenty years was authorized by an ordinance passed January 11, 1922, C. J., p. 1652. The company contends that the City is barred from collecting this claim by the decision in the case of *City of Chicago* v. *Chicago River and Indiana Railroad Company,* 294 Ill. App. 577 (1938). This contention is sound. In that case the court found from the evidence that the switch tracks involved in the above warrant were removed from the streets prior to January, 1929, and held that the City was not entitled to compensation after the removal of the said tracks. Moreover, the ordinance of January 11, 1922 was repealed by the City Council on August 19, 1936, C. J., p. 2252.

In view of the foregoing, it is our opinion that the Chicago River and Indiana Railroad Company is liable to the City in the amount of $646.00 for compensation under Warrant No. F 2312; that the Chicago Junction Railway Company is not liable to the City in the amount of $43,332.00 under Warrant No. F 2222; and that the Chicago River and Indiana Railroad Company is not liable to the City in the amount of $7,200.00 under Warrant No. F 2230.

However, the Chicago Junction Railway Company has maintained switch tracks across the City's streets without permission being granted by ordinance passed by the city council in violation of section 34-1 of the Municipal Code of Chicago and it is therefore liable for penalties under the said section for the past two years.

SWITCHTRACK COMPENSATION

(No. 11381—City Comptroller—C. P. H.—April 19, 1951.)

We have your communication of April 17, 1951 transmitting warrant No. F 2201 issued under date of November 10, 1950 to the Lake Shore Fuel Company in the amount of $1,529.52 for compensation for the maintenance of two switch tracks in N. Cherry Avenue north of W. Evergreen Avenue for the period from March 13, 1948 to October 1, 1950. You request our opinion as to whether or not the Lake Shore Fuel Company is liable for the payment of this warrant.

The city council on June 3, 1938 (C. J., p. 6142) passed an ordinance granting permission to one Franklin Marling to maintain the said switch tracks for a period of three years. This ordinance expired March 12,

1941 and was not renewed. After the expiration of the ordinance the Lake Shore Fuel Company, by oral agreement with Franklin Marling, occupied the premises adjacent to the switch tracks and used the switch tracks during the period covered by the warrant.

In a recent opinion we held that the City cannot collect compensation for the maintenance of switch tracks in the City's streets for a period after the expiration of the contract ordinance authorizing their maintenance. (Opinion of the Corporation Counsel to the City Comptroller, dated April 10, 1951.) In the instant case the contract ordinance expired March 12, 1941 and the city council did not pass a new ordinance authorizing Franklin Marling or the Lake Shore Fuel Company to maintain the switch tracks in the City's street. Since the warrant is for compensation from March 13, 1948 to October 1, 1950, a period when no contract ordinance was in force, there is no legal ground upon which to predicate the issuance of the warrant. It is therefore our opinion that Lake Shore Fuel Company is not liable to the City in the amount of $1,529.52 under warrant No. F 2201 referred to in your letter.

We direct your attention to the fact that Franklin Marling has maintained the switch tracks in the City's street without permission being granted by ordinance passed by the city council in violation of section 34-1 of the Municipal Code of Chicago and he is therefore liable for penalties provided in the said section for the past two years. Furthermore, under section 3 of the contract ordinance the City has the right to remove the switch tracks after the termination of the rights and privileges granted by the ordinance and to charge the cost thereof to Franklin Marling.

CLEARANCE SIGNS ON VIADUCTS

(No. 11387—Commissioner of Streets and Electricity—C. P. H.—May 9, 1951.)

We have your communication of May 3, 1951 attaching copies of letters you received from the Chicago River and Indiana Railroad Company, dated April 17, 1951 and May 2, 1951. From this correspondence it appears that you have received complaints that motor trucks have been striking the roof of the viaduct of the railroad located at W. 40th Street and S. Union Avenue. After receiving the complaints, you requested the railroad company to grant permission to the City to paint underclearance signs on the structure. The railroad company in refusing to grant such permission has suggested that the City place such signs on posts in the street near the viaduct. The City Traffic Engineer does not approve the suggested plan and you therefore request that an ordinance be drafted requiring all railroads to paint such signs on their viaducts located throughout the City.

By Section 8 of the Illinois Public Utilities Act, the Commerce Commission has been given general supervision of all public utilities (Illinois Revised Statutes, 1949, chap. 111⅔, par. 8). Section 57 of the Act provides as follows:

> "The Commission shall have power, after a hearing and upon its own motion, or upon complaint, by general or special orders, rules or regulations, or otherwise, to require every public utility to maintain and operate its plant, equipment or other property in such manner as to promote and safeguard the health and safety of its employees, passengers, customers, and the public, and to this end to

prescribe, among other things, the installation, use, maintenance and operation of appropriate safety or other devices or appliances including interlocking and other protective devices at grade crossings or junctions and block or other systems of signaling, to establish uniform or other standards of equipment, and to require the performance of any other act which the health or safety of its employees, passengers, customers or the public may demand." (Illinois Revised Statutes, 1949, chap. 111⅔, par. 61.)

This Act gives the Commerce Commission full and broad powers over all corporations that constitute public utilities and the courts have held, in matters delegated to the Commission, its jurisdiction is exclusive and supersedes any jurisdiction previously conferred upon cities and villages touching the same subject matter. *City of Chicago* v. *O'Connell* (1917) 278 Ill. 591; *Village of Atwood* v. *C. I. & W. R. Co.*, (1925) 316 Ill. 425; *Northern Trust Co.* v. *Chicago Rys. Co.* (1925) 318 Ill. 402; *City of De Witt* v. *C. C. C. & St. L. Ry. Co.* (1927) 324 Ill. 494; *Chicago Motor Coach Co.* v. *City of Chicago* (1929) 337 Ill. 200; and *Chester* v. *C. B. & Q. R. R. Co.* (1928) 247 Ill. App. 505.

In previous opinions we have held that the City cannot require railroad companies to paint black and white stripes on viaduct structures in the streets and to install danger signs and lights on such structures (Opinions of the Corporation Counsel, Vol. 18, pp. 600-601; Vol. 22, p. 485).

In view of the foregoing, it is our opinion that the City Council does not have power to adopt an ordinance compelling railroads to paint underclearance signs on viaduct structures. We recommend that you request the City Council to pass an order directing the Corporation Counsel to file a petition with the Commerce Commission asking for the issuance of an order requiring the railroads to do this work. We shall be pleased to prepare and present such a petition if the City Council shall so direct.

MAINTENANCE OF VIADUCT APPROACH

(No. 11443—Commissioner of Public Works—W. V. L.—November 8, 1951.)

We acknowledge receipt of your letter and drawing No. 1133 in which you request our opinion as to whether it is the duty of the Chicago & North Western Railway Company to maintain the filled approach portion of the W. Grant Avenue viaduct.

In your letter you state that the Railway Company has made repairs on the viaduct proper and on the wooden sidewalk and handrails of the filled approach; that prior to the substitution of buses for streetcars by the Chicago Transit Authority, the Transit Authority maintained the pavement on the entire structure including the filled approach; that the filled approach extends from the east line of the N. Des Plaines Street to the west end of the viaduct, a distance of approximately 150 feet and that the viaduct, consisting of four spans, is approximately 566 feet long.

If the filled approach is to be considered as a "street" as distinguished from an "approach" to said viaduct then the City is solely responsible for maintaining and repairing its public streets and the Railway Company has no duty to maintain or repair public streets. From the facts you have given us and our inspection of the premises, it is our opinion that the filled approach should be considered solely as an approach to the viaduct.

It is our opinion that under Paragraph 62, Chapter 111 2/3 of the Public Utilities Act, (Illinois Revised Statutes, 1949) entitled "Grade Crossings," the Illinois Commerce Commission is vested with the power to determine who shall maintain approaches to viaducts; whether repairs are necessary; and to direct the apportionment of the costs of such maintenance or improvement between the Railway Company and the City of Chicago.

Prior to the passage of that Act, a railway company under Section 8 of the statute pertaining to Railroads and Warehouses, was obliged to construct and maintain approaches to viaducts located within its right-of-way. (Paragraph 62, Chapter 114, Illinois Revised Statutes, 1949).

In the case of *I. C. R. R.* v. *Franklin County,* (387 Ill. 301, 1944) it was held that the Illinois Commerce Commission now has the sole authority to apportion the costs of repair, construction or improvement of approaches to viaduct crossings over a railroad. It further held that the provision of the Railroad and Warehouse Act stated above pertaining to maintenance of grade crossings are repugnant to the Public Utility Act, and where two statutes are clearly repugnant to each other, the later one operates as a repeal of the former.

In view of this decision, we suggest that you prepare the usual form of order to be presented to the City Council, which would direct the Corporation Counsel to file a petition with the Illinois Commerce Commission, petitioning said Commission to make a finding as to the duty of the Railway Company to maintain the filled approach to said viaduct and to apportion the costs incidental thereto.

SWITCHTRACK AND LOADING DOCK COMPENSATION

(No. 1164—City Comptroller—J. D. M.—January 26, 1953.)

Your letter of October 29, 1952, requests our opinion as to the payment of compensation for a loading platform and switch track in connection with the premises now owned by the City, the property having been acquired by condemnation for superhighway purposes.

After the City acquired the property, it entered into a month to month lease with the Express Ways Terminal, Inc. for a lease of the premises. The Express Ways Terminal are new tenants and had nothing to do with the original granting of the permit for the location of the switch track and loading platform which the Moore Company and the Division Lead Company secured by council ordinance November 26, 1946 (C. J. p. 6629).

The original ordinance required compensation in the amount of $1,524.00 which the Bureau of Compensation of the City of Chicago, on the rate basis used in computing compensation for switch tracks and loading platforms, set up at $1,324.00 for the use of the switch track and $200.00 for the loading platform. The ordinance also provided that part of the compensation was to be paid by the Division Lead Company whose property adjoins that of the Benjamin Moore Company. The Division Lead Company's share was $541.32 which sum, we understand from your records, is still being paid by that company for the use of its share of the switch track.

Under the authority of the City of *Genesso* v. *Illinois Northern Utilities Company,* 378 Ill. 506, (1941), the City may license that portion of the street which is not within the Railroad right-of-way and charge a fee for such use. In that case the Court said:

"It is our view that the power vested in cities to permit or refuse a license or franchise to a public utility has not been repealed by the provisions of the Public Utilities act, and anything said to the contrary in *City of Genesso* v. *Illinois Northern Utilities Company, supra,* or *Chicago Motor Coach Company* v. *City of Chicago, supra,* is not adhered to."

The loading platform involved herein extends around the building known as 415 N. Green Street which building is along the route of the Northwest Highway Project and was acquired by the City on November 1, 1950. The City, feeling that the building would not be wrecked for some time, leased the permises to the Express Ways Terminal, Inc. on a month to month basis beginning May 1, 1951. The lease made no mention of compensation for either the switch track or loading platform in connection with the said building.

We have held in a previous opinion rendered by this office following the holding in case of *City of Chicago* v. *McCausland,* 379 Ill. 602, that the owners of real estate which is subject to condemnation, lose all legal title to said property and, therefore, are not responsible for the payment of taxes or other liens which may be assessed against the property after filing of the Commissioner's report.

Following the ruling in the above cited case, it is apparent that it would be highly improbable that the City could now enforce payment of the compensation for the loading platform which is attached to the City owned building located at 415 N. Green Street.

B. CHICAGO TRANSIT AUTHORITY

ARMED SPECIAL POLICEMEN

(No. 11117—City Collector—C. N.—January 19, 1949.)

We have your letter of January 15, 1949 in which you embody the request of M. R. Johnson of the Chicago Transit Authority, for authority to permit its special policemen to carry firearms on and off the Authority's property. Mr. Johnson explains that these men are detailed to protect cash receipts, arrest pickpockets, purse snatchers, and morons, and to do other general work in connection with the safety and welfare of the public. He states that this work is carried on in subways, elevated lines, streetcars and buses, which makes it necessary for these policemen to be off the Authority's property with their firearms, at times, as when transferring between the various routes and assigned locations.

Mr. Johnson presents the argument that, inasmuch as the Authority is now classed as a Municipal Corporation, and is municipally controlled, it becomes more or less a part of the city. It is for this reason that he seeks permission for these special policemen to carry firearms on a city-wide basis in connection with their assignments. He concludes with the statement that it is the Authority's plan to double the present force of 11 deputized men in the near future.

You ask for an opinion as to what action you may take in this matter.

Section 173-1 Municipal Code of Chicago defines special policemen as follows:

The term "special policeman" is hereby defined as any person who, for hire or reward, shall guard or protect any building, structure, premises, person, or property within the city; provided, however, that this shall not apply to regularly appointed police officers of the city or to any sheriff or deputy sheriff of the county.

Succeeding sections except common carriers engaged in interstate or intrastate commerce within the city from the necessity of having their special policemen conform to licensing provisions, detail application procedure, bonding, fingerprinting, license fee, etc., and place the power of appointment and peremptory revocation of the license in the commissioner of police.

We believe it is clear that the definition contained in the above quoted Section 173-1 of the Municipal Code of Chicago limits special policemen to duty on fixed premises, protecting structures, persons and property that would not otherwise be so protected. It does not contemplate a roving band of armed men, doing general police work for the protection of the community while not responsible to the commissioner of police either for their instructions or the manner in which they are carried out. It is conceivable that such forces, gradually augmented could ultimately constitute a rival police force, tending to create confusion and divided authority in the enforcement of laws and ordinances.

Mr. Johnson's statement that the CTA is "now classed as a Municipal Corporation, and Municipally controlled" and therefore becomes "more or less a part of the city" is a sweeping example of a true premise and false conclusion. The municipal corporation status of the CTA clearly indicates its inherent right to engage such police force as may be necessary for the protection of its property and the performance of its functions. There is ample precedent for this. The Chicago Park District, a local Municipal Corporation, maintains its own police department. Such police work as is necessary for the protection of the general public using the transportation facilities of the CTA must be supplied by regular police officers under the direction of the commissioner of police.

For the reasons hereinabove fully discussed, we are of the opinion that the Chicago Transit Authority's request for additional special policemen to perform functions indicated in Mr. Johnson's letter should be denied. We also are of the opinion that it would be advisable for you to ascertain the present scope of activities of special policemen already licensed on behalf of the CTA with a view to revoking their licenses if investigation reveals that they are performing general, rather than special police duties.

COST OF PAVING STRIP ALONG TRACKS

(No. 11148—Commissioner of Streets and Electricity—J. G. S.—W. H. S.—May 25, 1949.)

In your letter of June 25, 1948 addressed to the Honorable Benjamin S. Adamowski, Corporation Counsel, referring to the cost of paving a strip along the car tracks extending from the outer edge of the rail to about two inches beyond the ends of the ties in S. State St. from 60th St. to Garfield Blvd. you request the opinion of this department upon two questions. Is the City responsible in this matter, and may the vehicle tax funds be used to make payment?

The City of Chicago ordered the paving of this strip to be done by the contractor in connection with the contract for paving S. State St. between the points indicated. The work of paving the strip was started on June 27, 1946 and was finished on October 24, 1946. The cost of the item was $4,387.10. Of this amount the City's share was $2,727.59 which latter sum has been paid to the contractor Robert R. Black, Inc. The payment of the balance $1,661.51 is in controversy. The contractor billed Chicago Surface Lines for the amount but it said it had not authorized the work and it refused to pay. The bill for the amount has also been presented to Chicago Transit Authority but it says it is not obligated.

Your first question is as to the City's responsibility in this matter. By the agreement of release entered into by the City of Chicago, the Trustees and Receivers of Chicago City Railway and Chicago Transit Authority on the 29th day of September, 1947, the City of Chicago and Authority waived, released and discharged all claims of every kind, nature and description against the Companies and the Trustees or Receivers, including but not limited to those based upon any ordinance, contract or agreement. We are therefore of the opinion that the Trustees and Receivers of Chicago City Railway Company are not liable upon this claim.

The work was finished on October 24, 1946. Chicago Transit Authority did not take over the Surface Lines and assume liability until October 1, 1947. We are therefore of the opinion that Chicago Transit Authority is not liable for the cost of the paving.

In view of our opinion above and inasmuch as the City of Chicago ordered the work to be done we are of the opinion that the City is liable to the contractor Robert R. Black, Inc. in the sum of $1,661.51.

We are further of the opinion that this item is a proper charge against the vehicle tax funds as set up in the City's appropriation bill since it is the intent and purpose of section 29-12 of the Municipal Code of Chicago, to apply all revenues derived from license and transfer fees to the cost of street and alley improvement and repair.

The draft of order attached to your letter is in due form save that we suggest that the date the contract was entered into with Robert R. Black, Inc. be inserted.

COST OF CONSTRUCTING AND OPERATING CITY BRIDGES

(No. 11209—City Council—W. H. S.—J. G. S.—November 16, 1949.)

You addressed a letter under date of September 13, 1949 to the Corporation Counsel reading as follows:

> "Transmitted herewith is a communication from the Commissioner of Public Works under date of July 27, 1949 re the Lake Street and Wells Street Bridges together with the attached correspondence and other documents all pertaining to the obligation of the Chicago Transit Authority to participate in the cost of constructing and operating the Lake Street and Wells Street Bridges.
>
> The Committee on Finance requests that you advise it as to whether or not there ever was or now exists any obligation on the

part of the Chicago Transit Authority, or its predecessor corporations, to participate in the payment for the construction or maintenance of either the Wells Street Bridge or the Lake Street Bridge."

Transmitted with your letter were:

(a) Copies of two agreements dated December 20, 1922 and December 31, 1923 providing for the payment by the elevated railroads of their share of the cost of the construction and of the cost of maintenance and repairs of the Wells Street and Lake Street bridges respectively;

(b) The letter of O. E. Hewitt, Commissioner of Public Works, dated July 27, 1949 and addressed to the Committee on Finance.

In our investigation of this matter we received from the department of finance:

(1) A copy of a letter of C. A. Whonsetler, comptroller of Chicago Transit Authority, dated August 6, 1948 to R. B. Upham, city comptroller, stating that he had referred the matter of the bills received from the city comptroller to the legal department of CTA for an opinion as to whether or not it is liable for charges pursuant to the agreements above referred to or whether the ordinance of April 23, 1945, from the City to CTA superseded these agreements.

(a) Opinion by D. R. Watson, addressed to G. T. Hellmuth, chief attorney, Chicago Transit Authority, dated August 4, 1948. This opinion holds that the agreements have been superseded by the ordinance of April 23, 1945 to the Transit Authority. Reference is made to section 18 of the ordinance of April 23, 1945 which section deals with the subject matter of compensation to the City and advises that Chicago Transit Authority should decline to pay any of the charges provided by the two bridge agreements after October 1, 1947.

You ask "whether or not there ever was or now exists any obligation on the part of the Chicago Transit Authority or its predecessor corporations to participate in the payment for the construction or maintenance of either the Wells Street Bridge or the Lake Street Bridge."

This question is divisible into two parts, (a) one part in reference to the payments which were due and payable prior to October 1, 1947 and (b) the other part in reference to the payments to be made by CTA under the ordinance passed April 23, 1945 for maintenance, repairs and replacements after October 1, 1947.

As to the first part of your question, namely "* * * any obligation on the part of the Chicago Transit Authority, or its predecessor corporations, to participate in the payment for the construction or maintenance" of the two bridges due and payable prior to October 1947, it is our opinion that there was such an obligation but that the portion of the obligation for the period prior to October 1, 1947 which was not paid to the City by the predecessors of CTA was waived, released and discharged by the instrument of release dated September 29, 1947 executed on behalf of the City by the Mayor and city clerk under authority and direction of two ordinances passed by the City Council on October 25, 1945. (See council journal, pages 4271-4273 and council journal of October 15, 1947, pages 985, 986.)

As to the second part of your question it is our opinion that since October 1, 1947 Chicago Transit Authority under the provisions of section 15 and Exhibit B of the ordinance passed on April 23, 1945 by the city council, was and is under obligation to pay to the City the cost of maintenance, repairs and replacements of the upper decks of the two bridges and of the tracks and paving within the street car rights-of-way on the two bridges.

In reaching these opinions we have considered the following matters.

WELLS STREET BRIDGE

The agreement dated December 20, 1922 between City of Chicago and Northwestern Elevated Railroad Company provides that company shall reimburse the City for one-third of the total cost of the bridge, ascertained as in the agreement provided. This one-third of the cost of the bridge amounted to five hundred three thousand, five hundred seven dollars and eighty-eight cents ($503,507.88).

Northwestern Elevated Railroad Company and its successors, the Chicago Rapid Transit Company and its receivers, made payments to the City under the agreement dated December 20, 1922 up to the year 1937. There was due to the City under the provisions of the agreement for the period ending December 31, 1943 the principal sum of one hundred twelve thousand, four hundred seventy-nine dollars and seventy-eight cents ($112,479.78) and interest upon the unpaid annual installments computed to and including December 31, 1944, the sum of thirty-eight thousand, two hundred forty-three dollars and twelve cents ($38,243.12), a total of one hundred fifty thousand, seven hundred twenty-two dollars and ninety cents ($150,722.90).

LAKE STREET BRIDGE

The agreement for the construction and maintenance of the Lake Street Bridge was dated December 31, 1923 and was executed by the City of Chicago and Samuel Insull as receiver of Chicago and Oak Park Elevated Railroad Company.

Samuel Insull as receiver and his successors, Chicago and Oak Park Elevated Railroad Company, Chicago Rapid Transit Company and its receivers, made payments under the agreement to the City of all installments and interest except the installments for the years 1937 and 1938. There was due the City from the receivers of Chicago Rapid Transit Company as successor to Chicago and Oak Park Elevated Railroad Company under the provisions of the agreement dated December 31, 1923, the principal sum of $24,000 being the two installments of $12,000 each due respectively on December 31, 1937 and December 31, 1938 and there was due under the terms of said agreement at the rate of five per cent (5%) per annum interest on said sums of $12,000 in the amount of $1,200 for year beginning January 1, 1937 and computed to December 31, 1944, interest in the total amount of $9,600 or a total of principal and interest of $33,600.

Petition was filed by the City of Chicago on July 10, 1945 in proceedings for reorganization, No. 65037, of Chicago Rapid Transit Company, et al. in the District Court of the United States for the Northern District of Illinois, Eastern Division, for the allowance of the above claims aggregating principal and interest in the sum of $187,322.90. This petition for allowance pended in the District Court during the period of reorganization of the Elevated Lines of Chicago and as a part of the settlement finally arrived at was dismissed by Judge Michael L. Igoe on October 3, 1947.

It took considerable time after the passage of the ordinance on April 23, 1945 to sell securities and to adjust all of the matters of the various parties in interest in order to enable Chicago Transit Authority to take over the Transit System.

On September 29, 1947 releases pursuant to Article II, Section G, L and M of the reorganization plan of Chicago Rapid Transit Lines, confirmed by the court on February 26, 1947, were executed and delivered by the City of Chicago, Chicago Transit Authority and the Permanent Trustee of Chicago Rapid Transit Company, debtor, and Union Consolidated Elevated Railway Company, subsidiary debtor.

THE RELEASE

Paragraph 2 of the instrument executed September 29, 1947 is as follows:

> "2. The City of Chicago and the Authority, as the case may be, without any payment to either of them do hereby waive, release and discharge all claims of every kind, nature and description against the Trustee, including but not limited to those based upon any ordinance, contract, or agreement, except the monthly payments specified in the ordinance of August 5, 1942 and accepted by the Trustees on February 13, 1943 providing for reimbursement to the City for the replacement and depreciation of fixed transportation equipment in the Initial System of Subways."

We are therefore of the opinion that the execution and delivery of the instrument of release dated September 29, 1947 and the dismissal of the City's petition for the allowance of $184,322.90 unpaid principal and interest accrued under the two bridge agreement by Judge Michael L. Igoe on October 3, 1947 constitutes a complete waiver, release and discharge of all claims specified in the above quoted paragraph owing at that time to the City by the permanent trustee of Chicago Rapid Transit Company and that such release included any obligation as to the two bridges of the predecessor corporations as to construction, maintenance and repair.

THE ORDINANCE OF APRIL 23, 1945.

The second part of the question you submitted to us is whether Chicago Transit Authority is liable for the maintenance, repairs and replacements of the Wells and Lake street bridges from the time it took over and began the operation of the Transit System on October 1, 1947.

DRIVEWAY PERMITS

(No. 11219—Commissioner of Streets and Electricity—W. H. S.—J. G. S.—December 13, 1949.)

In a letter dated December 5, 1949, addressed to the Corporation Counsel, you stated that Mr. R. L. Howell, Superintendent of Ways and Structures, Chicago Transit Authority, had requested a permit to construct a driveway at the new terminal location at 103rd Street and Vincennes Avenue and that Mr. Howell had supported the request with an opinion from the law department of Chicago Transit Authority in which it was held that it was not necessary to secure city council approval for the issuance of a permit to CTA. You, however, do feel that the ordinance of April 23, 1945 making the grant to the Chicago Transit Authority requires the Authority to take out a permit for the installation of driveways and you ask the advice of this office whether city council order should be passed before the issuance of such permit.

We have considered the opinion of the law department of Chicago Transit Authority and have concluded that it does not answer the question.

It is our opinion that the subject matter of your request is covered in its various aspects by sections 33-14 to 33-22, inclusive, of the Municipal Code of Chicago. The first paragraph of section 33-15 is as follows:

> "No person shall hereafter construct, build, establish or maintain any driveway over, across or upon any public sidewalk or public parkway where such driveway is for other than residence or dwelling

house use, or where it is necessary to cut down or alter any street curb or where the driveway depresses or elevates the established grade of public sidewalks or parkways, without first obtaining an order so to do from the city council and a permit so to do as hereinafter provided. * * *"

It is our opinion the requirement of the above section is conclusive of the question you present.

DRIVEWAY PERMITS

(No. 11322—Counsel, Chicago Transit Authority—J. G. S.—July 28, 1950.)

About the middle of March, accompanied by Mr. D. R. Watson of the legal staff of Chicago Transit Authority, you conferred with Mr. William H. Sexton, Special Assistant Corporation Counsel, on the applicability of the Driveway Permit Ordinance to Chicago Transit Authority and at that time submitted a memorandum on the subject prepared by Mr. Watson. We reply as follows:

1. The City of Chicago derives its power to pass the Driveway Permit Ordinance from sections 23-10 and 23-20 of the Illinois Revised Statutes 1949, as follows:

"23-10. To regulate the use of the streets and other municipal property.

"23-20. To regulate the use of sidewalks, the construction, repair, and the use of openings in sidewalks, and all vaults and structures thereunder; and to require the owner or occupant of any premises to keep the sidewalks abutting the premises free from snow and other obstructions."

The power to regulate is a police power and the two above quoted sections constitute the authority of the city council of Chicago to pass sections 33-14 and 33-22 of the Municipal Code. In considering this regulatory phase of the problem Mr. Watson cites a number of cases as follows:

Kinsley v. *City of Chicago*, 124 Ill. 359;

Aberdeen-Franklin Coal Co. v. *City of Chicago*, 315 Ill. 99;

Ruban v. *City of Chicago*, 330 Ill. 97 at 103;

City of Chicago v. *Arbuckle Bros.*, 344 Ill. 597;

Fligelman v. *City of Chicago*, 348 Ill. 294;

Condon v. *Village of Forest Park*, 278 Ill. 218 at 225

Nature's Rival Co. v. *City of Chicago*, 324 Ill. 596 at 568;

Ward Baking Co. v. *City of Chicago*, 340 Ill. 212 at 214

Herb Bros. v. *City of Alton*, 264 Ill. 628;

Bauer v. *City of Chicago*, 321 Ill. 259.

It is our opinion these cases hold the following:

(a) The power to regulate confers the power to inspect and license. Inspection is a necessary adjunct to regulation. Only by that means can proper regulation be provided for (*Ruban* v. *City of Chicago,* 330 Ill. 97 (1928) at 104). While the power to license is an incident of the power to regulate, to sustain the power to license as an incident to regulation, the ordinance must be a regulatory ordinance (*Aberdeen-Franklin Coal Co.* v. *City of Chicago,* 315 Ill. 99 (1928) at 104). The power to license is one of the means to regulate (*Kinsley* v. *City of Chicago,* 124 Ill. 359 (1888) at 361). The power to regulate includes the power to license (*City of Chicago* v. *Arbuckle Bros.,* 344 Ill. 597 (1931) at 602; *Nature's Rival Co.* v. *City of Chicago,* 324 Ill. 566 (1927) at 568).

(b) The City has no power to exact such a license fee solely for the purpose of raising revenue. The authority of a municipality in the exercise of regulation is limited to such a license charge as will bear some reasonable relation to the additional burdens imposed upon the municipality by the business or occupation licensed and the necessary expense involved in the police supervision (*Fligelman* v. *City of Chicago,* 348 Ill. 294 (1932) at 302: *Condon* v. *Village of Forest Park,* 278 Ill. (1917) at page 225; *Ward Baking Co.* v. *City of Chicago,* 340 Ill. 212 (1930) at page 214; *Bauer* v. *City of Chicago,* 321 Ill. 259 (1926) at page 265; *Herb Bros.* v. *City of Alton,* 264 Ill. 628 (1914) at page 631).

Section 33-14 provides that the location, construction and maintenance of driveways shall be under the direction and supervision of the commissioner of streets and electricity, and the location and construction of the same shall be in accordance with plans and specifications approved by said commissioner.

Section 33-15 provides that no person shall hereafter construct, build, establish or maintain any driveway over, across or upon any public sidewalk or public parkway where it is necessary to cut down or alter any street curb or where the driveway depresses or elevates the established grade of such sidewalks or parkways, without first obtaining an order so to do from the City Council and a permit so to do as in the Code provided.

Section 33-16 provides that all council orders for driveways shall contain the name of the person making such application for driveway, the location and dimensions of the proposed driveway, the use to which it is to be devoted and whether in the building thereof it will be necessary to cut down or alter the street curb or elevate or depress the existing grade of sidewalks or parkways. Council orders for driveways over 16 feet wide or for more than two driveways for one plot of ground consisting of one lot or two or more contiguous lots shall be referred to the committee of the city council having charge of matters concerning public ways, and no permit for a driveway shall be issued upon order of the city council until written application therefor has been made and the bond provided for has been filed.

Section 33-17 provides that application for a permit for a driveway shall be made to the commissioner of streets and electricity and shall require the name and address of the person making the application and the location and dimensions of such driveway, the plans and specifications and other details.

Section 33-18 provides that before a permit shall issue there shall be paid to the city collector a permit fee of ten dollars and for the maintenance thereafter there shall be paid for each calendar year following the year in which the permit fee required above is paid, the annual permit fee for maintenance, as follows: For the first 16 feet in width or fraction thereof, $5.00; and for each additional 16 feet in width or fraction thereof, $1.00.

Section 33-19 provides that no permit shall be issued for any work to be done in and about the construction of driveways until plans and

specifications therefor have been submitted to and approved by the commissioner of streets, and electricity. A copy of such plans and specifications shall at all times be kept on file in the office of the commissioner of streets and electricity. No alteration or change from said plans or specifications shall be made without the written consent thereto of said commissioner.

It is apparent from the foregoing provisions of the Code that the installation of a driveway across the public sidewalk at 103rd Street and Vincennes Avenue will require the curb and sidewalk to be cut down. This will require inspection, plans and specifications. The issuance of the permit or license in such a case is an exercise of the police power and is for the promotion of the safety of the public.

To administer the provisions and requirements of the Code above noted is an expense to the City of Chicago and for such administration the City is entitled to make a necessary and reasonable charge for the license. We submit that an initial license fee of ten dollars is proper and not unreasonable and it is necessary to cover the expense of administration as provided by the Code, and that since the City's business is conducted on a yearly basis the annual permit fee of five dollars for maintenance thereafter is reasonable.

2. Mr. Watson in Part 2 of his memorandum opinion objects to including Chicago Transit Authority in the definition of "person." In considering this phase of the problem he cites two cases:

Owners of Lands v. *People*, 113 Ill. 296 (1885) p. 314;

Wilson v. *Board of Trustees*, 133 Ill. 443 (1890) p. 478.

The case of *Owners of Lands* v. *People*, 113 Ill. 296, pp. 314-15 deals with the question of whether two acts providing for drainage corporations are special legislation, says that Article 9 of the Constitution clearly relates to private corporations and not to municipal corporations, but says nothing whatever about whether a local municipal corporation is or is not a person. The holding on the same point in *Wilson* v. *Board of Trustees*, 133 Ill. 443 (1890) 478 is based upon the same reasoning and arrives at a similar result.

Mr. Watson objects to the holding in the case of *People* v. *Deep Rock Oil Corporation*, 343 Ill. 388 (1931), where the word "person" is defined. At page 401 the court says:

> "Counsel argue that this statute is limited only to 'persons' and does not include cities or municipalities. It is a sufficient answer to say that the fifth clause of section 1 of the act relating to construction of statutes, (Smith's Stat., 1929, Chap. 131, Sec. 1) the word 'person' or 'persons' may extend and be applied to bodies politic and corporate as well as individuals."

This section appears in "An Act to revise the law in relation to the construction of the statutes," approved March 5, 1874, Ill. Rev. Stat. 1949, in chapter 131, Sec. 1.05, as follows:

> " 'Person' or 'persons' as well as all words referring to or importing persons, may extend and be applied to bodies politic and corporate as well as individuals. Added by act approved May 16, 1945. L. 1945, p. 1717."

In *City of Chicago* v. *Ames*, 365 Ill. 529, the court at page 532 said:

> "The use of the term 'person' in statutory enactments has been held to include municipalities. (*People* v. *Deep Rock Oil Corporation*, 343 Ill. 388; *Ohio* v. *Helvering*, 292 U. S. 380. 78 L. ed. 1307.)"

Mr. Watson contends that the word "person" as used in the Motor Fuel Tax Act is different from the word "person" as defined in section 1.05 of chapter 131. This position is not tenable. The definition of "person" as it appears in section 1 of the Motor Fuel Tax Act, chapter 120, vol. 2, par. 417 at page 772 Ill. Rev. Stat. 1949 is as follows:

> " 'Person' means any natural individual, firm, trust, estate, partnership, association, joint stock company, joint adventure, corporation, or a receiver, trustee, conservator or other representative appointed by order of any court, or any city, town, county or other *political subdivision* in this State. Whenever used in any section of this Act prescribing and imposing a fine or imprisonment or both, the term 'person' as applied to partnerships and associations shall mean and include the partners or members thereof, and as applied to corporations the term 'person' shall mean and include the officers, agents, or employees thereof who are responsible for any violation of this Act." (Emphasis ours.)

From the foregoing definition it appears that the word "person" as used in the Motor Fuel Tax Act and as passed upon in *People* v. *Deep Rock Oil Corporation*, 343 Ill. 388 at p. 401 means political subdivision. Chicago Transit Authority is a "body politic and municipal corporation" as provided in section 4 of Metropolitan Transit Authority Act, the act by which it was created. "Political subdivision" as used in the first section of the Motor Fuel Tax Act and "body politic and municipal corporation" as used in section 4 of the Metropolitan Transit Authority Act are synonymous.

We are therefore of the opinion that the word "person" as it appears in section 33-15 of the Municipal Code of Chicago comprehends municipal corporations, such as Chicago Transit Authority.

3. On July 24, 1950 Mr. Merrill B. Knox, Consulting Engineer in the employ of Chicago Transit Authority, submitted for our consideration four applications for permits for trolley bus and motor bus turnarounds and terminals as follows:

(a) trolley bus turnaround at W. North Avenue and N. Winchester Avenue,

(b) motor bus turnaround at W. 31st Street and S. California Avenue,

(c) trolley bus turnaround at N. Central Avenue and N. Milwaukee Avenue,

(d) motor bus terminal at W. 111th Street and S. Harding Avenue, and

(e) motor bus turnaround at N. Cicero Avenue and W. Pensacola Avenue.

These applications and the plats, surveys and engineering data submitted with them show the exact locations. They clearly come within the meaning of sections 33-14 to 33-22, inclusive, of the Code. Also submitted were statements setting forth the improvements to be accomplished both in traffic and in point of safety and operation. Mr. Knox contends that under the authority of the ordinance of April 23, 1945, by which the City granted consent, permission and the exclusive right and authority to Chicago Transit Authority to operate in, over, across, along and under the streets, alleys, public ways and public grounds within the City a transportation system for local transportation of passengers Chicago Transit Authority has a right to permits for the turnarounds and terminals above indicated without making application to the city council of Chicago for permits as provided in section 33-14 to 33-22 of the Code and that permits issued by the Commissioner of Streets and Electricity are a sufficient compliance with the ordinance. We do not concur in this view and have pointed out that the issu-

ance of permits in such cases is a matter for the exercise of the police power conferred upon municipalities by the General Assembly; that the city council constitutes the corporate authority of the City of Chicago and that it is within its discretion to retain to itself the exercise of the power to issue permits as it deems best.

We are therefore of the opinion that the Chicago Transit Authority should make its applications for the driveway permits as provided in sections 33-14 to 33-22 of the Municipal Code of Chicago.

SMOKING ON C. T. A. VEHICLES

(No. 11423—Alderman, 5th Ward—A. F. G.—September 19, 1951.)

In your letter of September 6, 1951 you refer to a "no smoking" ordinance passed a few years ago regulating smoking in places of public assembly, department stores and public elevators, and ask if this ordinance or any other ordinance of the city is applicable to smoking in vehicles of the Chicago Transit Authority?

The ordinance to which you refer is probably section 193-7.1 of the municipal code adopted December 1, 1948 (C. J. p. 3208) and provides: "* * * It is unlawful for any person to smoke or carry a lighted cigarette, cigar or pipe in any public elevator or in any retail store in which more that fifteen persons are employed excluding areas set apart for serving food or beverages, waiting and rest rooms, executive offices, beauty parlors, and other rooms or areas where merchandise is not exposed." A violator is subject to a fine of five dollars for each offense.

By section 90-62 of the code, smoking or the carrying of a lighted cigar, pipe or cigarette is prohibited in the following places:

"(a) In every hazardous use room, building or premises;

(b) In every institutional building except in the administration office on the first floor and in rooms designated as smoking rooms;

(c) In every theater except in rooms designated as smoking rooms;

(d) In every church, school, garage or hangar;

(e) In every building or premises occupied as a circus, stock show or horse show; also in every public assembly unit where the combustible nature and quantity of contents are, in the opinion of the division marshal in charge of fire prevention, hazardous to life and property from fire.

Section 90-63 requires standard "No Smoking" signs to be conspicuously posted in every room, building or premises where smoking is prohibited.

Neither of these two ordinances expressly prohibit smoking in street cars, buses or elevated cars, nor do we find any city ordinance which does so.

The Chicago Transit Authority with reference to smoking on its vehicles has adopted the following rule:

> "Smoking or spitting upon platforms or within cars and buses is strictly prohibited and trainmen are instructed to use good judgment and tact in enforcing with observance of this rule."

In addition, the Chicago Transit Authority conspicuously displays in each of its vehicles a placard requesting its patrons as a public health measure to observe the "No Smoking" regulations.

Prior to October 13, 1915 smoking was permitted on the front platform of surface cars and on special smoking cars on the elevated railroads. On that date an order was issued by the department of health prohibiting smoking on all public conveyances within the city. This order was posted in all cars and violators were threatened with conviction and fine. (Report and Hand Book of the Department of Health of the City of Chicago, 1911 to 1918 inclusive, page 108.)

This order has not been repealed and is still in effect and applies to the vehicles of the Chicago Transit Authority.

STREET COMPENSATION SETTLEMENT

(No. 11463—City Comptroller—B. O'H.—W. H. S.—December 27, 1951.)

With your letter of November 19, 1951 to the Corporation Counsel you enclose draft of a proposed letter to Chicago Transit Authority indicating your agreement with the revised statement of compensation due City from Authority for the year 1948. Said revised statement was submitted to you in the letter of November 1, 1951 from Authority's Comptroller, copy of which you have furnished us. Under said statement Authority will pay to City additional compensation of $24,706.72 for the year 1948.

You request us to advise you (a) as to your authority to make the proposed agreement and (b) whether we consider this a fair settlement.

(A) *Authority of City Comptroller*

Section 18 of ordinance passed April 23, 1945 provides for the payment by Authority to City as compensation for the use of streets, alleys, public ways and public grounds within the city, including the use and occupancy of the Initial System of Subways and the extensions thereto (beginning on line 21 of section 18)

> "* * * a sum equal to a per centum as hereinafter specified of that portion of the gross revenues as hereinbefore defined received by the Grantee in each fiscal year from operations within the corporate limits of the city less that portion of such gross revenues received from operations over lines or routes operated on roadways for the use of which the Chicago Park District has jurisdiction to require payment of compensation, *to be computed by such method as the Transit Board and the city comptroller shall by agreement determine and prescribe.*" (Emphasis is ours).

Where Authority operates its vehicles on lines exclusively within the city and over streets and public ways under the jurisdiction of the city the computation of the compensation is a simple matter in arithmetic, requiring merely the application of the rate per centum to the gross revenue less payments made by Authority to City for license fees and taxes as stated in the fourth paragraph of section 18.

However, the computation becomes complicated where the lines of Authority extend in part over city-controlled streets and in part over Chicago Park District-controlled streets or roadways or over roadways

ouside of the corporate limits of the city. It is necessary to determine the portion of the fares which should be included in the gross revenues of Authority upon which it is liable for payment of compensation to the City.

Fortunately, long prior to the time of the passage of the ordinance of April 23, 1945 the question of proper division of fares between primary and secondary lines had received exhaustive judicial review. This department in an opinion to Mr. John E. Traeger, city comptroller, dated February 7, 1912, signed by John W. Beckwith (later corporation counsel) and Max M. Korshak and approved by William H. Sexton, corporation counsel, covers 14 printed pages (637-651) in the Opinions of the Corporation Counsel, April 1, 1911 to December 31, 1912. We shall refer later in this opinion in discussing the fairness of the basis tentatively agreed upon by you and the Transit Board, to the opinion of this department of February 7, 1912. The question arose in connection with the city Comptroller's audit of the books of the North Western Elevated Railroad Company for the purpose of determining the amount of compensation to be paid to the City under the ordinance of January 8, 1894.

That opinion reflected the difficulty but nevertheless the necessity of devising some just and equitable basis of computing the respective revenues of primary and secondary lines when fares collected by either represent services rendered by both. The opinion said:

> (p. 648) "From the foregoing we conclude, therefore, that the company should pay compensation on the receipts originating on and collected by secondary lines to the extent that such receipts collected by the secondary lines represent travel or use of primary lines.
>
> "While we concede that the application of the above may be difficult and in instances, impossible, yet this does not change the law."
>
> * * *
>
> (p. 649) "The proper method upon which the computation should be based in order to determine the compensation due to the city is a matter requiring expert knowledge of accounting and it will be necessary to devise some just and equitable basis upon which computation should be made, although, as just stated, the court has held in the *State* v. *Ill. Central R. R. Co.*, supra, that in the absence of any other proof on that point the court would be justified in dividing the joint earnings *pro rata* according to the length of the carriage over the respective lines."

This explains the reason for and the purpose of the provision in section 18 of the ordinance passed April 23, 1945 to Transit Authority. Experience and the reasoning of the courts had shown that there was no set formula which could have been adopted by the city council with uniform fairness both to the grantor and grantee under all sets of circumstances. There always was the division *pro rata* based on mileage to fall backupon but the courts had held that also there were other factors which might on proper presentment be considered. Some measure of flexibility therefore was advisable, and the matter requiring expert knowledge of accounting, as stated above in the opinion of February 7, 1912, the ordinance passed April 23, 1945 authorized the city comptroller and the Transit Board, (each carrying on its discussions through its comptroller) by agreement to determine the basis or method of computing the compensation. It is presumed, of course, that the basis agreed upon will be just and equitable. In our opinion the test is (a) does the agreement accord with sound and experienced accounting judgment on the best basis on which to determine the gross revenues of Authority from operations upon which it is required to pay compensation to the City? and (b) does it substantially conform to the general principles governing the allocation of revenues between primary and secondary lines as discussed in the decisions of our courts of review? The courts have indicated a range

within which the knowledge and experience of accountants may contribute to the satisfactory solutions of problems in the computation of compensation under varying sets of circumstances. The authority as designated in section 18 we think is intended to be exercised within such range.

For convenience, the lines of Authority on city-controlled streets may be regarded as "primary lines" and the lines on Chicago Park District-controlled streets and roadways and the lines outside the corporate limits of the city as "secondary lines."

We understand that you and Authority's comptroller, after numerous discussions extending over a considerable period of time, have now tentatively agreed upon the method or basis of computing the compensation which both of you believe to be fair and equitable, providing for full payment of compensation to the City by Authority (a) a sum equal to the per centum specified by the ordinance and (b) applied to the gross revenues received by authority in each fiscal year from operations within the corporate limits of the city less that portion of such gross revenues received from operations over lines or routes operated on roadways for the use of which Chicago Park District has jurisdiction to require payment of compensation. Upon the execution of a formal agreement between you and the Transit Board the method or basis of computation set out in the agreement would become effective and binding under the provisions of section 18 of the ordinance.

While the ordinance specifically designates the city comptroller and empowers him to act impliedly on behalf of the City, we suggest that you request the approval of the proposed agreement by the city council.

(B)—Our Opinion as to Fairness of Settlement

Correspondence between you and the comptroller for Authority, copies of which you sent us, shows that the settlement under consideration has been under discussion since April 1949. This correspondence consists of:

(a) Your letter of April 20, 1949 to Mr. Whonsetler requesting copy of the audit of the books of Authority and directing his attention to the provision of section 18 of the ordinance of April 23, 1945, as to agreement by Transit Board and the city comptroller as to the method of computing compensation;

(b) Mr. Whonsetler's reply of April 27, 1949 sending you a detail showing the computation of the revenue earned from operations outside the limits of the city and from operations over streets and roadways under control of Chicago Park District and also a copy of the annual audit by Arthur Anderson & Company of the accounts of Authority for the year ended December 31, 1948;

(c) Your letter of May 18, 1949 to Mr. Whonsetler in which you state your disagreement with Authority's method of division of revenue from operations over lines and routes within the city and outside the city, and between the City and Park District roadways. In that letter you said:

> "For the Rapid Transit Division, you have deducted in your statement the full amount collected from passengers outside the City and multiplied this amount by two,—in effect, excluding the total revenue from passengers going both ways across the City limits. Taking the total collections outside of Chicago alone, without multiplying by two, would be more equitable.
>
> * * *
>
> "For the Surface Division you have taken the percentage which vehicle miles operated outside of Chicago and on Park District roadways bears to the total vehicle miles operated, and applied that percentage to the total passenger revenue.
>
> "This is not equitable as the travel outside of Chicago and the traffic derived from the Park District roadways is very light com-

pared to the entire City traffic. It would be more equitable to prorate the actual revenues from each route that extended outside the City and over Park District roadways on a vehicle mile basis. * * *"

(d) Mr. Whonsetler's reply of May 31, 1949 in which he stated Authority's position as follows:

"With respect to your objection to the doubling process applied to our traffic on the Rapid Transit Division originating outside the City of Chicago, we adopted this method on what we regard as a sound theory. * * * Certainly, all of the revenues in both directions from traffic originating or terminating outside the city limits on the Rapid Transit is earned by reason of operations outside the city. In other words, if it were not for these lines outside the city limits on the Rapid Transit neither the fares from or to these lines would be carried by the Transit Authority and we feel that the exclusion of the total traffic in both directions is justified.

"With respect to the objection you advance to our method of computing the revenue on the Surface Division outside the city limits, it would be most difficult to develop a proper statement of revenues for this purpose by lines. The only records we have, or can obtain, by lines, is the record of originating passengers and revenues derived from such passengers. You will appreciate, of course that because of the universal transfer privilege this statement will fall far short of the actual number of passengers carried on these lines. * * * It was for this reason that we determined upon using the system average revenue per vehicle mile and applying that figure to the vehicle miles operated outside the city limits on the Surface Division to determine the revenue to be deducted from the Surface Division passenger revenue for the purpose of computing the compensation to the City under the ordinance."

(e) Mr. Meinardi's letter to you of November 1, 1951 sending you a revised computation of "Net Compensation to City of Chicago Pursuant to Provisions of section 18 of the ordinance of April 23, 1945, for Fiscal Year ended December 31, 1948." Mr. Meinardi's letter states:

"* * * This re-computation was made as a result of conferences concerning this method between representatives of the City and of the Authority. In making this computation the amount of revenues from operations without the corporate limits of the City for the Rapid Transit System of the Authority was based on actual cash fares reported by agents and collectors. This amount represents 50% of the amount originally used in determining the amount paid to the City for the year 1948.

* * *

"The revised computation results in net compensation determined to be due the City of $1,060,153.44, as compared to the amount of $1,035,446.72 which was actually paid to the City for the year 1948, resulting in an additional payment which would be due of $24,706.72.

"If the attached method of determining net compensation due to the City is agreeable to you I would suggest that an agreement be drawn providing for such method of compensation and that such agreement be submitted to the City Authorities and to Chicago Transit Board for approval."

The discussions outlined above between you and Authority's comptroller, extending from April 1949 to November, 1951, have resulted in a tentative agreement whereby Authority recedes from its original position and accepts your position in regard to the method of computing the amount of revenue from operations without the corporate limits of the city for the Rapid Transit Division. This agreement, if entered into by you after approval by the city council and Transit Board, will result in the

payment to City by Authority of $24,706.72 as additional city compensation for the year 1948.

Under the tentative agreement you, on your part, would recede from your original position in regard to revenue from Surface Lines Operations where such operations are in part over city-controlled streets and in part the streets and roadways under the control of Chicago Park District. In this regard you would accept the method proposed by Authority. That is, instead of basing the computation upon the actual revenue from each *line* or *route* affected the *system* average revenue per vehicle mile would be used as the basis.

What the difference in method of computation would amount to in dollars and cents is problematical. Mr. Westphaln of your office informs us verbally that the adoption of the *lines* or *route* basis originally proposed by you might bring to the City additional compensation of about $2,000 for the year 1948. There is, of course, no way of determination in the absence of the actual figures. Authority contends that such actual figures would be most difficult to obtain as the only records it has or can obtain by lines is the record of originating passengers and revenues derived therefrom and because of the use of the universal transfer privilege such records would not reveal the actual service rendered by Authority.

Inasmuch as the additional compensation, if any, that might accrue to the City under the actual fares by *lines* or *routes* basis would be negligible and probably would entail upon Authority additional work and expense, we think you would be justified in agreeing to the *system* basis. In our opinion, the adoption of the *pro rata method* based upon mileage, when other means of determination of revenues and of services are not available or practical, has the sanction of judicial approval.

In *State* v. *Ill. Central Railroad Co.*, 246 Ill. 188, at 261, the court said:

> "* * * If, however, the State, on hearing in this proceeding, should prove that certain charges were made for carrying goods partly over the charter lines and partly over the non-charter lines, the court, in the absence of any other proof on that point, would be justified in dividing those joint charges *pro rata*, according to the length of the carriage over the respective lines."

In *Baltimore Union Pass. Ry. Co.* v. *The Mayor and City Council of Baltimore*, 71 Md. 405, the court said:

> "It appears clear that the court thought, that as there was no evidence enabling it or the jury to find how far each passenger who rode on the cars traveled, the only way to approximate a fair basis of settlement was to act on the assumption that each part of each line carries as many as any other part. This seems reasonable, and is the principle the legislature has sanctioned as the mode of ascertaining the taxable gross receipts of steam railroads whose tracks are partly within, partly without the State of Maryland * * *"

The above cases and others of similar tenor are quoted in the February 7, 1912 opinion of the corporation counsel, which you state in your letter of November 19, 1951 was followed by the city comptroller in determining the basis of computation now under discussion

The facts controlling in the Rapid Transit Division differ from those of the Surface Division lines and routes in two respects:

> (1) The actual figures of gross revenues from Rapid Transit operation are shown in the total of fares collected, which fares usually originate on the secondary lines in the morning when suburban residents are being transported to their places of employment within the corporate limits of the city and originate on the primary lines in the afternoon when city workers are returning to their homes in the outlying communities;

(2) Whereas transportation over Chicago Park District-controlled streets and roadways usually is incidental to transportation from starting points and to destinations on city-controlled streets, a negligible total of fares originating in Chicago Park District, it is claimed by Authority, and we think plausibly, that the territory served by the secondary lines of the Rapid Transit Division is the main source of the traffic carried by the primary lines.

Authority originally took the position that none of the Rapid Transit Division revenue, whether originating within the city or outside of the city, was chargeable to gross revenues upon which Authority paid compensation to the City since if it were not for the lines outside of the corporate limits there would be no transportation in the city from such source. Authority receding from this position and accepting your suggestion of an equal apportionment of the fares, the question is as to the fairness of this arrangement which is based upon factors other than relative mileage.

The court as above quoted in *State* v. *Illinois Central R.R. Co.* held that mileage is not the only fair and equitable basis. It is unnecessary here to go further into the reasoning and the citations so covered in the opinion of the corporation counsel of February 7, 1912. The conclusion reached in that opinion, applicable to the present proposal of an equal apportionment of Rapid Transit revenues, appears at page 650 of Opinions of the Corporation Counsel, *supra,* and reads as follows:

"It may be suggested as a practical solution of this difficult feature of determining compensation when traffic originates on a primary line and ends on a secondary line and vice versa, that these two classes of traffic may equalize each other. In other words, where traffic originates on a primary line as a consequence of the service of the secondary line in transporting the passengers to their destination the fares paid will equal those fares which originate on the secondary line in consequence of the service of the primary line in completing the transportation. This could be checked up by a count of passengers."

In our opinion, the proposed settlement (and agreement) is fair and equitable and is in accord with the principles of law governing the determination of a method or basis of computation of compensation which this department recommended to the city comptroller in the opinion dated February 7, 1912.

RELOCATING POLES

(No. 11469—Commissioner of Streets and Electricity—B. O'H.—W. H. S.—January 21, 1952.)

In your letter of December 21, 1951 to the corporation counsel (received by us January 4, 1952) you request our advice as to what action can be taken to compel Chicago Transit Authority to move its poles on S. Halsted street between W. 55th and W. 61st streets back to the curb and eliminate what you state is "considered a hazardous condition."

With your letter you transmit

(a) copy of a letter to you dated November 15, 1951 from C. O. Rosain, a realtor at 5933 S. Halsted street, in which he says that the trolley poles in the area described extend about 18 inches from the curb, that "the law requires us to park within 12 inches of the curb," and that his clients complain of damage to their fenders and auto bodies caused by the trolley poles being out in the street;

(b) copy of a letter to you dated December 10, 1951 from W. J. McCarter, Authority's general manager, in which he states that at your request he has investigated the cost of moving the poles "from their present location in the gutter to a point back of the curb," that the cost would be about $15,000 and that he does not believe "it is a morally justifiable charge against the car rider" as the moving of the poles will not improve transportation for the car rider but is of direct benefit to owners of the private automobiles;

(c) Copy of City drawing C-15793 showing Authority's poles on S. Halsted street, W. 61st street to W. Garfield boulevard, projecting beyond curb into street for distances up to 14 inches at some locations.

R. F. Gross, engineer for the committee on local transportation, informed us verbally that complaints similar to that in Mr. Rosain's letter to you were made by business men in the same area to Alderman Sheridan, that responsive to Alderman Sheridan's presentment of the views of his constituents the committee on local transportation had endeavored to have the poles on that portion of S. Halsted street relocated by Authority at its own expense and that Mr. Gross had taken up and discussed the matter with Mr. McCarter on November 21, 1951.

What concerns you, as well as Alderman Sheridan and the committee on local transportation, are (a) the liability of Authority to relocate the trolley poles at its own expense, and (b) if Authority is so liable what course is open to the City to effectuate the relocation as soon as possible. We will discuss the matter in the following order:

(a) *Liability of Authority to Relocate Trolley Poles at its own expense.*

The Revised Traffic Code defines street or highway as:

> "Every way or place, other than an alley or bridle path, open to the use of the public, as a matter of right, for purposes of travel"

and defines roadway as:

> "That portion of a public way between the regularly established curb lines or that part improved and intended to be used for vehicular travel." (Sec. 27-1)

The roadway of S. Halsted street is open to the use of the public, as a matter of right, for purposes of travel. The right of the public to its use for purposes of travel extends over the entire portion of the roadway between the regularly established curb lines or that part improved and intended to be used for vehicular travel. The permission granted to Authority by the City for the use of a portion of the roadway for street car operation is subordinate to the right of the public to use the roadway for public travel.

The use of the roadway for street car operation should not be permitted to interfere with the use of the roadway for public travel.

A trolley pole located outside the curb line of a street which prevents or makes difficult the parking of an automobile within the lawful distance from the curb or which prevents public travel over the full width of the roadway is an obstruction to the use of the roadway by the public as is a street car track which is above or below the established grade of the street.

Section 27-119 of the Revised Traffic Code for the City of Chicago passed December 22, 1950 reads:

> "No person shall stand or park a vehicle in a roadway other than parallel with the edge of the roadway headed in the direction of lawful traffic movement and with the curbside wheels of the vehicle within twelve (12) inches of the curb or edge of the roadway except as otherwise provided in this chapter. Double parking is prohibited."

It appearing from City map C 15793 that the poles under consideration are located at such distances from the curbside as (a) to violate the revised traffic code in making difficult if not impossible the parking of automobiles within the twelve inch limitaton and (b) to close to public travel a portion of the roadway, it is our opinion that there is no question of the obligation of Authority to relocate the poles at its own expense.

(b) · *Course Open to City to Effectuate Relocation of Poles as soon as possible.*

The second subparagraph of paragraph H of section 10 of the ordinance to Authority passed April 23, 1945, reads:

"Whenever prior to July 1, 1945, the City or any other governmental authority or public agency shall have widened the roadway in any portion of any city street in such a manner as to require the relocation, change or reconstruction of the street car tracks, poles and wires of the Grantee or in such a manner as to require the relocation, change or reconstruction of the columns or structures of the Grantee where such widened roadway crosses beneath any of the elevated rapid transit structures of the Grantee, and whenever such relocation, change or reconstruction is found to be justified by the requirements of traffic and safety and the location of such street car tracks, poles, wires, columns and structures in such street should conform to the lines of such widened roadways and such relocation, change or reconstruction shall not have been made by a predecessor of the Grantee, the Grantee shall establish a satisfactory schedule and at its own expense and at the times fixed by such schedule shall cause such street car tracks, poles and wires to be relocated, changed or reconstructed so that the center lines of its right-of-way will be substantially coincident with the center line of such widened roadway, and shall cause its columns and structures to be relocated, changed or reconstructed so that such new locations will conform substantially to the lines of and not impair the safe use of such widened roadways."

When Authority took over the local transportation system the trolley poles were in their present positions in relation to the curb line as a result of the widening of the roadway at some time prior thereto and at a time when the obligation was upon a predecessor of Authority to relocate the poles at its own expense. The relocation not having been made by a predecessor of Authority, Authority under the ordinance and its acceptance thereof assumed the obligation.

It will be noted, however, that the time for doing the actual work is to be fixed by a satisfactory schedule previously established by Authority.

The undersigned attended the meeting of the chairman of the committee on local transportation with Chairman Budd and four members of the Chicago Transit Board on January 11, 1952 and discussed among other matters the relocation of the poles at Authority's expense. They agreed substantially with us in our position as stated in this opinion. They stated, however, that as the necessary funds were not provided in the budget of Authority for the year 1952 the actual work of relocation should be scheduled by them for the year 1953 under the provisions of the second subparagraph of paragraph H of section 10 above quoted by us.

We suggest that if there are similar cases where the street car tracks, poles, wires, columns or structures of Authority require relocation, changing or reconstruction due to roadway widening prior to Authority's takeover, and which relocations, changes and reconstructions were not made by a predecessor of Authority, it is advisable to bring them at this time to the attention of Authority. Such seems to us the orderly procedure to be followed and one in conformance with paragraph H of section 10 of the ordinance.

It may be that the cost of the required relocations, changes and reconstructions will exceed in the aggregate the financial ability of Authority

to assume at one time. In such case the order of priorities should be fixed now. The schedule having been established by Authority, as provided in the second subparagraph of paragraph H of section 10, the work then will proceed at Authority's own expense at the time fixed by such schedule.

If on the other hand the aggregate of costs to be incurred by Authority should prove to be less than anticipated and not much in excess of the $15,000 estimate of cost of Mr. McCarter for the relocation of the trolley poles the City could reasonably urge that the schedule should provide for the relocation of the poles in S. Halsted Street without waiting for further appropriations in Authority's budget for the year 1953.

ELECTRIC POWER FOR POLK STREET BRIDGE

(No. 11582—Commissioner of Public Works—B. O'H.—W. H. S.—September 12, 1952.)

By letter of August 19, 1952, Mr. Hewitt requested our opinion;

(a) "as to whether under the Council Order passed January 16, 1952, 1952, (C. J. 1788) the CTA is obliged to supply the necessary electric power for the operation and illumination of this (Polk street) bridge during the year 1952 at the rate of $106.45 per month, through its existing facilities without any obligation on the part of the City to purchase any portions of those facilities."

and

(b) "whether the City is obligated to purchase any part of their (Authority's) facilities after the year 1952, in order to obtain power for this (Polk street) bridge."

The council order passed January 16, 1952, reads:

"Ordered, That the City Comptroller and the City Treasurer be and they are hereby authorized to pay to the Chicago Transit Authority for the necessary electric current for power and lighting for the operation and illumination of the various City bridges for the year 1952, or such portion thereof as said service may be furnished at the same rates paid for the year 1951—$106.45 per month per bridge, when bills and vouchers for same have been properly approved by the Commissioner of Public Works."

The order merely authorizes the city comptroller and city treasurer to pay Authority at the rate specified for such "service as may be rendered." It is not a contract ordinance. Although Authority and its predecessor have been and CTA is furnishing power for the operation and illumination of various city bridges, including Polk street bridge, there is not and never has been a formal agreement with the City and there is no provision in the ordinance passed April 23, 1945 requiring Authority to furnish such power or to make available its facilities for such purpose.

In our opinion, there is no obligation (a) on the part of Authority to furnish power for the operation and illumination of City bridges after December 31, 1952 and (b) on the part of City to purchase such power and thereafter maintain any part of Authority's facilities previously used or currently being used by Authority in the furnishing of power for the operation and illumination of City bridges. For the remaining months of the year 1952 we think that Authority, having accepted the benefits of the arrangement by the council order of January 16, 1952 and therefore having constructively agreed to it, should continue to furnish the power for the Polk street bridge at the specified rate of $106.45 a month provided same can be done with the present facilities.

Mr. Hewitt's letter also states that because of Authority's substitution of gas bus operation for street car operation over the Polk street bridge;

> "* * * it appears desirable to supply the bridge through a cable installed in a duct in the Polk street viaduct from the bridge to Canal Street to permit elimination of the trolley wires. This cable would be connected to existing cable now in service in Canal Street.
>
> This Department is willing to finance the cost of installing such a cable from the bridge to Canal Street, but the CTA is insisting that the City assume the burden of owning and maintaining an existing cable now in place, extending from Van Buren Street in Jefferson Street, in Harrison Street and in Canal Street to Polk Street: the CTA insists that the City purchase this existing cable at its scrap value of $2,431.00, asserting that they have no use for this cable and that its use would be restricted to supplying current to the Polk street bridge.
>
> We believe this to be an unwarranted demand upon the City. We believe that the CTA in contracting to supply current for the Chicago bridges, should assume the difficult installations along with the simple installations at the same contract prices."

But, as we have pointed out there is no contract between Authority and City who have been proceeding from year to year as did Chicago Surface Lines and City under an informal and more or less flexible so-called "gentleman's agreement." (See opinion of Corporation Counsel Busch to Mr. Sprague dated February 10, 1927, at which time Chicago Surface Lines were in receivership in the United States District Court.) If Authority has certain obligations under the so-called "gentleman's agreement" for the year of 1952, such obligations will terminate on December 31, 1952. The City and CTA are free to negotiate a formal contract or to continue as they have in the past, as they see fit.

While Authority, in its relations with City, is under no legal obligation after December 31, 1952 to furnish power for the operation and illumination of City bridges (the N. Wells and W. Lake Street bridges being excluded as they are covered by existing contracts) its obligation to the public is as great as that of the City. It is the duty of City to keep its streets and bridges open to public use and likewise it is the duty of Authority to keep its local transportation lines open to public use. We have been advised informally by the Bridge Division that if Authority should fail or refuse to furnish power for City bridges on fair and equitable terms acceptable to City it would probably necessitate the closing of City bridges for all use until such time as new installations could be placed for the reception of the AC current furnished by Commonwealth Edison Company in lieu of the DC current hereto furnished by CTA and also that at present plans have been prepared for furnishing power for the 92nd, 100th and 106th street bridges and that an expenditure of $63,444 by City is contemplated for necessary new installations. We estimate that if the same alterations were required at the price estimated in the case of these three bridges the cost of making the 46 bridges available for the reception of AC current would approximate $1,000,000. Furthermore, all work of installing new facilities must be let by public bidding after advertising, so that under the most favorable conditions a considerable time must elapse before the bridges could be operated and lighted by power from Commonwealth Edison Company.

The substitution of bus for street car operation and the elimination of trolley wires from which Authority has been furnishing the power for the bridges, has complicated the problem. So long as street cars were being operated on a bridge and the power obtained from the trolley wires on the bridge the problem was simple.

It may be helpful to review the historical background bearing on the legal aspects of the existing problem.

July 21, 1925 the city council passed an ordinance authorizing and directing the commissioner of public works to enter into a contract with Chicago Surface Lines for the furnishing by it of requisite power and lighting for the operation and illumination of bridges over the Chicago River at 46 designated streets. The contract authorized by the ordinance covered the period from January 1, 1925 to December 31, 1925 and provided for payment by City to Surface Lines of $106.45 a month for each bridge. (C. J. pp. 1254-5).

February 2, 1927 (C. J. p. 5398) the city council passed an ordinance directing and authorizing the commissioner of public works to enter into a contract with the Chicago Surface Lines for supplying the various city bridges with power for the year 1927. On February 10, 1927 Corporation Counsel Busch wrote Mr. Sprague as follows:

> "Some time ago your office requested this department to prepare a contract to be executed by the appropriate City officials and the officials of the constituent companies of the Chicago Surface Lines, providing for the furnishing of light and power for bridges during the current year, or for so much thereof as the present operating company shall continue to operate. This contract was accordingly prepared and signed by you. We lately furnished several signed copies to the Surface Lines to be executed by the appropriate persons. Yesterday Mr. Guilliams, General Counsel for the company, notified the writer that Mr. Sheean and Mr. Busch have lately considered that it would be inadvisable to enter into contracts of this character formally for a variety of reasons that appeared to them sufficient. In their considerations there was no thought of discontinuing the furnishing of this current by the companies for the City's use, but merely that no formal contracts should be entered into. It was Mr. Guilliams idea that the light and power should be continued to be furnished at the old rate until the parties agreed that this service should be discontinued. Mr. Guilliams is holding the contracts pending word from us. Will you please let me know if there is any objection on your part to our continuing under the same arrangement heretofore existing but without any formal written contract to evidence it?
>
> The thought occurs to me that you may want something other than a mere gentlemen's agreement to authorize payment of the monthly bills for this service."

February 28, 1927 Mr. Sprague wrote the committee on finance the following letter:

> "On February 2, p. 5398 C. J., the City Council authorized this Department to enter into a contract with the Chicago Surface Lines for electric light and power for the various City bridges. The contract was drawn up but the Law Department now informs me that owing to the present situation as exists between the Surface Lines and the City it would be inadvisable to enter into a formal contract. There is no desire on either side, however, to discontinue the service. Therefore, in order that payments for this service be made, will you kindy recommend for passage the attached Council Order?"

The council order referred to in that letter was passed by the city council and in substantially the same form it has been passed by the city council annually thereafter. The last of such orders was that passed by the city council on January 16, 1952.

Up to now there has been no contract for furnishing power to City bridges but the power has been furnished under this so-called "gentleman's agreement." The order passed each year by the city council merely authorized the city comptroller and city treasurer to make the payments at the specified price when and if the power was furnished.

It seems clear that the basic concept of this informal "gentleman's agreement," which appears to have been satisfactory in its operation for over a quarter of a century, was recognition of the common interest of City and local transportation systems.

USE OF OLD EQUIPMENT ON LOGAN SQUARE BRANCH

(No. 11628—City Council—W. H. S.—J. J. S.—December 18, 1952.)

You forwarded to us a copy of the resolution introduced in the City Council October 31, 1952 sponsored by Aldermen Geisler, Brandt and Peska which would direct the Committee on Local Transportation to investigate the action of the Chicago Transit Authority in its substitution of old cars for new on the Logan Square Branch of the Rapid Transit System. You asked our opinion as to whether the Authority's action violated any of the provisions of the Chicago Transit Authority Ordinance.

The cars now being used in the Dearborn Street Subway in connection with the Logan Square Branch, though old, are of steel construction of the Rapid Transit System. Reconstruction of those cars required ment set forth in the last sentence of Paragraph E of Section 9, of the Ordinance: "All passenger cars and other passenger vehicles operated in such subways shall be of steel or of other comparable material, and of approved construction for the safety, comfort and convenience of the patrons of the Transit System."

The only portion of Exhibit B of the Ordinance which might have any bearing is headed "Rapid Transit Cars" and deals with the modernization of the Rapid Transit System. Reconstruction of those cars required to be reconstructed has been completed and the Authority has acquired a number of new "L"—subway cars, has 100 on order and states that it plans to acquire many more. It is therefore our opinion that Exhibit B of the Ordinance has not been violated.

Furthermore, Section 31 of the Metropolitan Transit Authority Act provides, in part: "The Board shall have power to pass all ordinances and make all rules and regulations proper or necessary to regulate the use, operation and maintenance of its property and facilities, and to carry into effect the powers granted to the Authority * * *." This language clearly allows the Board to reassign equipment in its discretion, so long as such reassignment conforms to the requirements of Paragraph E of Section 9 of the Ordinance, above quoted.

ADVERTISING ON C. T. A VEHICLES

(No. 11633—City Council—W. H. S.—J. J. S.—January 8, 1953.)

On December 23, 1952 the Committee on Local Transportation directed that the Corporation Counsel be requested to render an opinion as to the power of the City Council to pass an ordinance amending the ordinance passed April 13, 1950 (C. J., p. 6032-6033) granting permission of the City of Chicago Transit Authority "to display or permit advertisements to be displayed on the front, rear and both sides of the exterior of its street cars and buses, and on both sides of the exterior of its cars operated in its Rapid Transit trains * * *."

The proposed amendatory ordinance would exclude political advertising on the exterior of all vehicles operated by the Chicago Transit Authority.

The Chicago Transit Authority Ordinance, passed April 23, 1945 (C. J., p. 3376), under Section 7, Advertisements and Concessions, states, in part:

> *"Advertisements, Other than in City-owned Subways.* The Grantee is authorized to display or to permit advertisements to be displayed within its cars and other vehicles, and when approved by the city council on the outside of its cars and other vehicles; and to the extent that the City lawfully may authorize it so to do, the Grantee is authroized to permit advertisements to be displayed upon any other property owned, leased or operated by it and used by it in the operation of the Transit System (but not including City-owned subways), subject always to the right and power of the city council to determine the locaton and character of all such advertisements."

It is our opinion that the language of the above quoted Section 7 of the 1945 ordinance retained the power of the City Council to put reasonable restrictions and conditions upon the type of advertising to be displayed on the outside of vehicle operated by the Chicago Transit Authority and that the passage of the proposed ordinance would be a valid exercise of the powers of the City Council.

We do recommend, however, that instead of amending the ordinance of April 13, 1950 it would be preferable to propose a new ordinance which would include the desired language and would repeal the 1950 ordinance. We respectfully suggest the following substitute ordinance:

"BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF CHICAGO:

SECTION 1. That approval, consent and permission of the City of Chicago are hereby given to Chicago Transit Authority, a municipal corporation, created by the laws of the State of Illinois, to display or permit advertisements, other than political advertisements, to be displayed on the front, rear and both sides of the exterior of its street cars and buses, and on both sides of the exterior of its cars operated in its Rapid Transit trains; all of said advertising displays to be 21" in height and to vary between 27", 36" and 44" in width; and all of said advertising displays to be placed below the window line on said cars and other vehicles.

SECTION 2. The approval, consent and permission granted by this ordinance shall continue in force and effect for the same term and co-extensive with the term specified in Section 2, paragraph B of the Chicago Transit Authority ordinance passed by the City Council of the City of Chicago on April 23, 1945.

SECTION 3. The ordinance passed by the City Council on April 13, 1950 and appearing on pages 6032 and 6033 of the Journal of the Proceedings of the City Council of that date, entitled "An Ordinance Giving Approval, Consent and Permission to Chicago Transit Authority to Display or Permit Advertisements to be Displayed on the Outside of its Cars and Other Vehicles" is hereby repealed.

SECTION 4. This ordinance shall be in full force and effect from and after its passage."

SECTION III

MANAGEMENT OF THE MUNICIPAL CORPORATION

CHAPTER XI — FINANCE

A. APPROPRIATIONS AND TAXES

SALES TAX ON DRUGS

(No. 11187—Purchasing Agent—J. F. O.—October 7, 1949.)

In your letter of recent date concerning the above subject, you enclose a letter of the Ohio Chemical & Manufacturing Company directed to the Chicago Board of Health requesting said Board to complete, sign and return a certificate designated as sales and use tax exemption certificate, in the event the Department wished to claim exemptions from the sales and use tax. Presumably you included the certificate for approval by this office prior to having the same signed by the president of the Board of Health.

Subsequent to your letter, our conversation disclosed that it is the Illinois Retailers' Occupation Tax that is being considered since the purchase order originates in Illinois and delivery of the personal property is made in Illinois.

This certificate, if signed, would relieve the Ohio Chemical & Manufacturing Company of liability under the Illinois Retailers' Occupation Tax.

If the commodity purchased from this Company was bought for resale, the certificate should be signed. If it was purchased for use and consumption by the City, it should not be signed.

Your letter also requests advice as to whether the City is obligated to pay sales tax to vendors on purchases of food and drugs for municipally owned hospitals and public health units.

Food and drugs purchased by the City for municipally owned hospitals and public health units are purchased for use and consumption and not for resale. Under such circumstances, unless the City assumes payment of the tax as a part of the purchase price of the commodity, the vendor, not the City, is liable for payment of the tax.

OVERESTIMATING OUTSTANDING TAX WARRANTS

(No. 11472—City Council—R. J. N.—January 28, 1952.)

Pursuant to the verbal request of the Chairman of the Finance Committee, there is transmitted herewith, an amendment to the 1950 appropriation ordinance of the City of Chicago.

There is presently pending in the County Court, a 1950 tax case known as the "collector's application for sale of lots and lands delinquent for nonpayment of taxes for the year 1950." Among the objections to the 1950

tax levy of the City of Chicago, is one based on the contention that the City Council failed to take all of its assets into consideration in compiling the 1950 budget by deducting from outstanding taxes from levies of the years prior to 1950, a larger amount of tax warrants than were actually outstanding on January 1, 1950. The objectors arrive at the conclusion that an over-estimate of tax warrants was made by deducting from the total taxes uncollected prior to January 1, 1950 from the levies of the years 1946 to 1949, inclusive, a 10% reserve for loss and cost and then deducting the actual amount of tax warrants and interest shown in the report of the City Comptroller of the City of Chicago for the year 1949.

The fallacy in the objector's contention is use of the 10% deduction for loss and cost reserve. Due to technical restrictions on the admissibility of evidence, we are unable to prove what we know is a fact, namely, that the City Council deducted as a reserve for loss and cost, a larger percentage than 10% and this percentage varied from year to year, depending on the collection experience for the individual year.

Section 236 of the Revenue Act of 1939 (Chapter 120, Paragraph 717, Ill. Rev. Stat.) and House Bill 933 of the 67th General Assembly and approved July 9, 1951, authorizes the municipal officials to correct levies that have not been sufficiently itemized at any time prior to an order of court in a tax proceeding.

We are of the opinion that there is sufficient legislative authority to permit the City Council to amend its previous appropriation ordinance where such an amendment does not increase appropriations or add to the tax levy. Accordingly we have prepared from the records kept at the Comptroller's Office and the Finance Committee's staff, an amendment to the 1950 appropriation ordinance which reflects the actual amounts considered by the Council in compiling the 1950 appropriation ordinance, incorporated these amounts in a proposed amendment to the 1950 ordinance and transmit the same herewith for your consideration.

APPROVAL OF BOND FUND CONTRACT

(No. 11589—City Comptroller—J. C. M.—September 25, 1952.)

In your letter of September 9, 1952 you advise:

"In the Annual Appropriation Ordinance for the year 1952 the City Council appropriated from the Electric Street Lighting System Bonds—1951, under account 464-X-62, the sum of $2,500,000 'for the purpose of paying the cost of improvement and extending the electric street lighting system. . . .' At its meeting of July 30, 1952, page 2903 of the Journal of the City Council, an additional amount of $2,000,000 was appropriated for under the same account for the same purpose, making a total of $4,500,000. The amount available for appropriation at January 1, 1952, was $7,904,883.44.

"Up to date this account has been encumbered for $3,328,549.30 leaving an unencumbered balance of $1,171,450.70 at this date.

"At its meeting of August 15, 1952, Council Journal, Page 2983, the Council authorized the Purchasing Agent to execute a contract with the Kil-Bar Electric Company for labor, tools and equipment in connection with the extension of the street lighting system in the amount of $2,859,313.00 against this account. This contract is $1,687,-862.30 in excess of the amounts previously appropriated by the City Council.

"We understand from the Commissioner of Streets and Electricity that the need to go forward with this work is urgent.

"Does the approval by the City Council of a contract payable from a bond issue constitute an additional appropriation sufficient to allow the Comptroller and Mayor to execute the contract?"

The bond issue in question was approved by referendum (C. J. July 11, 1951, pp. 529-532) and, therefore, comes within the holdings of *Tribune Co.* v. *Thompson*, 342 Ill. 503, and *Simpson* v. *City of Highwood*, 372 Ill. 212.

In the *Tribune Co.* case the Supreme Court held that a referendum had on the question of issuing general obligation bonds of the City of Chicago, to be paid by general taxation, dispensed with the necessity of an appropriation, although the City Council was charged with general supervisory powers over the expenditure of the funds. The fact that there was a setting aside of the proceeds of the bond issue in the anuual appropriation ordinance in that case tends to weaken the principle of law stated by the court. However, we have an interpretation of the decision rendered in the *Tribune Co.* case by the Suprme Court in the *Simpson* case.

The court in the *Simpson* case, referring to the holding in the *Tribune Co.* case, said (p. 220):

"In *Tribune Co.* v. *Thompson*, 342 Ill. 503, a referendum was had on the question of issuing general obligation bonds of the city of Chicago to be paid by general taxation, without an antecedent appropriation. We held that the referendum dispensed with the necessity of an appropriation. We there cited with approval the holdings in *State* v. *Martin*, 27 Neb. 441, 43 N. W. 244, and *Pryor* v. *Kansas City*, 153 Mo. 135, 54 S. W. 499, in each of which it was held that where general obligation bonds were authorized by a referendum, and contracts were afterward let for the improvement, no prior appropriation was necessary and the contracts were valid. In the *Missouri* case it is said no appropriation was necessary, since by the ordinance and the vote of the people, the proceeds of the bonds were put beyond the control of the common council either to apportion or control. That reasoning is applicable here. The proceeds of the bonds can be used for no other purpose than the one specified in the ordinance. In the *Thompson* case and the *Nebraska* and *Missouri* cases the proceeds were segregated by a referendum."

While it would have been better procedure for the City Council in its Appropriation Ordinance or Supplemental Appropriation Ordinance of 1952 to have appropriated in general terms the entire balance of the Electric Street Lighting System Bonds, it is our opinion that the authorization of the contract with the Kil-Bar Electric Company by the City Council on August 15, 1952, (C. J. p. 2983) constituted an application of the bond issue funds for the specific object and purpose as set forth in said authorization of the City Council and is in compliance with the provisions of Sec. 7 of the Bond Issue Ordinance of July 11, 1951 (C. J. pp. 529-532) as approved by referendum and, applying the rulings in the *Tribune Co.* and *Simpson* cases, the contract when executed will be a valid obligation of the City, there being sufficient monies remaining in the fund to meet this obligation.

Your letter also makes reference to two additional contracts payable from the Bridge Bond Fund. While you do not give all of the facts in your letter relative to the amount in the Bridge Bond Fund and the contracts outstanding, we assume that the amounts of expenditure called for by the two contracts mentioned, chargeable to account 477-X-60, are within the limitations of the Bridge Bonds Issue authorized by referendum (C. J. July 11, 1951, pp. 526-529) and, if so, our foregoing opinion as to the Kil-Bar Electric Company contract would apply with equal force to those contracts.

FEDERAL TAX ON AUTO PARTS

(No. 11601—J. L. F.—October 21, 1952.)

In response to your recent letter concerning the above captioned matter, we desire to inform you that we have conferred with the Excise Tax Division of the Chicago Office of the Collector of Internal Revenue, and we have made a survey of the current regulations now in force relating to excise taxes on sales by the manufacturer. Under Regulations 46 (1940 Edition) Relating to Excise Taxes on Sales by the Manufacturer, under Chapter 29, Sub-chapter A, of the Internal Revenue Code (Part 316 of Title 26 Codification of Federal Regulations) as amended, it is provided in Section 3442, Tax-Free Sales under Section 316.24 that no tax attaches to articles sold by the manufacturer direct to any state, territory of the United States, or any political subdivision of the foregoing, for its exclusive use, provided an exemption certificate is furnished by the authorized officer of said political subdivision to the said manufacturer.

Said regulation further provides that no sale may be made tax-free by the manufacturer to a dealer for resale to any state or any political subdivision thereof even though it is known at the time of the sale that the article will be resold. However, where any dealer resells a tax-paid article to any of the governmental units named above, for its exclusive use, the manufacturer who paid the tax to the United States on his sale of the article may secure a refund or credit in accordance with the provisions of Section 316.94.

Said regulation further provides that if it is impracticable to furnish a separate exemption certificate for each order or contract, a certificate covering all orders between given dates (such period not to exceed a month) will be acceptable; the said certificates and proper records of invoice, orders, etc., relative to tax-free sales must be retained as provided in Section 316.94.

In response to the questions raised by you in your NIGP letter No. 120 attached to your letter of October 2, 1952, we desire to offer the following responses:

In our opinion (a) exemption is mandatory upon automobile manufacturers. (b) It is not legal to accept a blanket discount in place of the authorized exemption. (c) Exemption certificates can not be obtained for the life of a contract but merely for a period of only one month. (d) The situation with respect to distributors of automotive parts sold or furnished to cities is the same as that of manufacturers and the exemption is mandatory upon them.

With reference to the payment of federal documentary stamp taxes on deeds of conveyances in which the City of Chicago has conveyed real property to purchasers, it has been our policy to claim a waiver of any liability for the payment by the City of Chicago of any such federal documentary stamp deeds on conveyances by the City, in accordance with regulations and rulings of the Federal Bureau of Internal Revenue.

Under our opinion 10797, dated June 26, 1944 in Volume 22 on page 222 of the Opinions of the Corporation Counsel, we have rendered the following opinion:

> "The Federal Excise Tax of 20% is not applicable to purchases of badges to award to city police officers for bravery. Under the Federal Code "no tax shall be imposed with respect to the sale of any article for the exclusive use of the United States, any State, Territory of the United States, or any political subdivision of the foregoing."

In answer to your inquiry regarding how the above problems are handled in our City, we desire to inform you that we have been making

full payment of the invoices rendered to the City by the manufacturers or distributors of automotive equipment, since paid invoices have included in the purchase price the 8% federal excise tax, without any breakdown to show the tax as a separate item. However, in our opinion and in furtherance of the views hereinabove expressed, we feel that in the payment of prices for automotive equipmnt sold or furnished to the City of Chicago by manufacturers or dealers in the future there should be excluded and deducted from the purchase price the said 8% excise tax, from which tax the City of Chicago is legally exempt under the regulations of the Federal Burau of Internal Revenue. Even though the said regulation of the Federal Bureau of Internal Revenue did not exempt such sale to municipalities from said excise tax, a requirement by the Federal Government that municipalities pay such a tax would be contrary to the basic principles of the Constitution of the United States and the law as laid down by the U. S. Supreme Court in the case of *McCullach* v. *State of Maryland*, 4 Wheat, 429, wherein Chief Justice Marshall announced the fundamental rule of law that:

> "An unlimited power of taxation existing in the federal or state government would result in consequence of interfering powers in the right of one government to pull down what there is an acknowledged right in another to build up, or in the right of one government to destroy what there is the right in another to preserve."

We, therefore, are requesting and directing Mr. John F. Ward, the Purchasing Agent of the City of Chicago, in conformity with this opinion, to deduct from all invoices paid in the future for automotive equpment sold to the City of Chicago, a sum equivalent to 8% of the invoice prices to cover the exempted excise tax and to remit 92% thereof in full payment thereof.

SALES TAX ON AIR RAID SIRENS

(No. 11643—Chicago Civil Defense Corps—J. E. C.—January 29, 1953.)

In your recent letter you referred to the accepted bid from a local manufacturer for the procurement of twenty (20) sirens which included $880.00 for Illinois State Occupational Tax. You requested that legality of such tax on these items be explored and that if the state tax of such items can be waived, it would mean an appreciable savings of public funds in the installation of Civil Defense Attack Warning equipment.

Kindly be advised that the tax referred to is strictly a tax to be paid by the retailers for the privilege of doing business within the State of Illinois and as such he is permitted to include that not as a tax, but as an increased sales price.

EXPENDITURES EXCEEDING APPROPRIATION FOR ELECTION TAXICAB SERVICE

(No. 11679—City Comptroller—R. J. N.—April 10, 1953.)

Your recent letter requests our opinion as to your authority to make payment upon a voucher in the amount of $14,241.28 drawn upon Account

26 J by the Board of Election Commissioners and approved for payment by the County Judge, which voucher was in payment for the hire of taxi cabs and the use of facilities of a taxi cab company at the election of November 8, 1952.

Your letter advises us that at the time this contract was entered into the appropriation in this account was only $20.00; that therefore the account was wholly inadequate to pay for the expenditures incurred.

The Election Code (Section 6-70, Chapter 46) provides in part as follows:

> "All expenses incurred by such Board of Election Commissioners shall be paid by said City."

Section 15-3 of the Cities and Villages Act provides, however, that:

> "No contract shall be made by the corporate authorities, or by any committee or member thereof, and no expense shall be incurred by any of the officers or departments of any municipality, whether the object of the expenditure has been ordered by the corporate authorities or not, unless an appropriation has been previously made concerning that contract or expense. Any contract made, or any expense otherwise incurred, in violation of the provisions of this section shall be null and void as to the municipality, and no money belonging thereto shall be paid on account thereof." * * *

The Supreme Court of Illinois in the case of *Wetherell* v. *Devine*, 116 Ill. 631, has held that the provisions of the Election Code requiring payment by the City of election expenses does not violate any constitutional provisions.

The Circuit Court of Appeals for the 7th Circuit in the case of *Empire Voting Machine Company* v. *City of Chicago*, 267 Fed. 162, held that the provision of the Election Code referred to above did not permit the Board of Election Commissioners to purchase voting machines where there was no appropriation previously authorized by the City Council.

We have been unable to find any cases where the precise question as to whether or not ordinary and necessary expenses of an election for which there are inadequate appropriations may be paid by a City out of other revenue has been passed upon by the courts.

On August 1, 1939 (Opinions of the Corporation Counsel Volume 20, page 117) we held as an abstract principle of law that the Election Commissioners are corporate authorities and therefore are bound by the provisions of the Cities and Villages Act prohibiting contracts without a prior appropriation and that therefore they may not incur obligations in excess of the appropriations.

We have been advised by the auditor for the Board of Election Commissioners that the voucher referred to above included the sum of $5,951.98 for cab hire incurred for the purpose of obtaining the repair of voting machines. Mechanical defects with these machines had caused great delay and inconvenience to the voting public at the previous primary held in April, 1952. Most of the delay was caused by the length of time required for repairmen to reach the polling places where the mechanical defects had been experienced. Use of radio operated cabs to substantially reduce this delay was certainly in the public interest and the expenditure was of a nature which could not have been reasonably anticipated the previous December when the annual appropriation ordinance was passed. Voting machines over a wide area had not been in use prior to the passage of the appropriation ordinance.

We are therefore of the opinion that this expenditure may be paid under the rule of the court in the case of *Empire Voting Machine Company* v. *City of Chicago*, 267 Fed. 162, which held that expenditures which

could have been anticipated at the time the annual appropriation ordinance was passed may not be incurred in the absence of an appropriation but that ordinary expenditures, such as office rent, clerk hire, etc. might be authorized. Expenditure for repair of voting machines is comparable to an expenditure which might be required were a special election to be called after passage of the annual appropriation ordinance and the Election Commissioners must be given considerable latitude in this respect so that they may conduct elections unhampered by restrictions which are not of their own making.

The balance of the expenditure presents a different picture. The sum of $8,289.38, was for the purpose of providing cab hire for special attorney deputies whose function was to make legal interpretations and answer questions in the event of disputes at polling places. We are unable to see why an expenditure of this nature could not have been foreseen at the time of the passage of the annual appropriation ordinance. We have not been informed of any difference between this election and previous elections which would require the rushing of deputies to polling places to settle disputes or give interpretations of election laws.

We are therefore of the opinion that payment of the portion of the voucher intended to cover this expense is not authorized and that you should therefore request the Board of Election Commissioners to prepare a new voucher in the sum of $5,951.98 and that this voucher may be honored for payment.

Payment of the voucher should be had out of any funds which have come into possession of the City of Chicago and which were in excess of the revenue anticipated at the time of passage of the annual appropriation ordinance. In other words, any surplus which you might have over anticipated revenue may be used to satisfy the obligation of this voucher.

CITY TAX ON UTILITY BILLS

(No. 11690—Mayor—J. F. G.—May 18, 1953.)

Inquiry has been made whether a tax upon subscribers and consumers of the services and commodities furnished by public utilities to be levied by the City by authority of the General Assembly of the State of Illinois would be a valid tax under the Illinois constitution. The tax would be included in the bill rendered to the taxpayer for the service described.

The history of litigation based upon the revenue article of the Illinois constitution indicates that the taxing power is restricted to: (1) ad valorem property taxes; (2) occupational taxes; and (3) franchise or privilege taxes. The proposed tax is not an occupational tax.

Until the decision of the Supreme Court in the case of *Johnson* v. *Halpin* (1952) 413 Ill. 257, it was the general opinion of constitutional lawyers that commodities are property; that a tax on the use thereof is a tax on property itself, which must be based on valuation and cannot be made the subject of a privilege tax. *Ohio Oil Co.* v. *Wright*, 386 Ill. 206, 212-215. In the *Johnson* case a tax on the privilege of using cigarettes in this State, regardless of where such cigarettes were purchased by the user, was upheld on the broad ground that the term "privilege" with reference to the taxing power is not limited to privileges authorized by the legislature, or which the legislature could entirely abolish, or to benefits conferred by the State. However, the tax involved in that case involved a commodity, the use of which the State may control or even abolish, and the court said (p. 271):

"Moreover, the selection of this particular privilege upon which to levy a tax is both reasonable and proper, since it is designed to complement the valid Cigarette Tax Act, and prevent the avoidance of the payment of that tax."

It is extremely doubtful that a general use tax not involving the special circumstances and facts involved in the *Johnson* case would be upheld by our Supreme Court as a privilege tax. That is to say, one could not conclude from the decision in that case that a tax on the use of food could be justified on the ground that the consumption of food is a privilege.

In our opinion, the proposed tax on the amount to be paid by the subscriber or consumer of a public utility service or commodity to be included in the bill rendered to the taxpayers by the public utility, which is already privileged and bound by franchise to serve the public without discrimination, is comparable to a tax on purchasers of property, commonly known as a sales tax. The court indicated that such tax would be unconstitutional, in the case of *Winter* v. *Barrett*, 352 Ill. 411, 457-459.

WATER FUND EXPENDITURES

(No. 11706—City Comptroller—J. L. F.—June 29, 1953.)

You recently wrote us concerning appropriations made in the 1953 Annual Appropriation Ordinance for expenditures from the Water Fund for several departments. You point out that prior to 1953, all expenditures were approved by the Commissioner of Public Works, and you request our advice concerning what approvals are necessary for expenditures for the year 1953 from the Water Fund.

In Chapter 8 of the Municipal Code of Chicago, under Section 8-9, it was previously provided that

"The Commissioner of Public Works shall certify to the City Comptroller all monies to be paid to any person out of the Water Fund,"

but the said Section 8-9 of the said Municipal Code was stricken by the passage of an ordinance on November 10, 1952, which ordinance was effective on January 1, 1953.

On the said date of November 10, 1952, an ordinance was also passed, to be effective on January 1, 1953, providing as follows:

Section 1. The Municipal Code of Chicago is hereby amended by the addition of a new Chapter 8.1, said chapter to read as follows:

"* * * 8.1-1 There is hereby established an executive department of the municipal government of the city which shall be known as the department of water and sewers. The said department shall embrace the commissioner of water and sewers, a deputy for water who shall also function as deputy commissioner of water and sewers, a deputy for sewers and such other assistants and employees as are herein designated and as the City Council may provide by annual appropriation ordinance.

"8.1-2 The said department shall include the bureau of water and the bureau of sewers. All officers and employees of said bureaus shall be under the direction and supervision of the commissioner of

water and sewers and shall perform such duties as may be required of them by said commissioner or by the provisions of this code.

"8.1-3 There is hereby created the office of commissioner of water and sewers. He shall be appointed by the Mayor, by and with the advice and consent of the City Council. He shall have the management and control of all matters and things pertaining to said department of water and sewers.

"8.1-4 *It shall be the duty of the commissioner of water and sewers, subject to the provisions hereof and the ordinances of the city to take special charge and superintendence of the following*: The operation and maintenance of all sewers and works pertaining thereto and all sewerage permits and licenses; *the operation and maintenance of the waterworks of the city, the extension, installation, repair or relocation of sewer and water pipes, except those installations to be constructed by contract or by the bureau of engineering of the department of public works, the collection of all water rates and fees for the use of water and the issuance of permits in connection with the waterworks system.*

"* * * Section 2. This ordinance shall be effective on January 1, 1953."

The said ordinance, hereinabove referred to, which was passed on November 10, 1952, to be effective on January 1, 1953, did not include any specific provision to replace Section 8-9 of Chapter 8 of the Code, which section had been previously stricken as hereinabove noted.

Furthermore, despite the fact that it clothed the Commissioner of Water and Sewers with the full, broad and basic authority prior thereto vested in the Commissioner of Public Works regarding the operation of the waterworks system of the City, said ordinance failed in any manner to provide for any certification to be given by the Commissioner of Water and Sewers for the expenditure of monies from the Water Fund.

We are, therefore, of the opinion that it was the intent of the City Council to obviate the necessity of requiring certification by the Commissioner of Public Works or the Commissioner of Water and Sewers to the City Comptroller of any monies to be paid to any person out of the Water Fund.

TAX ANTICIPATION WARRANTS—FORESTRY PURPOSES

(No. 11727—City Comptroller—R. J. N.—August 5, 1953.)

Your letter of July 10, 1953 requests our opinion of the legality of tax anticipation warrants issued against taxes levied for forestry purposes for the year 1953. No taxpayer has objected to the legality of the forestry fund taxes and no litigation contesting the validity of this tax is pending in any court.

Your letter calls our attention to the omission of the word "annual" from the proposition contained on the ballot at the time of approval by the electorate of the City's authority to levy an additional tax for forestry purposes.

The authority of the City of Chicago to levy this additional tax is granted by the State Legislature under the provisions of Article 69.1 of the Cities and Villages Act. That article provides that it shall not be

effective until the question of its adoption has been submitted to the electors of the municipality and approved by a majority of those voting on the question. The form of the ballot to be used in such an election is contained in the Statute. The question presented is therefore whether or not the deviation from the form set out in the Statute by the omission of the word "annual" nullifies the election results and makes the taxes levied under this article invalid.

The Statute requires that the ballot to be used should be in "substantially" the form set out therein. The proposition submitted to the voters was as follows:

> "Shall Article 69.1 of the Revised Cities and Villages Act permitting municipalities to levy an additional tax of not to exceed .05% for the establishment and maintenance of a *long term forestry program* for the propagation and preservation of community trees be adopted?"

The voter was to mark an (x) behind the yes or no on that proposition. In our opinion the proposition submitted did not deviate from the ballot contained in the Statute in the matter of substance. The use of the phrase *"long term forestry program"* advised the elector that the authority of the Statute was intended to be a continuing authority. Since the article authorized a program for more than one year and the voters approved the adoption of the article, it is our opinion that the voters intended to authorize taxation for more than one year. This conclusion is buttressed by the fact that tax levies are made annually and the electors generally are cognizant of that fact.

Our Supreme Court in several cases has held that inconsequential deviations from a Statute would not void the action of the electorate in authorizing additional taxation.

In the case of *The People* v. *C. & E. I. R. R. Co.*, 296 Ill. 246, at page 250, the court said:

> "* * * The legislature evidently did not intend that every word of the statutory form should be found in the form furnished the voter, and if enough of the words found in the statutory form, coupled with other apt words, are printed on the ballot furnished to the voter that will mean the same thing to all of the voters as the words used in the statutory form, the statute will be substantially complied with. * * *"

Our Supreme Court, in the cases of *The People* v. *B. & O. S. W. R. R. Co.*, 372 Ill. 38, and *Knappenberger* v. *Hughes*, 377 Ill. 126, held that referendum statutes were substantially complied with despite the failure to use the identical phraseology of the statutory form of ballot. For the foregoing reasons we are of the opinion that tax anticipation warrants issued to anticipate the collection of the 1953 forestry fund taxes are not invalid.

COST OF LEGAL SERVICES FOR TAX WARRANTS

(No. 11731—Commissioner, Department of Welfare—C. M.—August 17, 1953.)

Your letter dated July 29, 1953, addressed to Honorable John J. Mortimer, Corporation Counsel, reads as follows:

"Bill from Chapman and Cutler for $1500.00 for legal services in connection with the authorization of tax anticipation warrants.

Is this a legitimate charge against general assistance funds?"

The legislature of the State of Illinois has authorized the City of Chicago to issue tax anticipation warrants, whenever a municipality does not have sufficient money in its treasury to meet all necessary expenses and liabilities of the municipality. The corporate authorities may issue and sell warrants drawn against and in anticipation of taxes already levied for the particular funds from which these expenses and liabilities may be paid.

Chapter 24, Section 15, Paragraph 6.

Specific authority is given to the Department of Welfare to pay any warrants that have been issued by the City of Chicago which were drawn against the fund, including the payment of warrants issued against and in anticipation of these taxes, and accrued interest thereon, and the payment of cost of administering general assistance.

It is a recognized fact in the field of Municipal Finances that prospective purchasers of Municipal Bonds as Tax Anticipation Warrants, always make an offer to purchase subject to the approving legal opinions of the recognized firms of the so-called Bond Attorneys. Hence it is apparent that such a legal opinion is a necessary ingredient to the consummation of the sale of tax anticipation warrants, and an expressed power granted to a municipality by the legislature carries with it all necessary implied powers.

Arnold v. *City of Chicago*, 387 Ill. 532

City of Chicago v. *Moore*, 351 Ill. 510

In view of the foregoing we conclude that the costs involved in securing a legal approving opinion in connection with the sale of anticipation warrants, was a charge incidental and part of the said sale of the anticipated warrants, and is therefore a proper charge against the particular fund which benefits from said sale.

B. MANAGEMENT OF CITY FUNDS

REVOLVING FUND—SIDEWALK REPAIR

(No. 11102—Finance Committee—J. F. G.—November 12, 1947.)

Reference is made to your letter of November 10, 1947 requesting our opinion on a proposed appropriation for the year 1948 under Account 36-S-46 "for the purpose of establishing a revolving fund for sidewalk repair and reconstruction, to be expended upon authority of the City Council." A similar item is contained in the comptroller's estimates for the year 1948 under Account 36-S-45 "for the purpose of establishing a revolving fund for rat control, to be expended upon authority of the City Council."

Working capital funds are authorized by sections 7-24.1 to 7-24.10 of the Municipal Code of Chicago. The purpose of establishing a capital

fund is to create a pool of labor, material or equipment to be drawn upon for the performance of a corporate function which will be paid from some other fund available to reimburse the capital fund when the work is done or the materials are supplied. The creation of such funds was upheld in *The People* v. *Hamilton,* 387 Ill. 250, 252.

If it is desired to establish such capital funds they should be set up as capital accounts in proper departments for expenditure and administration subject to the provisions of the Municipal Code and not subject to be expended upon authority of the City Council.

The amounts appropriated for these revolving funds in 1947 may now be transferred by order of the City Council to the respective departments who will have control of them and may be set up in the 1948 appropriation ordinance as other capital accounts are set up so that the initial investment in these revolving funds will be added to the reserve for investment in capital accounts under current assets at January 1, 1948, which is not appropriable.

CERTIFYING WATER FUND PAYMENTS

(No. 11126—Commissioner of Public Works—F. T. M.—February 28, 1949.)

This is in reply to your letter of December 15, 1948 requesting our opinion as to whether or not all payments from the water Fund should be certified by the Commissioner of Public Works. In a recent discussion you stated that the question presented was whether your approval or certification was required on vouchers for payment from the Water Fund for labor, service or material furnished pursuant to a contract made on behalf of the City of Chicago by the City Purchasing Agent.

Various questions were stated in your letter respecting your obligation as Commissioner of Public Works to the Water Fund. It is our opinion that such obligation is created by ordinance rather than by Illinois Statutes, including the Charter of 1863. That Charter provided for a Board of Public Works charged with the duty of superintendence of the Water Works of the City of Chicago. Subsequent thereto, the General Assembly on April 10, 1872 adopted the general act providing for the incorporation of Cities and Villages which was adopted by the City of Chicago in the year 1875. The general act of 1872 placed the Water Works in the charge and superintendence of the City Council and gave to the council the power to fix water rates and make loans for use of water works which powers were previously held through the charter of 1863 by the Board of Public Works.

It must be noted that the 1872 enactment did not operate as to repeal or abrogate all of the provisions of the 1863 charter. In the case of *People* v. *Hummel,* 215 Ill. Sup. 71, (1905), the question involved was whether or not Sections 13 and 32 of the Act of 1863, requiring the City Treasurer to keep water funds in a separate fund and prohibiting its use for any other purpose than that for which it was received, were not repealed by the City's adoption of the 1872 Act.

The Court said on page 74:

> "Section 6 of Article 1 of the 1872 Act provided that from the time of the change of the organization of any town or city from its original organization to its organization under the general act the

provisions of the general act shall be applicable to such cities and villages, and that all laws in conflict therewith shall no longer be applicable. Said Section 6, however, further expressly provides as follows:

'But all laws or parts of laws, not inconsistent with the provisions of this act, shall continue in force and applicable to any city or village, the same as if such change of organization had not taken place.' * * *

The charter of 1863 created a board of Public Works, and invested that board with the charge and superintendence of the Water Works, and with power to assess water rates and make regulations, etc. The General Act of 1872 places the water-works in the charge and superintendence of the City Council, and gives to the Council the powers to fix water rates and make regulations, etc. Under the former charter the board of public works possessed certain powers with reference to procuring loans of money to be used for the water-works, which powers are vested by the latter enactment in the City Council. But *these differences in the two enactments* have no relation to the duty of the Treasurer of the City in the care and custody of the funds arising from the operation of the water-works." (Emphasis ours.)

The court held that the provisions of the 1872 Act were not inconsistent with the limitations placed upon the use and disposition of the water fund by Sections 13 and 32 of the Charter of 1863, but that the requirements of the later enactment were rather additional general requirements or duties imposed upon the Treasurer that the removal of any former duty or requirement. In the case of *People* v. *Brand*, 389 Ill. Sup. 298 (1945) the court held that Sections 13 and 32 of the 1863 charter are still in full force and effect.

After the adoption by the City of the General Incorporation Act, the City Council by ordinance established the Department of Public Works and the office of Commissioner of Public Works. The Commissioner was in such ordinance charged with certain duties, including the special charge of superintendence of the Water Works of the City.

Sections 8-7 and 8-9 of the Municipal Code provides as follows:

"It shall be the duty of the commissioner to cause the receipts and expenditures of the department to be kept in books of account in such manner as to show the same with entire accuracy and so the same may be readily understood and investigated. He shall also preserve on file in said department duplicate vouchers of all the expenditures of the department. The said books and vouchers, and all papers and files of the department, shall be at all times open to the examination of the comptroller, the committee on finance, or any member of the city council."

"The commissioner of public works shall certify to the city comptroller all monies to be paid to any person out of the water fund."

The aforesaid sections charge the Commissioner of Public Works with the duty of keeping accurate accounts of all receipts and expenditures of the Department, necessarily including transactions of the Water Fund and require the Commissioner to certify all monies paid to any person out of the Water Fund, being duties previously charged by Statute to the Board of Public Works. It is, therefore, our opinion that the Commissioner of Public Works has a legal obligation to keep the accurate records of payments to and from the Water Fund and that he is required to certify to the City Comptroller all monies paid to any person out of the Water Fund, including payments made to contractors or any persons

pursuant to a contract executed for and on behalf of the City by the Purchasing Agent. Certification of such voucher for payment must also be made by the Purchasing Agent pursuant to Section 26-11 of the Purchasing Ordinance.

With respect to the $50,000 bond required by the Commissioner of Public Works, it is our opinion that such bond applies to the faithful performance of all his duties, including but not being limited to duties and obligations pertinent to the Water Fund. It is also our opinion that payment of monies from the Water Fund without the certification or approval of the Commissioner of Public Works would operate to relieve the sureties of the bond from any obligation on such a transaction, provided that such approval could not be affirmatively inferred and proved from other facts or circumstances of the particular case.

PLAYGROUND MAINTENANCE

(No. 11132—City Council—R. J. N.—March 16, 1949.)

In accordance with your request of February 11, 1949 a representative of the Law Department attended a meeting of your Subcommittee on February 16, 1949, at which representatives of the Board of Education and the City Council of the City of Chicago discussed ways and means of providing for the necessary funds to equip, maintain and operate playgrounds adjacent to school premises.

At that meeting the Law Department representative stated that in his opinion the provisions of Section 34-21 of the School Code (Chapter 122, Section 34-21, Ill. Rev. Stat. 1947) are mandatory and impose the duty of equipping, maintaining and operating playgrounds adjacent to schools upon the Board of Education of the City of Chicago.

The statutory provision referred to reads as follows:

> "34-21. The board shall take control and management of all public playgrounds owned or acquired by the city which are adjacent to or connected with any public school in the city and shall equip, maintain and operate them for the moral, intellectual and physical welfare of the children and persons using them. The title to all lands occupied as such playgrounds shall vest in and be held by such city in trust for the use of schools. Nothing herein shall prevent the city from owning and operating parks, bathing beaches, municipal piers and athletic fields as provided by law."

After the announcement of this opinion a representative of the School Board suggested that they consult with the attorney for the School Board concerning the provisions of this Section of the statute. The Chairman of the City Council Subcommittee suggested that after such conference the Corporation Counsel's Office and the attorney for the School Board confer to determine if their interpretation of the statute coincided.

Telephone conversations were had by the undersigned with Mr. F. R. Schneberger, attorney for the School Board and on March 11, 1949, he transmitted to this office a copy of an opinion submitted by him to Mrs. H. M. Mulberry, a member of the Committee on Playground and Park Matters of the School Board. The substance of that opinion agrees with the information given by the representative of the Corporation Counsel to your Subcommittee verbally at the meeting on February 16, 1949. The attorney for the School Board, however, calls attention to the fact

that the school tax levy is limited to the rate of .0125 for playground purposes and that this levy has been made at this maximum rate for many years. He further advises that no additional playgrounds could be equipped, maintained or operated without additional revenue and calls attention to the fact that the City of Chicago has funds which are available from a bond issue for playground purposes. He does not directly contend, however, that the proceeds of the bond issue approved by the electors on June 4, 1945 could be used for the equipment, maintenance and operation of playgrounds adjacent to schools.

We are of the opinion that the authority to equip, operate and maintain playgrounds adjacent to schools has been removed from the City of Chicago and placed in the Board of Education of the City of Chicago by the statutory provisions referred to above. Under these circumstances despite the fact that the city has funds available for playground purposes the city is powerless to expend those funds to equip, operate or maintain playgrounds adjacent to schools.

The situation with which we are thus confronted is that one municipal corporation, (the city) has funds to accomplish the purposes desired but has no authority to expend those funds for that purpose while a second municipal corporation (the School Board) has the authority to expend funds for the equipment, maintenance and operation of playgrounds adjacent to schools but has no funds with which to accomplish the purpose.

It appears to us that the only satisfactory solution of the dilemma thus presented is amendment of the statutory provisions so that the municipal corporation which has the power may be given the funds with which to carry out the power or that the municipal corporation which has the funds be also given the power. Authority to accomplish either of these results would have to be procured from the legislature.

If your Committee desires that this office prepare bills to accomplish either of these purposes we shall be pleased to do so.

PHOTOSTATS OF CHECKS

(No. 11174—City Treasurer—A. F. G.—September 8, 1949.)

We have your letter of July 7, 1949 to which was attached a letter from the Continental Illinois National Bank and Trust Company of Chicago with a photostatic copy of a City of Chicago check, No. 211486, dated June 15, 1949 payable to Roy T. Burns, in the sum of $108.74.

The contents of the bank letter are summarized in your letter as follows:

> "On June 25, 1949, three gunmen held up the Brinks Express messengers as they were leaving the South Chicago Savings Bank. During the course of the hold-up a bag was stolen which contained a deposit of checks. This deposit contained a number of items drawn on the City Treasurer.
>
> It has been the custom of the South Chicago Savings Bank to photostat all checks they received. Fortunately all the checks which were stolen had been photostated, and enclosed herewith is one of the items which is in question.

The Continental Illinois National Bank and Trust Company of Chicago has requested the City Treasurer to pay on the photostats of these stolen checks."

You ask to be advised what course is to be taken in this matter.

The photostat submitted shows both sides of the check including all endorsements except that of the bank. We have discussed this matter with Mr. Doyle of the Comptroller's office and he sees no objection to the payment of these photostat copies of the original checks provided the bank receiving payment makes its endorsement on the back of the photostat and furnishes the city an indemnifying bond in twice the aggregate amount of the checks involved.

Your letter does not so state but we assume that payment on these checks has been stopped.

When the photostatic copies of these checks are paid and endorsed by the bank the comptroller's office will have as complete a file as if the original checks were cashed and cleared in the ordinary course of business.

M. T. S. TAX ANTICIPATION WARRANTS

(No. 11248—J. F. G.—February 8, 1950.)

At the request of Mr. Philip J. Weber, Secretary of the Board of Directors of the Municipal Tuberculosis Sanitarium, you are respectfully advised that warrants issued in anticipation of the collection of taxes levied for tuberculosis sanitarium purposes are not an indebtedness of the City of Chicago or of the Municipal Tuberculosis Sanitarium.

A tax anticipation warrant is simply an assignment of tax money which directs the treasurer to pay the holder the amount of the warrant solely from a specified tax when collected and received by the treasurer. The assignment is made "without recourse" and the holder of the warrant must look to the specific fund set apart for its payment. Unpaid tax warrants issued in anticipation of the collection of taxes levied for 1931 may not be paid from the proceeds of taxes levied for any other year. Likewise, unpaid tax warrants issued in anticipation of the collection of taxes for the years 1932, 1933 and 1934 cannot be carried on the books of the City of Chicago or in the Tuberculosis Sanitarium Fund as a liability payable from any revenue derived or to be derived from taxes levied after the year 1934 or from any other source, except collections from the tax levies in anticipation of which the warrants were issued even though, as stated by Mr. Weber, the taxes receivable to the year 1943 have been written off as uncollectible. Whatever amounts have been realized in the passed or will be realized in the future on the levies of 1931, 1932, 1933 and 1934 must be set apart for payment on account of unpaid warrants issued in anticipation of collection of the taxes of the respective years. This has been the law of Illinois as we have known it from the adoption of the Illinois Constitution in 1870 to the present time, without exception. A recent case upon this subject is *Leviton* v. *Bd. of Education*, 385 Ill. 599, decided in 1940.

If tax anticipation warrants were carried as general liabilities of the City or the Municipal Tuberculosis Sanitarium fund and appropriations were made and taxes levied for any year on the basis of such liabilities, the tax levy would be void to the extent of the liabilities so shown even if

payment of such liabilities were not specified in itemizing the purposes of the tax levy. *The People* v. *Schick*, 368 Ill. 353; *The People* v. *Wabash Ry. Co.*, 368 Ill. 497.

If any liability exists in relation to the warrants referred to it would be because taxes collected from the levies of the respective years in anticipation of which the warrants were issued were not properly applied to the payment of those warrants and interest thereon.

SPECIAL ASSESSMENT FUNDS

(No. 11279—City Comptroller—J. E. C.—March 31, 1950.)

With your letter of March 22, 1950 you attached a copy of a letter you received from John A. Hennessey, dated March 20, 1950. You request our opinion regarding the distribution of special assessment funds received from the County Treasurer as a result of the application of an award for property taken for public use, to the payment of delinquent special assessments against that property.

The case presented by Mr. Hennessey involved a situation where the amount realized by the City is less than the amount due for both principal and interest on the delinquent special assessments.

We are of the opinion that the distribution of special assessment funds should be made by allocating to each installment of each warrant involved that percentage of the amount due which the money received from the County Treasurer bears to the total amount delinquent. This applies to interest as well as principal.

You should therefore allocate to interest that proportion of the amount collected which the interest delinquency bears to the total delinquency in each installment of each warrant on which a collection is made.

VOTING MACHINE—PAYMENT

(No. 11283—City Comptroller—J. J. M.—April 5, 1950.)

We have your letter of March 29, 1950 in which you refer to a suit pending in the U. S. District Court regarding the purchase of voting machines by the Board of Election Commissioners. You ask if you may make payment upon vouchers approved by the Board and certified for payment, with the assurance that the City will not be subject to liability.

The only pending cases pertaining to the purchase of voting machines for the Board of Election Commissioners, of which we have knowledge, are as follows:

Shoup Voting Machine Corporation v. *Lipsky, Reinecke and Daly, constituting the Board of Election Commissioners*, U. S. District Court No. 49C-1049. We have today checked the court file and docket for that case and find that neither the City of Chicago nor its officers have been made parties.

Automatic Voting Machine Corporation v. *Richard J. Daley, et al., etc.*, Circuit Court No. 49C-13577. This is a suit for a declaratory judgment in which the plaintiffs ask for a decree finding that the sales of its voting machines to the Board of Election Commissioners are exempt from the provisions of the Illinois Occupation Tax Statute by reason of the interstate character of the transactions. The plaintiff asks alternative relief, in the event the court refuses to hold the sales exempt from the tax provision, by way of a declaration that the plaintiff is entitled to be reimbursed by the Board or the City for the sum which it might be required to pay to the State of Illinois.

From our examination of the facts involved in the two cases referred to above, and the law applicable thereto, and in the absence of any notice of other such court proceedings involving the City or its officers, or of claims or other purported interest of third parties, we are of the opinion that you may make payment for voting machines contracted for by the Board of Election Commissioners, upon properly certified and approved vouchers.

INVESTING MOTOR FUEL FUNDS

(No. 11289—City Comptroller—J. F. G.—April 14, 1950.)

In answer to your question whether the City may invest motor fuel tax funds in short term United States Treasury Notes, you are advised that Section 15-8 of the Revised Cities and Villages Act expressly provides that any funds in the City Treasury set aside for use for particular purposes, which are not immediately necessary for those purposes, by ordinance, may be used in the purchase of interest bearing obligations of the United States. All interest upon these obligations and all money paid in redemption of them, or realized from the sale thereof, must be credited and placed in the particular fund used to purchase such obligations.

The motor fuel tax funds held in the City Treasury for specified highway or street improvements or maintenance are not excepted by any law from the funds which may be so invested to earn interest if that can be done without impairing or delaying the commencement or progress of motor fuel tax projects approved by the State Department of Public Works and Buildings for which the motor fuel tax funds held in the City Treasury are earmarked.

Your attention is again directed to the provision that the investment of any funds held in the City Treasury may be made only by authority of an ordinance passed by the City Council.

FEDERAL HEALTH FUNDS

(No. 11308—President, Board of Health—J. F. O.—June 13, 1950.)

On December 23, 1949, you requested an opinion from this department on the following:

"Is it legal for the Chicago Health Department to use a portion of funds obtained from the United States Public Health Service through the State Department of Health, other than those for venereal disease purposes, to supplement the salary of employees whose names now appear on City pay rolls.

"If your answer is 'No' it would be appreciated if you would advise me what can be done to make legal use of such State-Federal funds, other than those earmarked for venereal disease work."

A letter from this office dated March 10, 1950 was answered by you March 20, transmitting a claim on behalf of Dr. Max C. Igloe. A further letter from this department on March 22, 1950 resulted in your letter of April 4, 1950 which is now being answered.

Your letter of April 4, 1950 encloses photostatic copies of two letters (dated July 15, 1948, and May 16, 1949) you received from the State Department of Health, which letters we now see for the first time. The letter of July 15, 1948 contains this paragraph,

"If the District Health Officer referred to in your letter will be responsible for a venereal disease program in his district or for a mental health program in his district or for a tuberculosis program in his district, I believe that it would be entirely proper to pay a part of his salary proportionate to the respective activity from the earmarked funds for either of these programs."

on which we will comment later.

The letter dated May 16, 1949 places a restriction on the use of grants of State or Federal grant-in-aid funds for supplementing salaries of local employees over and above the amount established by the local agency, subject to requests for exceptions approved by official action of the local appropriating body and subsequently approved in writing by the Mayor of the City or Chairman of the County Board of Health as the case may be.

It is the opinion of this office that in view of the restriction outlined in the letter of May 16, 1949 signed by Roland R. Cross, M. D. Director, the Department of Public Health, you could not supplement salaries of employees now on your department pay roll unless an exception was allowed for a person or persons responsible for a specified health program. Should you desire such an exception you should initiate a request for same for the approval of the Council and the Mayor, as outlined in the May 16, 1949, directive of the State Department of Public Health.

We are of the opinion that funds, thus received, other than for venereal disease purposes, could legally be used for district mental health or district tuberculosis programs.

MOTOR FUEL FUND—PAINTING BRIDGES

(No. 11350—Commissioner of Public Works—J. D. M.—December 28, 1950.)

Your letter of December 12, 1950 encloses a proposed ordinance requesting our opinion and approval as to form and legality of such ordinance.

The ordinance provides for authorization to spend $50,000.00 for the maintenance, repair and painting of existing bridges and approaches thereto on S. California Avenue, S. Kedzie Avenue, S. Pulaski Road, S. Cicero Avenue, W. Bryn Mawr Avenue and the south half of W. Devon Avenue.

Section 10½ of an act relating to a tax upon the privilege of operating motor vehicles, etc. (Chapter 120, Section 426½, Ill. Rev. Stat., 1949), provides in part as follows:

> "* * * The remainder of any money alloted to the several municipalities shall be used for one or more of the following purposes.
>
> * * *
>
> "(1)—The construction, reconstruction and maintenance of State highways in the municipality, or the maintenance of Federal secondary roads.
>
> * * *
>
> "(2)—The construction, reconstruction and maintenance of a system of arterial streets or thoroughfares (other than state highways) in the municipality as should be designated by the Council or President and Board of Trustees and approved by the Department of Public Works.
>
> * * *
>
> "(6)—The payment of engineering costs in connection with all such work heretofore described."

A thoroughfare is described as "a street or passage through which one can fare, (travel;) that is, a street or highway affording an unobstructed exit at each end into another street or public passage" (Black's Law Dictionary, 3rd Ed.).

The Supreme Court of Illinois has held that these bridges are simply a component part of the public thoroughfare. The public roadways spanning the Sanitary District channels are an integral part of the public thoroughfares of the city. For this reason, the City has jurisdiction and control over public highway bridges. The right to exercise jurisdiction and control over the bridges is accompanied by the corresponding duty to maintain and repair bridges. (*City of Chicago* v. *Sanitary District*, 404 Ill. 315).

It is therefore our opinion that motor fuel tax funds may be used to maintain, repair and paint bridges and approaches on arterial streets or state highways within the City of Chicago.

The ordinance as submitted to us has been changed to include just the south half of the W. Devon Avenue bridge. Devon Avenue is the dividing line between the Village of Lincolnwood and the City of Chicago and therefore the City is responsible for the care and the maintenance of the south half of said bridge. (*City of Chicago* v. *Sanitary District*, 404 Ill. 315).

It will be noted that the consent of the Department of Public Works and Buildings is necessary before money can be expended from this fund.

We are therefore forwarding the proposed ordinance as thus changed with our approval as to form and legality.

COLLECTING PARKING METER FUNDS

(No. 11352—City Collector—J. E. C.—January 5, 1951.)

In your letter of December 7, 1951 you request our opinion on three questions pertaining to the collection and deposit of parking meter receipts.

You ask first whether the City Collector is legally required to turn over all receipts to the City Treasurer for deposit.

Section 7-8 of the Municipal Code, requires that all monies paid or received by the City Collector shall be transmitted daily to the City Treasurer.

Your second question is, "Can the City Treasurer legally authorize the City Collector to deposit parking meter receipts direct in banks designated by the City Treasurer?"

The responsibility for the monies collected would be transferred to the City Treasurer if such authorization were made. It would be impractical for the Treasurer to assume this responsibility without one of his employees checking the amount of such deposit.

Your third question is, "If the answer to question No. 2 is in the negative, can the City Treasurer designate certain locations in the City in which coin boxes containing parking meter receipts will be placed for short periods of time for safekeeping only until accounted for by the Collector before transmitting them to the City Treasurer?"

Since the Municipal Code requires daily transmittal of funds to the Treasurer, we are of the opinion that the Treasurer can not authorize delay in such transmittal.

We are therefore of the opinion that the difficulties mentioned in your letter require either that the Street Department be held responsible for parking meter collections, (which would permit transmittal of funds on other than daily basis) or the Municipal Code should be amended to exempt parking meter receipts from daily deposit requirements.

For your convenience we are forwarding an amendment to the Code to exempt parking meter collections from the requirement of daily transmittal to the Treasurer. If you desire to have the Collector supervise the parking meter receipts, you should forward this amendment to the City Council for action.

NAVY PIER REPAIRS

(No. 11466—City Council—F. C. F.—January 8, 1952.)

We acknowledge receipt of your letter in which you requested this office to prepare and submit to the Committee on Finance for its approval, for passage by the City Council of an ordinance authorizing the leasing of space at Navy Pier for show or convention purposes at the rate of one and one-half cent per square foot per week, plus necessary insurance cost and plus the cost of the Fire Department detail on account of such use, with the rental money segregated in a separate account to be used only for repair purposes at the Pier.

You also transmitted and we acknowledge receipt of three forms of ordinance, in duplicate, authorizing the lease of space at Navy Pier to the National Housewares Manufacturing Ass'n., the Illinois Retail Hardware Association and the National Restaurant Association for various periods during 1952 for show or convention purposes.

We are of the opinion that repairs at Navy Pier are no different than other corporate expenses. In the absence of any statutory requirement that the rental money derived from the leasing of pier facilities be segregated in a separate account to be used only for repair purposes at the Pier, the funds to be used for such repair purposes should be set up in the budget as a corporate expense and the income derived from the rental of Navy Pier should go to the general corporate fund.

RETENTION OF REALTY AND WATER BILL RECEIPTS

(No. 11663—C. N.—March 13, 1953.)

Your letter of March 6, 1953 addressed to Mayor Kennelly, in which you ask for legal requirements as to the length of time during which paid realty and water tax bills must be retained by a property owner, has been referred to this department. You are particularly anxious to ascertain what the law is as to how long a period of retention of such receipted bills is required of an owner about to enter into a sale of his property holdings.

Actually, no specific period of time is set by law. Unpaid realty taxes comprise a lien against the property and are, therefore, a cloud upon the seller's title that makes it impossible for him to perfect a sale by presentation of a warranty deed which guarantees that there are no liens against the property to be sold. The records of the County Collector's office disclose all paid and unpaid realty tax bills on each piece of parcel of real estate.

Because unpaid realty tax bills comprise a lien, retention by the property owner of all bills paid since he acquired title to the property is prima facie proof that there are no liens growing out of unpaid realty taxes and greatly simplifies initial steps in consummating a sale of the property. Such retention also precludes any possibility of error in public records in so far as the title holder contemplating a sale is concerned.

Inasmuch as they do not comprise a definite lien against the property, water bills are of less importance and the only actual value of such receipts lie in prorating the amounts to be charged against the seller and buyer of the property. Recent realty tax bills are also of value in prorating.

Since failure to have paid realty tax bills in his possession might lead to unnecessary expense in proving up title, it is advisable for property owners to retain all paid realty tax bills, from the time of acquiring title to the time of sale.

TRAVEL EXPENSES FOR DAIRY INSPECTORS

(No. 11698—President, Board of Health—E. R. H.—June 4, 1953.)

We acknowledge your letter of April 16, 1953, replying to our request of April 8 for further information as to the memorandum presented

to the Board of Health, referred to in your letter to this office under date of April 7, 1953, concerning the payment to dairy inspectors for travel expenses.

You state in your reply that the claims in question cover payroll periods from January 1, 1953 to date; that the Chief Sanitary Officer of the Health Department stopped approving these items on January 15, 1953 and asked clarification from the Board of Health as to the legal propriety of payment of such items. You further state that these items have been approved and paid from December 4, 1931 to December 31, 1952 from budget account 60-J-2 and you ask our opinion as to whether or not the Board can legally authorize payment of such expense items.

On page 61 of the Annual Appropriation Ordinance for 1953, we find an appropriation to the Board of Health, account number 60-J-2 for "Passenger transportation for Food Inspectors and Dairy Inspectors, $10,000.00."

However, payment of such traveling expenses must be made in accordance with the provisions of the order passed by the City Council December 30, 1952, appearing in the Journal of the Proceedings of the City Council of that date at page 3884, which reads as follows:

> *"Ordered.* That on and after January 1, 1953, the President, Board of Health, be and he is hereby authorized to approve bills on account of country dairy inspection for persons so engaged on the following basis when such persons are actually detailed on country dairy inspection:
>
> | | |
> |---|---|
> | Lodging, per night | $4.50 |
> | Breakfast | 1.00 |
> | Luncheon | 1.50 |
> | Dinner | 2.00 |
> | Automobile storage at night not to exceed per night | 1.00 |
>
> and the City Comptroller and the City Treasurer are authorized and directed to pass vouchers in payment for same when approved by the President, Board of Health."

It is our opinion that such traveling expenses from January 1, 1953 can be legally paid from the aforesaid account number 60-J-2, in accordance with the above quoted Council Order of December 30, 1952, and since the Annual Appropriation Ordinance above referred to expressly authorizes such payments, the Council Order of December 4, 1931 which you referred to should not be relied upon as authority for such payments.

MOTOR FUEL FUNDS FOR ADDITIONAL BRIDGE EXPENSES

(No. 11709—Commissioner of Public Works—H. A. C.—July 2, 1953.)

With your recent communication you enclose carbon copies of letters from the Attorney General and the Division of Highways relative to the matter of settling a claim of Mt. Vernon Bridge Company totaling $259,614.48 for the sum of $202,680.00 out of Motor Fuel Tax funds. On August 8, 1952 the City Council (C. J. p. 2928) authorized the settlement of the claim and on September 18, 1952 an amendment was passed permitting payment of a portion of the claim out of the Vehicle Tax funds. Your communication informs us that previously the basis of the claim was: contract for S. Canal Street bridge awarded December 18, 1941; some steel was delayed by the priority rating which was not sufficiently high to

obtain steel necessary for the bridge. On July 13, 1943 the United States government ordered all work stopped on this bridge. On August 1, 1946, after the cessation of hostilities, the Mt. Vernon Bridge Company informed the City that they would be willing to proceed with their contract, provided they would receive adequate assurances from the City that they would not be prejudiced to subsequently filing their claim for extra costs resulting from the war delays. You further advised that the Commissioner of Public Works, considering it to the best interest of the City to proceed with the bridge construction as soon as possible, advised the firm that it could proceed with the construction without prejudice to its rights, that at the same time the Commissioner also reserved the right of the City to contest the claim.

Upon passage of the Council Order authorizing the settlement of the claim, necessary forms and information were transmitted to the State of Illinois for approval, as well as for authorization to expend $170,000.00 from Motor Fuel Tax funds. The Division of Highways, State of Illinois, by letter dated December 22, 1952, rejected the claim and advised that the use of the Motor Fuel Tax funds could not be approved. In support of such action the department attached an opinion of the Attorney General, dated December 3, 1952, addressed to the Hon. Charles P. Casey, Director, Department of Public Works and Buildings, in which he reviewed the facts and concluded that the Commissioner of Public Works of the City of Chicago did not submit the matter of extending the time of completion of the work under the contract and the paying of additional compensation on account of increased costs to the Department of Public Works and Buildings, and that the first request for such additional Motor Fuel Tax funds was first received by the department on October 25, 1952, over four (4) years subsequent to the completion of construction of the bridge, and the agreement for additional costs. The opinion refers to Section 10½ of the Motor Fuel Tax law (Paragraph 42½, Chapter 120, Ill. Rev. Stat. 1951) relating to use of Motor Fuel Tax funds by municipalities and refers to that portion which states:

* * * *

> "The *municipality may advertise for bids and* let contracts for all construction to the *lowest responsible bidder;* or with the approval of the Department, may do the work itself through its officers agents and employees. *No contract shall be let without the approval of the Department,* nor shall bids be advertised until the surveys, plans, specifications and estimates have been approved by the Department. *All work shall be performed in accordance with said approved* ordinances or resolutions, plans, specifications, and *contracts,* as the case may be, *and it shall be the duty of the Department of Public Works and Buildings to inspect the work to such degree as may be necessary to insure compliance with this provision."* (Emphasis added.)

The opinion concludes that the approval of the department is a condition prerequisite to the letting of a construction contract which is to be paid in whole or in part from Motor Fuel Tax funds and that the work called for by said contract is to be performed for the amount stated in the contract, and further finds that a contract modification or change increasing the contract costs beyond the approved amount should also be approved by the department if reimbursement is expected from the Motor Fuel Tax funds. The Attorney General concludes that because of the failure of the City to obtain such approval the Department of Public Works and Buildings is not authorized to approve payment of the additional amount to the contractor over and above his paid price and therefore the department is not authorized to make a certification to the Department of Finance for payment of this additional amount to the contractor from Motor Fuel Tax funds.

Your letter points out the importance of the Canal Street bridge and that the Commissioner of Public Works was acting in the general public's interest in deciding to construct the bridge first and litigate or settle the matter afterwards. Reference is also made to the fact that in New York incomplete construction contracts which were awarded before the war were subsequently cancelled and the contractors were released and that as soon as critical materials became available the projects were readvertised and awarded at much higher construction costs. By comparison you state that the City undoubtedly saved considerable money by its action and that you believe that the opinion of the Attorney General should be reviewed. You request that we advise you whether in the opinion of the Law Department on the basis of the facts and the law a request for reconsideration should be made to the State Highway Department.

The Motor Fuel Tax Act is contained in paragraphs 417 to 434 inclusive, of Chapter 120 of the Illinois Revised Statutes, and the heading of the act is as follows:

> "AN ACT in relation to a tax upon the privilege of operating motor vehicles upon the public highways, based upon the consumption of motor fuel therein, and making certain appropriations in connection therewith. (Approved March 25, 1929 L. 1929, p. 625.)"

Section 10½ of the act enumerates the use of the funds by municipalities and allocates a portion of such funds for the payment of a portion of the interest on certain bonds issued for the relief of indigent persons and the remainder of any money allotted to municipalities to one or more of twelve enumerated uses of such money connected with construction, reconstruction and maintenance of certain roads, streets and thoroughfares.

Paragraph 433 of the act substantially states that the purpose of the act is to impose a tax upon the privilege of operating a motor vehicle. It would therefore seem that the primary purpose of the act is to impose a tax for the privilege of operating motor vehicles upon public highways and that the revenue derived therefrom is to be used for construction, reconstruction and maintenance of streets and highways. No contract to be paid from Motor Fuel Tax funds (Sec. 10½) shall be let without approval of the Department of Public Works and Buildings and all work performed shall be inspected by the department. The obvious intention of the legislature must have been to create a system of checks and balances in matters involving use of Motor Fuel Tax funds. The Attorney General in his opinion strictly construed the act in deciding that the City by neglecting to inform the department of subsequent agreement with the Mt. Vernon Bridge Company had not strictly complied with the act and therefore the department could not approve payment of the additional amount to the contractor over and above the original contract price.

We are of the opinion that contracts must be submitted to the department for approval in order to qualify for payment from Motor Fuel Tax funds. In the instant matter the original contract was submitted and approved but the agreement relative to payment for additional costs was not submitted. We have been unable to find any decisions relative to the necessity of resubmitting agreements for additional costs.

A strict interpretation of the act would seem to infer that the Commissioner of Public Works had no right to contract for payment of additional costs without first obtaining the approval of the department. We feel however, that the Attorney General perhaps did not have all of the facts when the decision disallowing payment was made, as we are informed by your department that state inspectors were constantly present on the job and that monthly reports with estimates for payment of the contract price were sent to the state so that the state would know that the job was being done properly. It would seem that the actual intent of the act was therefore being carried out and that the Department of Public Works and

Buildings was able to insure adequate performance of the contract. The project was a necessary one and payment could have been made from Motor Fuel Tax funds if proper procedure had been followed. Perhaps if the Attorney General is given full details of the constant supervision by the department he would determine that there was substantial compliance and that Motor Fuel Tax funds may be properly used for payment of a portion of this claim. A request for reconsideration should be made to the State Highway Department.

HIGHER TAX DEED OFFER

(No. 11714—City Council—J. F. O.—July 15, 1953.)

Your letter of recent date requests an opinion on the following:

> It is within the province of the Subcommittee to consider a higher compromise offer for tax deeds presented directly to the Subcommittee subsequent to receipt of an offer presented to the Subcommittee by another party through the Comptroller's office?

Your letter further states that neither party in this case is the equity owner.

The policy established for processing these items has been:

(1) All compromise offers would originate in the Comptroller's office.

(2) The suggested recommendations of the Comptroller would be transmitted to the Sub-committee on Special Assessments for their consideration.

This policy was established to protect the Council in that it insured a reasonable minimum offer. The effect of this action is to abrogate said policy.

It is our opinion that there is no legal objection to the subcommittee considering a higher compromise offer presented directly to the subcommittee.

C. JUDGMENTS AND CLAIMS

INJURED DURING LIFEGUARD EXAMINATION

(No. 11216—City Council—C. N.—December 1, 1949.)

This is a claim for personal injuries sustained on June 20, 1949 at 3:30 P. M., by claimant's minor son, Robert Rouse, while taking the City life guard test at Rainbow Beach, on the lake front at 76th Street.

The record reveals that claimant's son, a candidate for the position of life guard, who was attending the school for life guards at the beach at the time of the accident, stepped on a sharp object in the water while launching a boat. He received first aid at the beach and then was taken to a doctor's office where eight stitches were required to close the wound.

On November 4, 1937 we rendered Opinion No. 9689 for your committee, (a digest of which can be found at page 477, volume XIX, Opinions of the Corporation Counsel and Assistants), in which we stated that the city is not liable for injuries sustained at a bathing beach, for in the establishment and maintenance of bathing beaches the city is performing a governmental function for the general public health, recreation and exercise and may not be held liable for injuries arising out of the negligence of its employees at such bathing beach.

For the reasons therein fully discussed, we are of the opinion that the City of Chicago is not liable for the personal injuries herein claimed.

DAMAGE TO PRIVATE SEWERS BY TREES ON CITY PARKWAY

(No. 11302—Alderman, 5th Ward—E. L. W.—May 17, 1950.)

Your letter of May 3, 1950 inquires as to the liability of the City for damage by clogging of sewer caused by roots of trees in the City parkways.

The City is responsible for removing from the parkway any dead and dangerous trees as well as live trees which damage property by blocking sewers and raising and breaking sidewalks; however, this liability would only attach where the City had notice of such a condition. (See Corporation Counsel's Opinions, Volume 18, No. 8491, p. 942; Volume 19, No. 9515, p. 243).

The City would not be liable for the condition which you set out in your letter unless it had received prior notice and took no action to remedy such condition.

WATER SUPPLIED TO PARK DISTRICT

(No. 11427—Commissioner of Public Works—C. P. H.—September 26, 1951.)

We have your letter of July 12, 1951 with reference to claims against the Chicago Park District for water supplied to the District since January 14, 1938. With your communication you transmit copies of certain ordinances adopted by the City Council providing for the furnishing of water to parks and boulevards under the jurisdiction of the South Park Commissioners, Lincoln Park Commissioners and the Chicago Park District, a copy of a letter addressed to you by the Superintendent of water under date of July 11, 1951 showing locations of meters and amounts alleged to be due for water supplied the District through the meters, and a copy of an opinion of the attorney for the Chicago Park District, dated February 7, 1940 holding that the District is not liable for these water claims. You request our opinion as to whether or not the District is indebted to the City for water supplied through and registered by these meters.

The Chicago Park District was created by an Act of the Legislature and approved by the Governor on July 10, 1933. The Act was later submitted to and adopted by the voters by a referendum vote. By virtue of the Act (ch. 105, pars. 333.1 to 333.23a, Ill. Rev. Stat. 1949) the Chicago Park District succeeded to all the rights, obligations and privileges accruing to its predecessors under contracts, grants and licenses. Therefore all the rights, obligations and duties that existed in the South Park Commissioners and the Lincoln Park Commissioners under contracts with the City of Chicago for water, are now vested in the Chicago Park District.

TWO WATER METERS LOCATED AT 825 S. MICHIGAN AVENUE.

You state that the District is indebted to the City in the sum of $419,222.88 for water supplied through the above meters for the period from January 23, 1939 to June 21, 1951. The District contends that water registered by these meters was used in territory formerly under the jurisdiction of the South Park Commissioners and that the District is therefore not liable for payment of this water under the provisions of the ordinance passed by the City Council on November 16, 1896 whereby the City, in consideration of the South Park Commissioners taking over and maintaining Jackson Street from the River to Michigan Avenue, agreed to furnish the water needed for parks and boulevards under the jurisdiction of the South Park Commissioners free of expense. This ordinance was accepted by the South Park Commissioners on November 18, 1896.

In an opinion addressed to the Commissioner of Public Works dated December 24, 1912, it was stated that this ordinance applied only to water furnished parks and boulevards under the jurisdiction and control of the South Park Commissioners at the time the ordinance was passed, and that it did not apply to water used in any new parks or extensions which were added to the South Park Commissioners since the ordinance was passed. (Ops. of Corp. Coun., Vol. VI, p. 1263.) Your communication and the documents attached thereto do not disclose the territory within the jurisdiction of the Chicago Park District that received water service through the above meters nor have we been able to ascertain this information from your department. If the water registered through the above meters was used for parks and boulevards under the jurisdiction of the South Park Commissioners at the time the ordinance was passed on November 16, 1896, the City under this ordinance is obliged to furnish the water to the District free of charge. However, if such water was used in territory not under the jurisdiction and control of the South Park Commissioners on November 16, 1896, it is our opinion that the Chicago Park District is liable to the City of Chicago for payment of the above water claim in the sum of $419,222.88.

METER LOCATED AT EAST 11TH PLACE AND MICHIGAN AVENUE.

You further state that the District is liable to the City in the sum of $3,228.09 for water supplied through the above meter for the period from September, 1939, to October, 1950. You base this charge on an order passed by the City Council on August 2, 1935 (C. J., pp. 527-28) authorizing the Commissioner of Public Works to enter into an agreement with the District for the purpose of furnishing water through a connection between the Park Row shaft of the City of Chicago four-mile tunnel system and the City's pumping station erected on this shaft and formerly occupied by the Century of Progress International Exposition, from which the District furnishes water service to all of Grant Park, all of Burnham Park, as far south as 56th Street, Northerly Island, and any other islands that may be constructed between Northerly Island and 56th Street.

The order further directed that the agreement should provide that the City of Chicago charge the Chicago Park District $5.00 per million cubic feet of water taken through the suction line. The District contends that it is not liable under this council order as no formal agreement was entered into between the City and the District in accordance with the

provisions of the council order. There is no merit to this contention. The above claim is for compensation for the use of the City's pumping station by the Chicago Park District. While it is true that no written agreement was entered into by the City and the District, yet the District received the use and benefit of the pumping station and is liable on an implied contract for such use and benefit. It is well settled that if a municipality accepts work or service for its benefit liability will attach on an implied promise to pay for the value of the work or services; *Welsbach Traffic Signal Co.* v. *Chicago*, 328 Ill. App. 467 (1946). It is therefore our opinion that the Chicago Park District is liable to the City of Chicago for payment of the above water claim in the sum of $3,228.09.

METER AT WILSON AVENUE AND SERVICE DRIVE.

You further state that the District is indebted to the City in the sum of $68,750.00 for water supplied the District through the above meter for the period from September, 1939, to April, 1950. The District contends that water registered by this meter was used in territory formerly under the juisdiction of the Lincoln Park Commissioners and that the District is therefore not liable for payment of this water claim under the provisions of the ordinance passed by the City Council on July 2, 1923, and accepted by the Lincoln Park Commissioners on September 12, 1923, whereby the City of Chicago, in consideration of the Lincoln Park Commissioners taking over jurisdiction and control of that portion of the upper level of North Michigan Avenue extending from Ohio Street to the River, agreed to furnish water free of charge to that portion of Lincoln Park now or hereafter filled in lying between the north line of Devon Avenue and the south line of Diversey Parkway and east of the western boundary line of Lincoln Park. This contention is without force.

The City Council on September 7, 1938 (C. J., pp. 6902-04) passed an ordinance granting permission and authority to the Chicago Park District to construct, repair, maintain and operate a water tunnel connecting with the City's water tunel in Clarendon Avenue at approximately Wilson Avenue. The ordinance further provided that the District shall pay to the City the sum of $6,250.00 a year for the rights, privileges, easements and authority granted by the ordinance. The District accepted this ordinance on September 27, 1938. The above claim is for compensation for the right of the Chicago Park District to contruct, maintain and operate a water tunnel connecting with the City's water tunnel in Clarendon Avenue and is based upon the contract ordinance which was adopted by the City and accepted by the District. It is therefore our opinion that the Chicago Park District is liable to the City of Chicago for the payment of the above claim for compensation in the sum of $68,750.00.

METER LOCATED AT WILSON AVENUE FOR MARINE DRIVE.

You further state that the District is indebted to the City in the sum of $962.64 for water supplied the District through the above meter for the period from May, 1942, to June, 1951. The District again contends that water registered by this meter was used in territory formerly under the jurisdiction of the Lincoln Park Commissioners and that the District is therefore not liable for payment of this water under the provisions of the ordinance passed by the City Council on July 2, 1923, and accepted by the Lincoln Park Commissioners on September 12, 1923, whereby the City of Chicago in consideration of the Lincoln Park Commissioners taking over jurisdiction and control of that portion of the upper level of North Michigan Avenue extending from Ohio Street to the River agreed to furnish water free of charge to that portion of Lincoln Park now or hereafter filled in lying between the north line of Devon Avenue and the south line of Diversey Parkway and east of the western boundary line of Lincoln Park. We are advised by your department that the City of Chicago granted permission to the Chicago Park District to tap the City's water mains for the sole purpose of obtaining water to prime the pumps in the

pump house at the above location. The water so taken was registered by the above meter. This privilege was not granted to the Chicago Park District by the ordinance of 1923 referred to herein and relied upon by the District. It is therefore our opinion that the Chicago Park District is liable to the City of Chicago for payment of the above claim in the sum of $962.64.

SOUTHWEST LAND TUNNEL CONNECTION WITH POWER HOUSE LOCATED IN WASHINGTON PARK.

You further state that the Chicago Park District is indebted to the City of Chicago in the sum of $28,749.54 for the period from January 1, 1940 to June 31, 1951, under the provisions of an ordinance passed by the City Council on November 13, 1911, (C. J., p. 1637). This ordinance granted permission and authority to the South Park Commissioners to construct and maintain a water tunnel between the City's southwest land tunnel and the power house in Washington Park. The ordinance provided that the South Park Commissioners shall pay to the City the sum of $208.33 per month as compensation for this privilege. This ordinance was accepted by the South Park Commissioners. The attorney for the Chicago Park District did not discuss this claim in his opinion. Since this claim is based upon a valid agreement between the City of Chicago and the South Park Commissioners, it is our opinion that the Chicago Park District, as successor to the South Park Commissioners, is liable to the City of Chicago for payment of the above claim for compensation in the sum of $28,749.54.

* * * *

In sub-paragraphs 1, 2 and 4 on page 2 of your communication you ask advice with reference to discontinuing water service to the Chicago Park District for nonpayment of these claims. Under section 185-44 of the Municipal Code of Chicago, the Commissioner of Public Works may withhold the shutting off of water to municipalities for nonpayment of water bills when in his judgment "the whithholding of such shutting off best serves the interests of the City of Chicago." By virtue of these provisions of the Code you have the authority to determine whether or not water service should be discontinued because of nonpayment of water bills. The courts have repeatedly held that upon nonpayment of money due under a contract the party entitled thereto may abandon the contract and recover the amount actually due thereunder; (*Keller* v. *Clifford*, 165 Ill. 544 (1897); *Dobbins* v. *Higgins*, 78 Ill. 440 (1875); *Spiro* v. *Cable* 248 Ill. App. 343 (1928); *Knotts* v. *Clark Const. Co.*, 249 Fed. 181 (1918) Certiorari denied, 246 U. S. 666.) If you should decide to shut off the water supply to the Chicago Park District, such action should be confined solely to the water supply and facilities covered by the agreements under which the Chicago Park District is in default.

With reference to the contract ordinances of 1898 and 1923, the Chicago Park District is maintaining and operating Jackson Boulevard and the Upper Level of Michigan Avenue, in consideration of the City of Chicago supplying free water to the territory described in the contract ordinances. It is well settled that the right of rescission of a contract can only be exercised upon a return of the consideration set forth in the contract: *Jackson* v. *Anderson*, 355 Ill. 550 (1934). Since the Chicago Park District is discharging all of its obligations and duties under these contract ordinances, the City of Chicago has no right to discontinue water service under these contracts.

With respect to sub-paragraphs 3 and 5 appearing on page 2 of your communication, we find that there are no facts stated upon which to predicate an opinion.

In view of the foregoing, we recommend that a conference be held by the proper officials of the City of Chicago and the Chicago Park District and representatives of their law departments for the purpose of settling these claims.

WATER MAIN LEAK

(No. 11481—City Council—C. N.—February 20, 1952.)

The claim for damage to property, on February 13, 1951, said to have been caused by a leak in the water main, has been submitted to us for an opinion as to the city's liability.

Claimant corporation states that this water leak caused considerable damage to its building wall and moulds and models in the basement of the premises; and also caused considerable delay in operations of the factory and the necessity for cleaning up the premises as the water receded.

The report of the Superintendent, Central District, Water Pipe Extension Division explains that on February 5, 1951, at 8:25 A. M., a telephone notification was received from the main office of the Division of a water leak in the street seeping into the basement of premises at 2601 S. Peoria Street. Shortly thereafter the complaint was referred to a foreman who was engaged in inspection of a flooded basement at 325 W. Madison Street. He arrived at 2601 S. Peoria Street at approximately 11 A. M. and found water flowing through the building wall through to the street. He located another foreman and crew and instructed them to move to the scene as soon as possible and shut down the main. This crew arrived at about 12 noon, closed the main and when this operation was completed at 12:20 P. M. the leakage of water ceased.

The crew then excavated in the street and repaired the broken main by installing a new cast iron pipe in the existing line.

The report goes on to state that claimant's basement at 2601 S. Peoria Street was flooded to a depth of 4" in a section approximately 30'x50' in size. Stored in the basement were eighty plaster moulds of various sizes and shapes, which the secretary of claimant corporation stated was valued at $40.00 each. Foreman Hopkins inspected this equipment on February 5th and again on February 15th and is of the opinion that no damage resulted. Another foreman also made an inspection of the premises and stated that he could observe no damage to property.

It is apparent from this report that claimant's statement as to the date is erroneous and that the leak actually occurred on February 5th, not February 13, 1951.

In various prior opinions on claims of this nature, including our Opinion No. 7606 of June 14, 1932, to the Chairman of your Committee, (quoted in full), on page 932, volume XVIII, Opinions of the Corporation Counsel and Assistants, we pointed out that the city is not liable for damage caused by the break of a water main unless defective material was used in its construction, or there was negligence in its installation and maintenance or there was negligence after notice had been received of the break. In that opinion reference was made to the case of *City of Chicago* v. *Selz, Schwab & Co.*, 202 Ill. at page 549. In the same case, we quoted the following from McQuillin on Municipal Corporations, volume VIII, page 8287:

> "In all sewer or water main cases cited by the plaintiff in which the city was held liable there was either evidence of actual negligence in the construction or operation of the water main or sewer, or notice to the city authorities of the break or overflow, accompanied by neglect on their part to repair promptly, or actual notice by reason of like prior occurrences that the sewer or pipe were defectively constructed or maintained. * * * A municipality is not an insurer of its

water or sewer system any more than of its streets. It is required only to use reasonable care in establishing and maintaining such a system."

In the present instance there is no showing that any defective material was used in the construction of the main or that there was negligence in installation or maintenance thereof. A Water Pipe Extension Division crew responded with commendable promptness after notice had been received of the break.

We are of the opinion, therefore, that the City of Chicago is not liable for the damage to property herein claimed.

CANOPY COMPENSATION

(No. 11603—Superintendent of Compensation—J. D. M.—October 7, 1952.)

Your letter of June 23, 1952, requests our opinion as to the payment of compensation for a canopy covered in the ordinance of July 8, 1949, (C. J., p. 4534). The ordinance as passed required a fixed compensation of $305.00 per annum for the period beginning June 19, 1949.

The canopy involved herein extends around the building known as 225 N. Union Avenue and which building is used by the Standard Fish Company. The greater part of the building was condemned for superhighway purposes and the City received a deed for the property on January 4, 1952. Shortly after the City acquired the property, the Standard Fish Company became a tenant of the City on a month to month basis, paying rent for the property herein involved to the City of Chicago.

It is a well established rule of law that "when the money is actually paid, which is the event that completes the taking, the title acquired relates back to the time when the commissioners made their report, and it is only the liens that existed at that time that are liens against the fund." *City of Chicago* v. *McCausland*, 379 Ill., 602. It is, therefore, apparent that the owners of real estate which is subject to condemnation, lose all legal title to said property and, therefore, are not responsible for the payment of taxes or other liens which may be assessed against the property after the filing of the commissioner's report.

Following the ruling in the above cited case, it is apparent that it would be highly improbable that the City could now enforce payment of the compensation for this canopy.

We are informed by your office that the compensation for this canopy has been paid up to June 19, 1951. The attorney for the Standard Fish Company has made a compromise offer of 50 per cent of the annual fee based on the fact that they owe no compensation to the City of Chicago after January 4, 1952, which is the date on which the City received the deed for this property. We are of the opinion that said offer ought to be accepted in settlement of this claim.

We are of the opinion also that in the future where the City is leasing previously condemned property for a fixed rental that some consideration be given to ordinances existing at the time of the leasing and if it is desired that the City collect fees under the ordinance, that such fees be included within the lease so that this question of the payment of fees under ordinances will be fully covered in any future lease which the City may enter into.

UNION STATION—VAN BUREN STREET VIADUCT REPAIRS

(No. 11626—Acting Commissioner, Public Works—B. O'H.—December 12, 1952.)

We are in receipt of your letters of October 28, 1952 and December 5, 1952, concerning respectively, (a) the liability of Chicago Union Station Company (successor of The Union Station Company) to defray the expense of making necessary repairs in the roadway of the viaduct in W. Van-Buren Street between the east line of S. Canal Street and the Chicago river, and (b) a copy of a letter you propose to send to Chicago Transit Authority in answer to its request for permit to remove its street car rails from the viaduct.

With your letter of October 28, 1952 you transmit copies of your letter of September 19, 1952 to C. P. Fisher, general manager of Chicago Union Station Company, and Mr. Fisher's reply dated October 9, 1952.

In his letter Mr. Fisher denied that Chicago Union Station Company is obligated by the ordinance passed March 23, 1914 to maintain the roadway surface of the viaduct between the outer street car rails and the narrow strips immediately adjacent.

Mr. Fisher's denial of obligation is based on Section 4 of the ordinance passed March 23, 1914, which reads:

> "Section 4. Upon the changes of grade in the portions of streets mentioned in Section 2 being made, The Union Station Company shall at its own sole cost and expense repave and curb with such material and upon such specifications as may be directed by the Commissioner of Public Works, said portions of said streets, and shall reconstruct and repair as may be directed by said Commissioner of Public Works the sidewalks upon both sides of the portions of said streets named in Section 2, and shall maintain said repaving, curbing and sidewalks in good order and repair, satisfactory to the Commissioner of Public Works of the City of Chicago, ordinary wear excepted, for a period of ten years from the completion of said work. Any street railway company occupying any of the said streets within the territory designated in Section 1 and 2 of this ordinance shall, when, and as the grade of said streets shall be changed, as in this ordinance provided, conform the grade of its track or tracks to the change of grade of said streets as in Section 2 required, and reconstruct and restore its tracks and property, but at the sole cost and expense of The Union Station Company as in Section 3 of this ordinance provided, *but nothing in this ordinance shall operate or be held to relieve said street railway companies of or from any liability now existing, however created, at their own expense, after the changes, restoration and reconstruction of street railway tracks and property, provided for or necessitated by this ordinance shall have been completed, to pave and maintain such streets between or on either side of their said tracks in the manner now or hereafter required by ordinance.*"

(The emphasis, which indicates the proviso in section 4 quoted in Mr. Fisher's letter, is ours.)

You state in your letter to us:

> "It is our position that this viaduct was built and maintained by the Union Station Co., except that the street car company (Chicago Surface Lines) maintained the street car track area. When buses were substituted for street cars the C. T. A. discontinued use of the car tracks and ceased maintenance. The City never has maintained any part of this structure and never entered into any agreement to do so.

"We propose making the necessary repairs so that the roadway may be safe for public use, and we will subsequently prepare a warrant for collection of the costs.

"Kindly advise if this procedure meets with your approval."

Section 2 of the ordinance passed March 23, 1914 provides for certain specified changes in the grades of streets in the area occupied or to be occupied by The Union Station Company and the railroad tracks and facilities in connection therewith. Section 3 of said ordinance obligates The Union Station Company to defray the cost and expense in such changing, alteration, reconstruction, removal or destruction of property belonging to the City of Chicago or to any public utility as might be necessitated by any rearrangement or reconstruction of tracks or changes in grades as provided for in section 2. Section 4, quoted above, obligates The Union Station Company *upon the changes of grades in the portion of the streets mentioned in section 2 being made* to repave and curb at its own sole cost and expense and thereafter to maintain said repaving and curbing in good order and repair *for a period of ten years from the completion of said work.* Sections 2, 3 and 4 have relation to plans for regrading which long ago have been executed.

The provision of the ordinance passed March 23, 1914 which governs in the case under discussion is section 6(3) which obligates The Union Station Company to the continuing support and maintenance of the roadway. Said Section 6(3) reads:

"(3) The Union Station Company shall *at all times* support and maintain the roadway and sidewalk over any and all space occupied by it or any railroad company now or hereafter using the passenger station and facilities herein authorized pursuant to the provisions of this ordinance, in good condition and repair, all to the satisfaction of the Commissioner of Public Works of the City of Chicago, and in accordance with plans and specifications which shall be submitted to and approved by him." (Emphasis ours.)

The obligation was, and is, on Chicago Union Station Company to maintain in good condition and repair the roadway of the viaduct. But so long as a portion of the roadway is occupied by the street car tracks of Authority (which under its ordinance with City is in such circumstance responsible for maintenance and repairs) Chicago Union Station Company is relieved of the obligation so far as that portion of the roadway is concerned. Said obligation will attach to Chicago Union Station Company when (and not before) street car operation has been discontinued, the street car tracks removed and the right-of-way has been restored substantially to the same condition as the rest of the roadway.

We approve of the procedure as stated in your letter of October 28, 1952, but only to the extent that it applies to the area in the roadway of the viaduct not occupied by Authority's right-of-way and on which Authority's street car tracks still remain. As we have stated above the responsibility of Chicago Union Station Company to maintain and repair the entire roadway does not begin until the street car tracks have been removed.

With your letter to us of December 5, 1952 you transmit copy of a proposed letter by you to Authority in answer to its request for permit to remove street car rails from the viaduct.

In your letter to us you state that:

"The C. T. A. wishes to remove its rails. If the street is opened to remove rails, neither the C. T. A. nor the Chicago Union Station Co., owners, will restore the pavement. Under these circumstances, we hesitate to grant a permit until assurances are obtained that such pavement on this privately owned viaduct will be restored by someone."

In your proposed letter to Authority you state:

"The subject viaduct was built by and owned and maintained by the Chicago Union Station Company. The City neither owns nor maintains this structure. * * *

"As the proposed operations will affect the owners of the structure, we believe it proper that you likewise direct a request for the permission to the Union Station Company, the owners."

You request our advise as to the sending of the communication, as drafted by you, to Authority.

The viaduct is not privately owned and Chicago Union Station Company is not the owner. The viaduct is part of a public street owned by the people of the State of Illinois and under the control and regulation by the City. By the ordinance passed March 23, 1914 The Union Station Company was required to contruct, repair and maintain the roadway, other than the street railway right-of-way. Said obligations must be respected both by Chicago Union Station Company and City, and obligations of Authority in the ordinance passed April 13, 1945 must be respected both by Authority and City. But in neither case does the ordinance granting certain rights of use in return for the assumption of certain obligations divest the City of its control over the viaduct.

The 1945 ordinance governs in the matter of track removal and repairing of the right-of-way on the viaduct. Chicago Union Station Company is not a party to that contract ordinance. The 1914 ordinance governs in the matter of maintenance and repairs after the right-of-way has been abandoned. Authority is not a party to that contract ordinance. To both ordinances City is a contracting party in the proper exercise of its rights and duty in the control and regulation of public streets including this viaduct specifically.

We submit for your consideration the following procedure for you to follow:

(a) give written notice to Authority that City (or any other governmental authority or public agency) is ready to repave Authority's right-of-way in the viaduct and to make demand that Authority at its own expense shall remove its street car *tracks*, poles and wires from such right-of-way and pay to the City at the rate of five thousand dollars per mile of single track and ten thousand dollars per mile of double track so removed from the street in payment to the City of a portion of the City's cost of repaving such right-of-way. (See paragraph K of section 10 of the ordinance passed April 13, 1945);

(b) notify Chicago Union Station Company by letter of the action you have taken and state that after the street car tracks have been removed by Authority and the right-of-way repaved, you will hold Chicago Union Station Company responsible for keeping in good condition and repair the entire width of the roadway of the viaduct (and also the sidewalk) including that portion previously occupied by Authority's right-of-way, as provided in section 6(3) of the ordinance passed March 23, 1914.

LIABILITY FOR DAMAGE TO CARS TOWED FROM RESTRICTED PARKING AREAS

(No. 11693—Commissioner of Streets and Sanitation—M. I. W.—May 27, 1953.)

We have your letter of May 8, in which you describe the present program in which the Department of Streets and Sanitation is engaged with

the Chicago Police Department of towing cars found illegally parked in the downtown area.

According to your description of the procedure the traffic officer calls the ward office and the Bureau of Sanitation man fills out a vehicle towing order, which is given the towing truck operator who proceeds to the location. The offending car, which has by this time been ticketed, is towed to the police pound where it is stored until claimed.

You state that you have prepared a vehicle release and receipt form which will be filled out by the Bureau of Sanitation representative at the time the owner presents evidence of ownership, pays the storage and towing charges and is properly released by the police officer on duty in the pound.

You ask our opinion as to the advisability of securing from the owner a waiver of damage claim exempting the City from any damage to the automobile incurred as a result of the towing and storage.

It is a well established rule of law, reiterated through many Illinois cases, that a municipality is not liable for damage to persons or property flowing from the exercise of governmental functions, while liability will be found where the function is exercised in its corporate or ministerial capacity. *Roumbos* v. *City of Chicago*, 332 Ill. 70 (1928). The cases also expressly point to the difficulty of applying this distinction to any specific set of facts. *4 Dillon on Mun. Corp.*, 5th ed.—sec. 1625.

It has been held that the regulation of traffic is a governmental function and that a city may not be held liable for acts or omissions with respect thereto. *Scarpi* v. *City of Chicago*, 339 Ill. App. 434 (1946).

Municipal authority to control parking is derived from the statutory grants of power to regulate the use of streets and to regulate traffic upon the streets. Chap. 24, secs. 23-10, 23-27 Ill. Rev. Stat. (1951); *City of Bloomington* v. *Wirrick*, 381 Ill. 347 (1943).

It thus appears that the regulation of parking and therefore the enforcement of parking ordinances is performed in the governmental rather than private capacity of the city. This view is further strengthened by language in the Uniform Act Regulating Traffic Upon the Highway, Chap. 95½, Sec. 123 Ill. Rev. Stat. (1951):

> "(a) The provisions of this Act shall not be deemed to prevent local authorities, with respect to streets and highways under their jurisdiction and within the reasonable *exercise of the police power* from—
>
> 1. Regulating the standing or parking of vehicles;" (emphasis added).

In the case of *Haggenjos* v. *City of Chicago*, 336 Ill. 573 (1929) the court said that the regulation of parking is "necessary for the safety, welfare and convenience of the public." This language helps place this function almost precisely within the scope of the "governmental capacity test" as applied by the courts and liability would therefore ordinarily not lie.

There are however two further considerations which should be borne in mind. The first is the apparent tendency of the courts to modify application of the governmental versus corporate capacity test, so as to place upon municipalities an ever increasing burden of responsibility. Thus, in the case before us, it is conceivable that a court which chose to further this trend away from the traditional view might say that, although the enforcement of parking ordinances is the exercise of a governmental function once the point of towing or the point of storage is reached, the city is no longer engaged in enforcement but is acting in a custodial or ministerial capacity and is therefore liable for the exercise of due care by its agents.

The second danger lies in the statutory provision found in the Cities and Villages Act, Chap. 24, sec. 1-15 Ill. Rev. Stat. (1951) which requires the city to indemnify any member of the police department for any judgment recovered against him for damages to any person or property caused in performance of his duties. Since the pound where the automobiles are stored is under police control, the provisions of this act could operate to result eventually in the city being for all practical purposes an insurer of all vehicles kept therein.

The question then is what can the City do to protect itself against such liability. You inquire as to the advisability of securing a waiver of damage claim from the owner freeing the City from any responsibility. The problems that immediately present themselves are (1) what would happen should the owner refuse to sign such a waiver, and (2) would such a release be a binding agreement without the essential element of valid consideration?

As to the first problem, the ordinance under which this program operates (Municipal Code, Secs. 27-173to 27-182), in setting out pre-conditions to recovery of the property, grants no authority to those in custody of the vehicles to include the execution of a waiver of damages as one of such pre-conditions. Nor are we able to find such authority elsewhere. Such a document, obtained from a person told he must sign in order to recover his automobile, would be subject to the challenge of the use of duress.

Nor are we able to see what consideration could properly be recited to clothe such an agreement with binding validity. Since the owner of the vehicle is legally entitled to its return upon compliance with the provisions of Sec. 27-177 (as to payment of charges, etc.) the return of the vehicle does not constitute consideration.

We do suggest that in order to safeguard the City from unfair claims on the part of owners, where the vehicle may have been damaged prior to its coming into contact with city employes, that the clause found in Sec. 27-178 setting out records to be kept be carefully compiled within regard to observing "the general description of condition." Particular notice should be taken of any significant damage apparent on the vehicle at the time it is removed from the street and brought to the pound. A written record should be made of such condition and kept in such a manner as to readily enable the City to avail itself of the testimony of the officer in charge of the pound, the towing operator and the ticketing officer, all of whom could substantiate the fact of previously existing damage, should such a claim be made.

We suggest that you discuss this matter with Police Department to establsih the necessary procedure.

You also ask our opinion as to whether we deem it advisable for the Bureau of Sanitation representative, who collects the towing and storage fee, to be bonded.

Section 25-15 of the Municipal Code provides in the second paragraph as follows:

> "Any subordinate officer or employe may be required by the head of any other department or agency of the city government . . . to give bond payable to the city in such penal sum as may be approved by the city council . . . conditioned for the faithful performance of the duties of the office or position and the payment of all monies received by such subordinate officer and employe. All such subordinate officers and employes who shall receive or have the care, custody or handling of any monies . . . belonging to the city *shall be required to give such bond.*" (Emphasis added.)

It is therefore our opinion that the Bureau of Sanitation representative who collects the towing and storage fee should be bonded.

Regulations governing the bonding of employes are found in the Municipal Code, Sections 25-14 to 25-22. A standard form of bond has been approved by this office and application may be made in the comptroller's office.

SAFEGUARDS TAKEN AFTER ACCIDENT

(No. 11695—Commissioner of Streets and Sanitation—C. N.—May 28, 1953.)

We have your letter of May 22, 1953, in which you state that Alderman Ronan has requested lighting of the underpass on Division Street at N. Kenton Avenue on a 24-hour daily basis. This request is motivated by a recent accident involving a CTA bus and a City vehicle parked under the viaduct, the CTA driver contending that the contrast between the bright sunshine outside and the darkness encountered in the underpass blinded him in such manner that he could not avoid the collision. You describe the illumination system now provided for the underpass, kept burning from dusk to dawn plus one hour. You ask for an opinion as to whether providing illumination in the underpass for 24 hours daily would constitute an admission of negligence for the conditions maintaining when the accident occurred.

The adequacy of lighting is a question of fact. In court actions questions of fact are determined by the jury, after evidence properly introduced has been fully weighed. The City's action in providing more lights or the same lights for a longer daily period in a given underpass should not be construed as an admission that the lighting system which formerly prevailed was inadequate. Such change in the illumination provided could be attributed to reasons having no direct connection with the circumstances surrounding the accident described by Alderman Ronan. If it could be shown that the illumination supplied at the time of the accident was adequate and that the reason given by the CTA driver for the collision is not well based, changing the lighting system in any way decided upon by the municipality would have no direct bearing upon the determination of negligence. Of course, if it could be shown that the lighting was in any way inadequate, a basis would appear for a finding of negligence on the City's part.

It is the duty of the municipality to take any steps calculated to reduce accident hazards. To penalize the City for improving its illumination systems would be a form of retroactive application that would work hardship upon all those who use the public ways. The only actual limitation is the rule that, once an illumination system has been provided, it must be maintained and any reduction in the quantity, quality or periods of time, or any deviation from what the public has been led to expect, might form a basis for a finding of liability in the event of a subsequent accident.

We are of the opinion, therefore, that extending the period of lighting in the underpass would not necessarily impose liability upon the City for an accident which occurred before the lighting period was extended.

LIABILITY OF ABUTTING OWNER FOR COST OF SIDEWALK REPAIR

(No. 11729—Chief Street Inspector—C. P. B.—August 12, 1953.)

In your letter you stated that owners of the property in question in the City of Chicago, have failed to repair the defective sidewalk in front of their premises after notice from the City of Chicago so to do. You requested that we take any action which we deem necessary.

Under the provisions of the Sidewalk Act—Ch. 24—Article 63 the city may reconstruct a defective sidewalk, upon the abutting property owners failure to do so upon proper notice and assess the cost of such repair to the abutting property owner.

The procedure for such action is clearly outlined in Ch. 24 Article 63, referred to above and commented upon in Opinions of the Corporation Counsel, Vol. 20, page 304, Opinion No. 9836. This comprehensive opinion reviews the cases upon point and thoroughly discusses the instant and related questions.

We are therefore of the opinion that the city may reconstruct defective sidewalks and assess the abutting property owner for such costs in accordance with the substantive law and procedure set forth in the Sidewalk Act, cited and discussed earlier in this opinion.

D. BONDS

VOTING MACHINE BONDS

(No. 11141—City Comptroller—R. J. N.—May 9, 1949.)

Your letter of April 20, 1949 requests preparation by this office of an amendment to Section 24-5 of the Election Code (Chapter 46, Section 24-5, Illinois Revised Statutes) which now prohibits the sale of bonds for the purchase of voting machines at less than par, and substitute a provision permitting such sale at "the best price obtainable."

Our examination of the factual background of this matter discloses that on September 29, 1947 the City Council by ordinance provided for the calling of an election submitting the question as to the issuance of $7,000,000 worth of voting machine bonds dated January 1, 1949 in denominations of $1,000 each to bear interest at 3% and to be sold at not less than par value and accrued interest; that on November 4, 1947 the question was submitted to the electorate to decide whether bonds should be issued in accordance with the provisions of the ordinance of September 29, 1947. The statute (Chapter 46, Section 24-5, Illinois Revised Statutes) at the time of the election provided that the bonds authorized thereunder should not be issued or sold at less than par.

Although there are no Illinois cases involving bond issues where a statutory amendment subsequent to the authorization of the bond issue by the electorate have been involved we believe that the Illinois courts

would hold the same as courts throughout the country on this point and rule that an amendment made subsequent to the approval of the issue by the electorate could not be made the authority to issue bonds and the bonds issued thereunder would be void.

The leading case on this point appears to be the case of *Perry* v. *City of Los Angeles, et al.*, 203 Pacific 992 (California), where Chief Justice Shaw stated:

> * * * "in my opinion, the vote of the people, by which the city was authorized to sell the bonds at a price not less than par, constituted a part, and a material part, of the contract evidenced by the bonds, as stated in *Bank* v. *Escondido Irr. Dist.*, 144 Cal. 329, 77 Pac. 937. The city is the nominal obligor or promisor on the bonds. It has no authority to make the promise and issue the bonds, except such as it obtained by this vote, and that authority was conditioned that the buyer of the bonds, the promisee, should pay to the city at least the par value as the consideration thereof. The real payors of the bonds are the people who pay the taxes levied to raise the fund for that purpose. They are, under the constitutional scheme, in substance and effect the principals whose authority must be first given, in order to authorize their agent, the city, to make the contract. This authority as evidenced by the records of the election at which the authority was given, must be considered as a part of the contract, at least to the extent that the conditions therein stated cannot be disregarded by the city in selling the bonds, nor by the purchaser at the sale, and, this being so, it necessarily follows that an act of the Legislature purporting to authorize a disregard thereof would, if valid, impair a material portion of the contractual obligation."

In New York the court of last appeal of that state has held that where a village contracted to sell $50,000 of the bond issue with accrued interest of $444.00 for a sale of $50,000 thus granting a discount of the accumulated interest the contract was void. *Village of Fort Edward* v. *Fish*, 50 N. E. 973.

A similar decision was handed down by the Georgia Supreme Court in *Wheeler* v. *Board of Trustees of Fargo School District*, 37 S. E. 322. In that case the court even held that a constitutional change would not authorize a deviation from the law in existence at the time the bonds were approved.

Our reasons for presuming that the Illinois courts would hold similarly are based on the case *Cornell* v. *The People ex rel. Charles Walsh*, 107 Ill. 372 where the court held that a change in the manner of the appointment of Park Commissioners subsequent to the authorization by the electorate for the Park Commissioners to levy taxes did not authorize Commissioners appointed under the new procedure to levy those taxes without the new manner of appointment being approved by the voters.

Under these circumstances we are of the opinion that no change in the statutory law should be attempted at this time. We are of the opinion that a change in the statute would not be effective to approve a change in the terms of the bonds already authorized by the electorate. The proper procedure would be to attempt a sale of the bonds under the conditions approved by the electorate; namely a sale at no greater than 3% interest and at not less than par value. In the event there are no bidders at the sale the council should pass a new ordinance for a sale at a higher interest rate which ordinance would have to be resubmitted to the electorate before bonds could be issued.

SEWER BOND FUND

(No. 11224—Commissioner of Public Works—E. L. W.—December 15, 1949.)

Your communication of recent date informs us that during the year 1949, the Water Pipe Extension Division will expend out of the Water Fund approximately $250,000.00 and in 1950 approximately $300,000.00 for the cost and expense of supporting, protecting, maintaining, removing, replacing, relocating, rearranging, adjusting, repairing, altering, restoring or reconstructing city-owned water mains, connections and appurtenances incident to the constructing of city-owned sewers. That the above mentioned work is due entirely to sewer construction work.

You ask our opinion as to whether the expense of doing this work in connection with the Water System can be charged to the Sewer Bond Fund. The Sewer Bond Fund Ordinance of April 16, 1945 (C. J. p. 5606) was passed for the purpose of "improving, extending and constructing sewers in the city."

Any work that is incidental to the construction of a Public Improvement under a bond issue can be charged to the Bond Fund. (Corporation Counsel's Opinions, Vol. 18, p. 753, No. 7708; Vol. 22, p. 530, No. 11090. *Chicago* v. *Norton Milling Company*, 196 Ill. 580).

From the information given in your communication, it is our opinion that the work done in connection with the city-owned water mains is incidental to the construction of the city-owned sewers and therefore can properly be charged to the Sewer Bond Fund.

SUBWAY REVENUE BONDS

(No. 11303—City Comptroller—R. J. N.—May 23, 1950.)

Your letter of May 17, 1950, requests our examination of a proposed ordinance for the issuance of $2,000,000 Subway Revenue Bonds. Your letter also requests our opinion as to whether or not payments made by the Chicago Transit Authority as reimbursement to the City of Chicago for expenses incurred in construction of the subways which are in excess of the sums required to be deposited with the First National Bank for the purpose of retiring the bonds authorized by the proposed ordinance can be used for purposes other than retiring bonds.

We note that the date of the agreement between the Chicago Transit Authority and the City of Chicago providing for payments by the Transit Authority of the sums of $11,446.84 and $12,831.15 for the State Street and Dearborn Street Subways respectively, has not been inserted in the ordinance as submitted to us. This omission should be supplied. We have not examined that agreement but presume that it is quoted correctly in the attached ordinance. We also note that there are several penciled corrections upon the ordinance as submitted to us which we presume will be incorporated in the ordinance in its final form.

We have made no computations to determine whether or not the $24,277.79 total monthly payments by the Transit Authority will be sufficient to amortize both principal and interest upon the bonds authorized but assume that these computations are correct and are adequate to retire the bonds and interest thereon at maturity.

We note that the ordinance provides for a premium to be paid in the event bonds are called for retirement prior to their maturity. The premium is authorized at the discretion of the City Council under the provisions of Section 70-4 of the Cities and Villages Act.

Under the provisions of the ordinance and the depositary agreement attached thereto the City is required to deposit at the First National Bank of Chicago, the sum of $160,000 as a "Debt Service Reserve" which must be kept intact by the City of Chicago, and in addition thereto is required to deposit monthly a sum equal of 1/6 of the interest accruing on the next succeeding interest date plus 1/12 of the principal amount due on the next maturity date of the bonds. This latter fund is to be known as "Chicago Subway Revenue Bonds of 1950 Sinking Fund Deposits" and in the event there is not sufficient money in the Chicago Subway Revenue Bonds of 1950 Sinking Fund Deposits, the depositary is authorized to use a portion of the funds in the Debt Service Reserve in order to pay principal and interest upon the bonds as the same become due. Provision is made for the investment of the Debt Service Reserve in certain designated governmental securities and in the event those securities are sold at a loss the Debt Service Reserve must be augmented by the City of Chicago so that it again totals $160,000. The depositary agreement also allows the bank "reasonable compensation" for all services rendered by it, including attorney's fees which the City agrees to pay promptly on demand from time to time.

If the monthly payments by the Transit Authority as reimbursement for the State and Dearborn Street Subways exceed the amounts required under the depositary agreement (amounts needed for payment of principal and interest upon bonds; amounts needed to maintain the Debt Service Reserve" at $160,000 and the compensation of the depositary) the balance may be used for the purposes enumerated in paragraph "C" of the Transit Ordinance (page 3390, C. J., April 23, 1945). These expenditures, however, are subject to the general control of the City Council.

TERMINATION OF SURETY BOND

(No. 11328—City Comptroller—H. A. C.—August 11, 1950.)

Your communication of July 19, 1950, advises that on January 26, 1927, an ordinance was passed by the City Council (C. J., p. 5356), authorizing the Chicago Tunnel Company to maintain an ash hoist extending from the boiler room of the LaSalle Hotel into the tunnel of the Chicago Tunnel Company in Calhoun place. You further informed us that the Globe Indemnity Company, surety on the bond filed in accordance with the provisions of the ordinance, have requested termination of liability on the bond.

Your letter states that no application was made for renewal authority because of an opinion rendered by the Corporation Counsel, March 27, 1933, (Volume 18, Opinions of the Corporation Counsel, p. 634), although the ash hoist is still maintained at the location specified, and request that we inform your office if, in view of that opinion, liability on the bond on file may be terminated and if so, as of what date.

The ordinance of 1927 was for a period of ten (10) years, and Section 6 of the ordinance required a surety bond to save the City harmless against all liabilities, and provided that the bond and the liability of the sureties be kept in force throughout the lifetime of the ordinance.

On July 19, 1932, an ordinance was passed by the City Council, (C. J. p. 2731) (1932-33) (Chicago Tunnel Co. ordinance), granting permission and authority to Chicago Tunnel Company to construct, maintain and operate a tunnel system, and to use and occupy existing tunnels of the City of Chicago for a term of years.

Section 18 of the ordinance of July 19, 1932, provided that by the acceptance of the ordinance, the Company waived and released all and every right in the streets, alleys and public ways of the City heretofore granted, it being understood and agreed that the Company's rights to acquire and maintain a tunnel system and to use and occupy tunnels of the City are such only as are granted by this ordinance.

In the opinion of March 27, 1933, we advised your office that under the terms of the ordinance of July 19, 1932, the chute from the LaSalle Hotel into the tunnel in Calhoun Place is recognized as City property, and an integral part of the tunnel leased to the Chicago Tunnel Company. The opinion further advised your office, that the ordinance of 1927 was no longer effective.

We are of the opinion that the provisions of the 1927 ordinance are no longer effective, and that liability on the surety bond should be terminated.

RELEASING COAL-HOLE SURETY BOND

(No. 11368—City Comptroller—C. P. H.—March 5, 1951.)

We have your letter of February 28, 1951 wherein you ask our opinion as to whether or not you should comply with the request of the Columbia Casualty Company that the City of Chicago terminate the liability of the Company under the terms of the bond signed by one Simon Bloom and the Company, under date of June 6, 1930. The bond was filed with the City on June 17, 1930 in connection with the issuance of permit No. 5544 to Simon Bloom authorizing the construction and maintenance of a coal hole in the sidewalk abutting upon the premises known as 1301 W. 14th Place, Chicago. The Columbia Casualty Company claims that it should be released from liability on the bond because the Chicago Housing Authority acquired the said premises on June 3, 1950 and demolished the improvement located thereon for the purpose of erecting a low-rent housing project.

The bond, required to be filed by section 34-38 of the Municipal Code, provides that Simon Bloom and the Columbia Casualty Company shall indemnify, save and keep harmless the City of Chicago from any and all loss, cost, damage, or claim of damage, expense or liability of any kind, whatsoever, which the City may suffer or be put to, or which may accrue against, be charged to, or recovered from the City by reason of or on account of the construction and maintenance of the coal hole.

Under the provisions of the Revised Cities and Villages Act, a person who is about to commence a civil action against the City on account of any injury to his person, is required to serve notice upon the City within six months from the date the cause of action accrued (Ill. Rev. Stat. 1949, ch. 24, par. 1-11). The courts, however, have repeatedly held that these provisions of the act are not applicable to persons who are mentally or physically incapable of giving such notice to the City; (*McDonald* v. *City of Spring Valley*, 285 Ill. 52; *Doerr* v. *City of Freeport*, 239 Ill. App. 560). It follows that the City is unable to ascertain whether or not it will suffer

losses on account of injuries to persons by reason of the construction and maintenance of the coal hole. If the City should sustain such losses, it would have a right of action against the Columbia Casualty Company under the provisions of the bond. Furthermore, in an opinion to the Commissioner of Buildings, dated March 2, 1942 we stated that the practice of returning or cancelling indemnity bonds filed with the City is not regarded as safe or proper. (Ops. of Corp. Coun, Vol. XXI, p. 50).

It is, therefore, our opinion that you should not in any manner whatsoever release the Columbia Casualty Company of any of its obligations under the terms of the indemnity bond referred to in your letter.

CITY OWNED GARAGES

(No. 11458—City Council—J. C. M.—December 13, 1951.)

In your letter of December 4, 1951 you request an opinion as to whether it would be legal for the City of Chicago to enter into a contract for (1) the construction of garages, (2) the payment of the cost of construction from the proceeds of the sale of revenue bonds and (3) the operation of the garages until the revenue bonds have been amortized, for convenience called the "package plan" under which bids would be taken on an alternate method, after advertisement.

Under the so-called "package plan," we understand the financing group would (1) construct the facilities, receiving payment either in cash or revenue bonds; (2) operate the facilities under lease for a period of years until the bonds are retired. An admitted weakness in this proposal lies in the fact that no provision is suggested for furnishing the funds necessary to get under way, i.e., for the preparation of plans and acquisition of the sites. It is obvious that competitive bids could not be taken unless plans and specifications are on file so that all of the bids relate to the same subject matter. This is true in relation to the issuance of bonds, construction and leasing, whether bids are taken collectively or alternately. While it is not ncessary that the bonds be sold on competitive bidding, being revenue bonds, there would have to be commitments to insure their support. The location and approximate cost of the sites would have to be known as well as the size and sufficient details of construction to permit a fair estimate of the cost of the facilities. The location and capacity of the facilities would be important elements in determining the bid or negotiated price of revenue bonds.

It must be pointed out that improvidently issued or improperly supported bonds would be harmful to the City in other financing ventures, including financing for parking facilities in other areas.

Reference must be made to the proposed agreement with the so-called Banking Group published in the Council Journal of October 31, 1951, page 1177. That agreement contemplates that a plan, developed by the Banking Group with its own funds, would be submitted to the City Council. The background studies for the plan would be sufficiently complete to warrant a commitment by that group to purchase the bonds if the City Council accepts the plan and presumably the plan itself could furnish the basis for taking competitive bids for the bonds. Sale of the bonds would, of course, carry a commitment that the other steps would follow as planned. If the plans and specifications furnished were in sufficient detail, assuming that the aforesaid Banking Group agreement had been entered into by the City, we are of the opinion that at this point the Council could pass an ordinance for the location and acquisition of the sites, the construction of

the facilities and the issuance of the bonds. The Council could also, at that time, determine whether it would negotiate the sale of the bonds or take bids. Sale of the bonds on bids, even to the Banking Group, would, under the terms of its proposed agreement, make the City liable to the Banking Group for 1½% of the par value of such bonds at the time of delivery thereof to cover its expense in making and furnishing the survey, preliminary plans and details.

Chapter 24, (Cities and Villages Act) Articles 52.1-1 to 52.1-10 (Par. 52.1-1 to 52.1-10, Chap. 24, Ill. Rev. Stat. 1951) is the source of the authority and contains the manner and means of the exercise of such authority.

Paragraph 52.1-1 confers upon municipalities the authority (a) "to acquire by purchase or otherwise, own, construct, equip, manage, control, erect, improve, extend, maintain and operate motor vehicle parking lot or lots, garage or garages, parking meters and other revenue producing facilities necessary or incidental to the regulation, control and parking of motor vehicles as the corporate authorities may from time to time find the necessity therefor exists," provided the Plan Commission gives it prior approval; (b) to maintain and operate such parking facilities and to charge for the use thereof; (c) "to enter into contracts dealing in any manner with the objects and purposes of this article"; (d) to acquire sites, buildings and facilities by gift, lease, contract, purchase or condemnation, and to pledge the revenue thereof for the payment of any bonds issued for such purpose; (e) to borrow money and issue and sell bonds in such amount or amounts as the corporate authorities may determine for those purposes.

Paragraph 52.1-2 provides that such bonds shall bear interest at not to exceed six (6) per cent per annum and "may be sold in such manner as they deem best in the public interest." Such bonds shall be payable solely and only from revenues to be derived from the operation of any or all of its parking facilities. The maturity date of such bonds shall not exceed thirty (30) years.

Paragraph 52.1-3 provides that the corporate authorities in order to avail itself of this Article shall:

> (a) Adopt an ordinance describing in a general way the contemplated project and refer to plans and specifications therefor, *which shall be placed on file in the office of the clerk of the municipality, and which shall be open for the inspection of the public.*
>
> (b) The ordinance shall (1) state the estimated cost of such project; (2) fix the amount of revenue bonds proposed to be issued, maturity and interest rates and details; (3) contain covenants relating to the issuance of additional bonds, kinds and amounts of insurance to be carried, operation, maintenance, management and keeping of records, and other matters. It shall also provide for publication of the ordinance.

Paragraph 52.1-4 provides for charges and fees for parking facilities sufficient to meet all charges of maintenance, principal and interest of the bonds.

Paragraph 52.1-8 provides for leasing of parking facilities; that no lease for operation or management of any such parking facilities shall be made for more than one year, except to the highest and best bidder after notice requesting bids and after publication.

Paragraph 52.1-10 limits expenditures under this Article from revenue bonds or from revenues derived from the operation of parking facilities.

In *Poole* v. *City of Kankakee,* (1950) 406 Ill. 521, this Act was held to be constitutional.

Under Paragraph 52.1-3 it will be noted that *at the time of the passage of the ordinance there shall be placed on file with the City Clerk plans and specifications for the contemplated project.* The cost of such plans and specifications would have to be paid out of revenue bonds or revenue derived from the operation of parking facilities, as provided in Paragraph 52.1-10. These could be paid for from revenue, not otherwise pledged, derived from the maintenance of parking meters. The properties likewise could be acquired with funds so derived from parking meters.

The construction of garages would have to be let by contract to the highest responsible bidder as provided in the Purchasing Act (Chap. 24, Article 22A, Ill. Rev. Stat. 1951).

The leasing of the facilities would be governed by Paragraph 52.1-8 as above set forth.

The City can negotiate the bonds "in such manner as they deem best in the public interest."

In any event, the construction of the project and the leasing of the same for a period beyond one (1) year require publication and solicitation of bids. Under the provisions of the Statute, the sale of the bonds could be by negotiation.

In consideration of the problem, there are no decided cases, as far as we are able to ascertain, covering all the aspects thereof.

The following decisions are helpful:

In *Commonwealth Public Service Co.* v. *City of Deer Lodge* (Mont. 1934), 29 Pac. (2) 667, plaintiff, a taxpayer, sued to restrain the City from issuing bonds to a contractor in payment of the cost of construction of public water works. It was held that under a contract whereby the bonds, at their face or par value, are exchanged for work at an agreed valuation, and the price of the construction work is determined by a competitive bid which is accepted, such constitutes a sale under the Statute. (McQuillan on Mun. Corp. (2nd Ed.) Sec. 2462.) Even this situation presents problems that only courts of competent jurisdiction can determine with any degree of certainty. In the above case it was further urged that, since by advertising for bids and stating therein that the successful bidder would be paid for his services in bonds, bidders would be restricted either to those who had funds of their own, or to those who would be forced to sell the bonds at a discount, the price bid for the work to be done would be higher than if it had been advertised that the contract price would be paid in cash; and the Statute requiring contracts of this character to be let to the lowest bidder is violated; consequently, the contract is void.

The trial court found "That there is no evidence to show that the bids received from the contractors were any higher by reason of the insertion of such conditions in said notice than such bids would have been without it." * * *. The Supreme Court said:

> "If the fact had been found or the proof had disclosed by this notice the bids were made at a figure in excess of what they would have been had the medium of payment been specified in cash, then clearly the contention of plaintiff would be sound. * * * It is not here shown by evidence that the bonds were of any less value than the cash consideration provided in the contract. In the absence of a showing that the bonds of a par value of the amount of the bid were of any less value than the equivalent amount in cash, we are unable to say that there was such a departure from the notice as to warrant us in condemning the contract."

In *Crowe* v. *Boyle* (Cal. 1920), 193 Pac. (2d) Ill. it was held that it was not illegal for a contractor with a city on a cost-plus basis to use part of his fee in the purchase of bonds sold to raise funds for the work.

In *Washington-Oregon Corp.* v. *City of Chehalis*, (Wash. 1913), 136 Pac. 681, the city advertised the sale of $70,000 in general bonds and $115,000 in special water fund bonds and called for bids for the construction of the plant, providing in the call that contractor would be paid by the issuance to him of the $70,000 general fund bonds and so much of the $115,000 issue of special funds bonds as should be necessary to complete payment. No bids were received for the special water fund bonds, and no bid acceptable to the city was obtained for the general fund bonds. A bid of W. H. Mitchell for the construction of the plant for $161,750, being satisfactory to the city, was accepted, and the city was about to contract with him for the construction of the plant and for the delivery to him of the $70,000 general funds bonds and so much of the special water fund bonds as would be required to meet the balance of his bid, when this action was brought.

In this case the State Code provided that "such bonds shall be sold in such manner as the corporate authorities shall deem for the best interest of the City." The court said:

> "We find in this language *no limitation upon the power of the City to deliver the bonds to the contractor in payment for the construction of the water plant.* * * * Because the Statute uses the word 'sale' does not necessarily imply that the bonds can only be disposed of for cash and the cash thus obtained paid to the contractor. Tiedeman, in his work on Sales (Section 12), says: 'Although it has been sometimes held that the sale must be a transfer for money, and that every other transfer is an exchange or barter, the better opinion is that the transaction is still a sale, although the transfer is made for something else than money, provided each article is transferred at an agreed or the market value, so that the one thing is received in payment of the price of the other.' (*Williams* v. *City of Rock Hill* (S. C. 1935), 180 S. E. 799."

The court went on to discuss other cases upholding the above reasoning and held that the arrangement between the City and the contractor was a "sale" of the bonds within the meaning of the Statute.

As stated in *Simpson* v. *City of Highwood*, 372 Ill. 212, 219, where revenue bonds were involved:

> "While, in local improvements, the contractors take the bonds, and in this case they are paid from the proceeds of the bonds, we observe no material difference in the result. The bonds, in either case, are not an obligation of the municipality, and the holder can look only to a special fund for payment, which must be segregated and never becomes a part of the general corporate funds."

In *State* v. *City of Daytona Beach* (1949), 42 So. (2) 764, it was held:

> "In the absence of a statute providing for public sale, the issuing authority may adopt such method of sale as in their judgment in the exercise of a sound discretion will be for the best interest of the municipality. *Thomas* v. *McHugh*, 65 N. D. 149, 256 N. W. 763; *Vollmer* v. *Village of Amherst*, 65 Ohio App. 26, 29 N. E. (2) 379."

In *Eagle* v. *City of Corbin* (1938) Ky., 122 S. W. (2) 798, 802, it was held:

> "It is beyond the power of a municipality to contract to sell or dispose of bonds before they come into existence, or, at least, before they are authorized." (Citing 44 C. J. 1214.)

In this last cited case, though the council had broad powers to sell the bonds to the best interests of the city, the court held that such power does not extend to avoiding public and reasonable advertisement or a proposal to receive bids or offers for bonds proposed to be issued and sold.

In 44 C. J. p. 1214, Sec. 4186, it is said:

> "It is beyond the power of a municipality to contract to sell or dispose of bonds before the issuance of the bonds is authorized (citing *Stanley* v. *Baltimore*, 146 Md. 277, 126 Atl. 151, 130 Atl. 181; *Merrill* v. *Monticello*, 22 Fed. 589; *Thomas* v. *Grand Junction*, 13 Colo. App. 80, 56 P. 665; *Hoag* v. *Greenwich*, 133 N. Y. 152, 30 N. E. 842), but in the absence of a statutory provision to the contrary, a sale of bonds for the acquisition of property may precede the taking over the property (*Taylor* v. *Smith*, 13 Del., Ch. 39, 115 Atl. 405)."

In *McNichols* v. *City & County of Denver* (1951) 230 P. (2) 591, the court held:

> "Where municipality issued bonds and stated thereon that bond was payable as to full principal and interest solely out of the revenues of certain offstreet parking facilities, but at the same time the bond contained a provision that it was secured by a mortgage or trust indenture covering certain city property, the bonds were more than revenue bonds and became part of indebtedness of municipality and increased outstanding indebtedness."

Illinois cases present a varied state of facts bordering on this situation from *Schnell* v. *City of Rock Island*, (1907) 232 Ill. 89, *City of Joliet* v. *Alexander*, (1902) 194 Ill. 457 to *Hairgrove* v. *City of Jacksonville*, (1937) 366 Ill. 163. In *Poole* v. *City of Kankakee* (1950), 406 Ill. 521, the court makes the following analysis of the preceding Illinois cases in the following paragraph from which it would seem that it still makes a distinction between the pledge of income from facilities (whether existing or to be acquired) and the pledge or mortgage of municipal property, including the pledge or mortgage of the facilities themselves, (p. 534):

> "Relying on the cases of *City of Joliet* v. *Alexander*, 194 Ill. 457, and *Schnell* v. *City of Rock Island*, 232 Ill. 89, where it was held that the mortgage of existing property and income create a debt which put the cities there involved beyond their constitutional debt limit, appellees urge that the pledge of revenues from existing meters is invalid on the same general principle involved in the cited cases, because the City of Kankakee will be deprived of the use of such revenues for other purposes. Such argument ignores the modification of those cases contained in *Moffet* v. *City of Decatur*, 322 Ill. 82, *Ward* v. *City of Chicago*, 342 Ill. 167 and *Simpson* v. *City of Highwood*, 372 Ill. 212, where it is stated that *where no property of the City is pledged to secure payment of an indebtedness, it does not violate the constitutional debt limitation to pledge the revenues both from the facility being extended and from the extension.* In the instant case no attempt is made to pledge or mortgage any city property, thus, if the principle has any application at all, under the rule of the last cited cases, *the pledge of income from existing facilities does not render the ordinance invalid.*"

Because of the conditions precedent contained in Paragraph 52.1-3 of the Act, it would appear that the plan considered in connection with the proposed agreement with the Banking Group is more feasible in that it provides for the furnishing of all the data necessary to comply with the Act. Subsequent thereto bids could be solicited in the alternative; *first*, (a) for the sale of the bonds having a fixed interest rate and maturity dates in an amount sufficient to cover all costs and expenses to complete the project; (b) for the construction of the public improvement, and (c) for the leasing of the premises and operation of the parking facilities, with a minimum guarantee, as separate items. Second, (a) for bids upon the cost of the construction of the improvement, with payment to be made in revenue bonds having a fixed interest rate and maturity dates, and (b) for the leasing of the premises and operating the parking facili-

ties. Upon consideration of the totals, it can be determined whether the cost of the improvement will or will not be larger as part of a package when compared to the bids received under the separate items, including the payment of the cost of the improvement by cash received from the sale of the bonds.

The matter of soliciting bids for the leasing, managing and operating the parking facilities prior to their substantial completion may invite attack. There necessarily would be considerable time elapsed between the completion of the improvements and the effective date of the lease. It could be argued that Paragraph 52.1-8 of the Act relative to leasing parking facilities contemplates the existence of the facilities. On the other hand, Paragraph 52.1-4 provides "whenever bonds are issued as provided by this Article *it shall be the duty of the corporate authorities to establish charges and fees for the use of such parking facilities,*" etc. This duty devolves upon the municipality prior to the construction of the facilities, and relates to the facilities provided for under the ordinance adopted under the provisions of Paragraph 52.1-3. In that paragraph the legislature uses the words "contemplated project," "the estimated cost of such project," "maintain the project," and "operation of the project," indicating the project as a complete thing. Furthermore, under Paragraph 52.1-1 (c) the municipality is authorized to "Enter into contracts dealing in any manner with the objects and purposes of this Article." To carry out those objects and purposes, contracts providing for future performance are, without doubt, necessary.

It is therefore our opinion that the "package plan" referred to in your letter of December 4th, 1951 could not be approved in its present form. As stated above, provision must be made for plans and specifications for the facilities and for the acquisition of the sites. The "package plan" is lacking in this regard. If provisions were made for these two items, the feasibility of the "package plan" would seem to be that the entire project could be brought to early completion by advertising for bids which would embrace each of the component parts of the project, as above outlined. Under the circumstances, as indicated herein, the so-called "package plan" would come within the provisions of the statute.

It is our further opinion that the City Council could authorize the proposed contract with the Banking Group (C. J. October 31, 1951, pp. 1177-1178) as a preliminary step for the purpose of obtaining data therein called for to be the basis for an ordinance under Paragraph 52.1-3 of the Act. The Council upon receipt of that data could then provide for the location of the sites and the approximate sum necessary to be obtained from the sale of revenue bonds for the acquisition thereof. The Council could then determine whether to negotiate the sale of the bonds to the Banking Group in accordance with its report and proposal or to seek bids therefor. If it determines not to negotiate the sale of the bonds to the Banking Group, then bids may be sought for (1) the sale of the bonds; (2) the cost of construction of the facilities and (3) for the leasing and operation of the facilities, and in the alternative (1) for the cost of the construction of the facilities, with payment to be made by issuance of bonds and (2) for leasing and operating the parking facilities as a package. If the bids indicate that the amount to be received from the sale of the bonds for cash taken with the cost of the construction to be paid for in cash, and the amount of bonds required to be delivered to the contractor for the cost of the construction, are fairly relative, either plan could be legally adopted.

If the plan to pay for the construction by delivery of bonds is adopted, the additional funds that would be necessary for the acquisition of the sites and all other expenses in connection with the project could be obtained by the sale of such an amount of bonds at the bid price for cash.

LEGALITY OF RELEASES

(No. 11563—City Comptroller—J. C. M.—July 18, 1952.)

With your letter of July 10, 1952, you transmitted Bond No. 4574186-A issued by Fidelity and Deposit Company of Maryland covering employees of the City of Chicago whose names appear in the schedule attached thereto, for the period from May 1, 1952 to May 1, 1953, together with the prior bond No. 4574186 issued by that company on May 1, 1943. You request our opinion as to the legality of the new bond.

In your letter you state:

> "It was never contemplated by the Company that our bond should carry cumulative liability, and the home office has been advised that in the absence of a clause to the contrary, the courts could and have ruled that a bond was cumulative."

The prior bond is, in our opinion, a cumulative bond. The new bond provides for a liability at all times limited to the amount set opposite the name of the employee insured. Hence, regardless of the number of years premiums are paid, the liability of the surety is not increased. It is not a cumulative bond.

Under Paragraph 5 of the new bond (No. 4574186-A) the liability, if any, of the surety upon the old bond (No. 4574186) continues only as to the employees named in the schedule attached to the new bond and the new bond terminates the liability, if any, of those employees covered by the prior bond but not included in the schedule in the new bond. We question your right to release the surety of any liability to the City under the old bond. While this liability may at the moment appear to be suppositious, until the statutory limitation on actions becomes a bar to any recovery, the protection given by the prior contract should not be released.

In a letter dated March 5, 1951 you were advised that "the practice of returning or cancelling indemnity bonds filed with the City is not regarded as safe or proper." (Ops. of Corp. Coun., Vol XXI, p. 50.) Chapter 7-3 of the City Code permits you to execute releases only when you have been legally authorized to do so.

We suggest that you advise the Fidelity and Deposit Company that Paragraph 5 must be revised by eliminating any reference to the prior bond.

We, therefore, return the new bond without our approval and the old bond for your records.

PARKING FACILITY BONDS

(No. 11569—City Council—J. C. M.—July 29, 1952.)

In your letter of July 28, 1952 you request an opinion as to whether the proposed ordinance relating to the issuance of City of Chicago Parking Facility Bonds, introduced in the City Council on July 2, 1952 (C. J. p. 2699) and published as Committee Pamphlet No. 5, is in due form and in compliance with the contract entered into with the Bankers Group relating thereto.

In connection with our examination and consideration of the proposed ordinance, we had numerous conferences with the following: Mr. Walter Cleave and Mr. Henry E. Cutler of the law firm of Chapman & Cutler, representing the Bankers Group, party to the contract set forth in the Journal of Proceedings, January 10, 1952 (C. J. p. 1652); Commissioner of Streets and Electricity, L. M. Johnson; Commissioner of Subways and Superhighways, V. E. Gunlock; City Comptroller, J. H. Dillard; Henry M. Doyle of the Comptroller's Office; and you, as Chairman of the Committee.

Many revisions of the ordinance as introduced in the Council were made bearing on form and substance, too numerous to set out in detail. The proposed ordinance as revised and printed is transmitted herewith, approved as to form.

Under its contract with the City, the Bankers Group was to perform the following functions confined to the area described as:

"the area bounded by E. and W. Grand Avenues, N. and S. Halsted Street, E. and W. Roosevelt Road and N. & S. Michigan Avenue,"

1. To employ nationally recognized engineers in the field involved to advise it with respect to preliminary details of location, design, estimated cost of construction and other matters. It employed De Leuw, Cather & Company, who has furnished a report and survey which we understand has been presented to your committee.

2. To employ skilled and experienced municipal bond attorneys. It has employed Chapman & Cutler and Mr. Cutler of that firm has participated in our conferences relating to the proposed ordinance.

3. To correlate the work of the engineers and attorneys engaged on such project. The survey report, plans and specifications and the proposed ordinance as revised indicate such a correlation.

4. To submit a report to the Committee on Traffic and Public Safety for consideration "as to whether or not it appears practicable to finance such project on a self-liquidating basis." We are advised that the report of DeLeuw, Cather & Company, together with plans and specifications covering what is described as Project A-1 have been submitted to the Committee and indicate that the five multiple level off-street parking facilities buildings will be self-sustaining.

5. To submit, upon passage of the ordinance, a commitment whereby it agrees to purchase from the City "all such revenue bonds issued pursuant to the plan and recommendation contained in said report submitted by the Bankers Group." Such a commitment is not yet due.

The proposed ordinance is not limited to projects contemplated by the agreement with the Bankers Group, being the five multiple units, which projects were to be self-liquidating, nor is it limited as to the area described in said agreement. In addition to the pledge of the revenues receivable from the off-street garages, as indicated in the engineer's report, the revenue of all parking meters throughout the City, installed or to be installed in the future, is pledged as security for any bonds issued and identified as Bonds of Series A. To this extent the ordinance is at variance with the agreement.

We have not examined the records of the Chicago Plan Commission to determine whether it has approved the project as submitted by the Bankers Group. We have not examined the plans and specifications to be filed with the City Clerk upon passage of the proposed ordinance, but we are verbally advised by Mr. Gunlock that the plans and specifications for the contemplated project are adequately set forth.

The agreement excludes any revenues received from parking facilities operated in conjunction with municipal airports and lands acquired by the City for superhighways upon which parking facilities may be temporarily leased or operated prior to the completion of such highways, provided such facilities are not acquired, constructed or maintained with funds obtained through the issuance of City of Chicago Parking Facility Revenue Bonds or with funds derived from any income from the parking facilities so acquired, constructed or maintained and parking meters.

It should be noted that the proposed ordinance as revised is intended to be a basic ordinance within the scope of which it is contemplated that projects in addition to the initial loop area project may subsequently be included by supplemental ordinances.

PARKING FACILITY BONDS

(No. 11591—Mayor—J. F. G.—September 26, 1952.)

We have examined the ordinance passed by the city council September 18, 1952, which authorizes the issuance of City of Chicago Parking Facility Revenue Bonds, to determine the liability of the City for payment of the bonds.

In the course of the consideration of the ordinance by the city council we suggested certain changes in the draft to foreclose any possible construction of the conditions in the form of the bonds to be issued as general obligations for the payment of which the City might be required to levy taxes or make appropriation from the Corporate Purposes Fund or from any other city fund except the revenue from the use and operation of motor vehicle parking lots, garages and parking meters. Our suggestions were adopted and all references in the ordinance and the form of the bonds to constitutional debt limits were corrected.

The basis for the ordinance and the authority to issue such revenue bonds is Article 52.1 of the Revised Cities and Villages Act, which was held valid by our Supreme Court in *Poole* v. *City of Kankakee*, 436 Ill. 521. In that case the ordinance of the City of Kankakee providing for the issuance of bonds secured by a pledge of the revenue from parking facilities to be acquired and constructed and from existing parking meters was held not to be a general obligation of that city within the constitutional debt limit.

We are of the opinion that the ordinance passed by the city council of Chicago on September 18, 1952, and the form of the bonds thereby authorized do not pledge any property or taxing power of the City and may not be paid from the Corporate Purposes Fund or any other general or special funds of the city excepting proceeds from the use of parking meters and off street parking facilities.

CROSSING BOND

(No. 11595—City Comptroller—E. R. H.—October 8, 1952.)

We acknowledge your letter of September 23, 1952, in which you state that under date of May 23, 1927 an ordinance was passed authorizing the Chicago City Railway Company to maintain a street car track crossing

W. 79th, W. 80th, W. 82nd, and W. 83rd Streets, attaching copies of letters, dated July 1, 1952 from the United States Fidelity and Guaranty Company who is surety on the bond filed in connection with said ordinance, and from the Chicago Transit Company, dated May 20, 1952 to the United States Fidelity and Guaranty Comapny, asking that this bond be terminated and further premiums cancelled. You asked that we inform your office as to whether liability on the bond should be terminated.

Under the provisions of the Revised Cities and Villages Act, it is necessary for a person commencing a civil action against the City on account of any injury to his person, to serve notice upon the City within six months from the date the cause of action accrued (Ill. Rev. Stat. 1949, ch. 24, par. 1-11). However, the courts have repeatedly held that these provisions of the act are not applicable to persons who are mentally or physically incapable of giving such notice to the City; (*McDonald* v. *City of Spring Valley*, 285 Ill. 52; *Doerr* v. *City of Freeport*, 239 Ill. App. 560).

Under date of March 5, 1951, we rendered to your office our opinion in a similar case involving the Columbia Casualty Company's bond in connection with the construction and maintenance of a coal hole. In that opinion we stated:

> "It follows that the City is unable to ascertain whether or not it will suffer losses on account of injuries to persons by reason of the construction and maintenance of the coal hole. If the City should sustain such losses, it would have a right of action against the Columbia Casualty Company under the provisions of the bond. Furthermore, in an opinion to the Commissioner of Buildings, dated March 2, 1942 we stated that the practice of returning or cancelling indemnity bonds filed with the City is not regarded as safe or proper. (Ops. of Corp. Coun., Vol. XXI, p. 50.)"

It is our opinion that you should not in any manner whatsoever release the United States Fidelity and Guaranty Company of any of its obligations under the terms of the bond referred to in your letter.

PARKING FACILITY BONDS

(No. 11632—City Comptroller—J. C. M.—January 5, 1953.)

Complying with your request for an opinion in conformance with the provisions of Section 3.02, paragraph (4) of the ordinance authorizing City of Chicago Parking Facility Revenue Bonds, passed by the City Council of the City of Chicago on September 18, 1952, in the amount of $14,800,000.00, appearing on page 3142 of the Journal of the Proceedings of the City Council, and a supplemental ordinance passed by said City Council on October 31, 1952 authorizing the issuance of additional revenue bonds in the amount of $7,800,000.00, appearing on page 3374 of the Journal of the Proceedings of the City Council, we have examined the following instruments heretofore delivered by you to this office:

(1) Certified copy of the ordinance passed on September 18, 1952 and approved by the Mayor of the City of Chicago on October 7, 1952.

(2) Certificate of publication of the said ordinance passed on September 18, 1952 in the Chicago Herald-American, a secular newspaper published in the English language and having general circulation in the City of Chicago, on October 21, 1952.

(3) Certified copy of amendment to said ordinance of September 18, 1952.

(4) Certificate of publication of said amendment, passed on December 1, 1952, in the said Chicago Herald-American on December 5, 1952.

(5) Certificate of Ludwig D. Schreiber, City Clerk of the City of Chicago, that there is on file in his office and open to public inspection, plans and specifications of Project A-1 as described in said ordinance of September 18, 1952.

(6) Certified copy of the supplemental ordinance passed by the City Council on October 31, 1952 and approved by the Mayor of the City of Chicago on November 8, 1952.

(7) Certificate of publication of the supplemental ordinance passed by the City Council on October 31, 1952 in said Chicago Herald-American on November 17, 1952.

(8) Certified copy of an amendment to said supplemental ordinance passed by the City Council on December 11, 1952 and signed by the Mayor on December 16, 1952, appearing on page 3569 of the Journal of the Proceedings of the City Council.

(9) Certificate of publication of the amendment to said supplemental ordinance in said Chicago Herald-American on December 19, 1952.

(10) Certificate of Ludwig D. Schreiber, City Clerk of the City of Chicago, that there is on file in his office and open to public inspection, plans and specifications of Project A-2 as described in said supplemental ordinance of October 31, 1952.

(11) Certificate of De Leuw, Cather & Company, independent engineers, which certificate covers Projects A-1 and A-2 and is dated December 29, 1952.

We are of the opinion:

(a) That said instruments are in substantial conformity with the provisions of Section 3.02 of the ordinance of September 18, 1952, the provisions of the supplemental ordinance of October 31, 1952 and evidence a compliance with the provisions of Chapter 24, Sections 52.1-1 to 52.1-10, inclusive, Illinois Revised Statutes (1951).

(b) That the Chicago Plan Commission gave its approvals to the parking facilities described as Projects A-1 and A-2, as provided by law, which approvals were concurred in by the provisions of said ordinances and statute to permit the issuance of the City of Chicago Parking Facility Revenue Bonds, Series A, Project A-1, in the principal amount of $14,800,000, and Project A-2, in the principal amount of $7,800,000.00.

(c) That the City of Chicago will have, upon the completion of Project A-1 and Project A-2, for which the Bonds of Series A are to be issued, title thereto and will be authorized to own, use and operate the Projects and use and apply the revenues therefrom as in said ordinances and statute provided.

(d) That, as appears from said instruments, said bonds may be properly issued and delivered under the terms of said ordinances.

LOCAL IMPROVEMENT BONDS

(No. 11730—City Comptroller—R. J. N.—August 12, 1953.)

Your letter of August 11, 1953, requests our opinion as to whether bond issues under the provisions of the Local Improvement Act (Article 84, Cities and Villages Act) may contain the heading "Special Assessment Bond" or "Special Assessment Improvement Bond" rather than the heading "Improvement Bond" which is suggested in Section 86-A of the Local Improvement Act, (Chapter 24, Section 84-86A Ill. Rev. Stats. 1951) and which has been used under all previous improvements paid for by special assessments.

Although the statutes referred to in the previous paragraph is not made mandatory by its terms, we see no reason for departing from the form suggested by the statute. When the exact words of the statute are used no court can be given an opportunity to decide whether or not the bond issue is in substantial compliance with the statute, but if changes are made in the language, a court might conceivably hold that the statute had not been complied with.

We are therefore of the opinion that bonds issued for the payment of recent local improvements, should follow the form set out in the statute and be headed with the phrase "Improvement Bond."

CHAPTER XII — CITY PROPERTY

A. REAL ESTATE

LAWLER BATH HOUSE

(No. 11232—Secretary, Health Department—J. J. M.—January 5, 1950.)

We have your letter of December 29, 1949 in which you request our opinion as to the status of the title of the City of Chicago to the Lawler Bath House, located at 802-804 South Paulina street. You state the premises are to be used as a District Health Center and the opinion is required in order to obtain financial aid from the State of Illinois and the Federal Government.

Our letter of opinion of September 15, 1914, based upon examination of the abstract for the property in question, shows fee simple title at that time in Samuel M. Jess subject to certain objections which have subsequently been cleared. By warranty deed dated September 21, 1914, recorded in the office of the Recorder of Deeds of Cook County on October 8, 1914 as Document No. 5508419, Samuel M. Jess and Ethel D. Jess, his wife, conveyed to the City of Chicago, a municipal corporation, the said property described as follows:

> Lots 1, 2, 3 and 4 (except the West 26 feet of said lots) in the subdivision of the East one-half of block 7 in the Assessor's Division of the East one-half of the South East one-quarter of Section 18, Township 39 North, Range 14, East of the 3rd P.M.

We are of the opinion that the City of Chicago has good and valid title to the above described premises, free and clear of any pre-existing mortgages, deeds of trust, leases, liens or other encumbrances which would affect the value or usefulness of the site for municipal purposes, including the use as a district health center. We are further of the opinion that all deeds and documents necessary to protect the title of the City of Chicago have been duly recorded or filed for record.

Examination of the tract indices in the office of the Recorder of Deeds of Cook County discloses no conveyances or encumbrances of the said described property by the City of Chicago subsequent to taking title as aforesaid.

TRANSFERRING PLAYGROUND TO PARK DISTRICT

(No. 11245—City Comptroller—J. D. M.—January 30, 1950.)

Your letter of January 3, 1950 asked for our approval of a proposed agreement between the City of Chicago and the Chicago Park District, execution of which is authorized by ordinance of December 22, 1948 (C. J. p. 3457) as amended January 14, 1949 (C. J. p. 3660).

The property involved originally belonged to the County of Cook, which leased it to the City of Chicago for a period of twenty (20) years ending August 31, 1958 at an annual rental of $1500.00 per year. The City has used the property for a playground and the Chicago Park District proposes to utilize it as a park.

We are advised by the Comptroller's office that the City has never paid any rent for this property and that rent for eleven (11) years is due as of September 1, 1949. This item is one of a group of items which are now in the process of mediation between the County of Cook and the City in an effort to adjust all of the open items between the City and the County.

The property was sold by the County to the Chicago Park District on September 10, 1949 and the deed recorded on September 15, 1949 as Document No. 14632921.

In the deed to the Chicago Park District no provision is made in regard to the lease between the County and the City. Whatever future rights the County had in the property under the terms of the lease, such as the right to receive rent, were terminated as of September 10, 1949.

The City's lease provided for the removal of all playground equipment constructed by the City, including a builing, swimming pool, playground facilities and fencing and for the restoration of the land to its original condition.

The purpose of the agreement is to transfer the playground facilities to the Park District which thereafter will maintain them for the public. It follows that the public will continue to have the use of the facilities and the City will be relieved of the expense of maintaining them and of paying rent to the County.

We are of the opinion that the equipment installed by the City is permanent in nature and a part of the real estate. As such, its transfer to the Park District is not such a transaction as would be within the purview of the Purchasing Act.

We return herewith the agreement approved as to form and legality, subject to proper execution.

REMOVAL OF DEAD TREES

(No. 11288—Commissioner of Public Works—H. H. P.—April 12, 1950.)

Your letter of March 14, 1950 requests our opinion upon the following questions:

1. May the City enact an ordinance requiring an abutting property owner to remove from public property on a public street any dead trees or dead boughs overhanging said street?

2. May the City enact an ordinance requiring an abutting property owner to remove from his premises along a public street any dead trees or dead boughs overhanging said street?

As to question No. 1, we refer you to "Opinions of the Corporation Counsel," v. 22, p. 139, wherein Mr. Joseph F. Grossman states (p. 140):

"The title to the streets from lot line to lot line which include the sidewalks, parkways and roadways is in the City in trust for the use of the public. The improvement and maintenance of streets is a public obligation and may not be charged to abutting property owners except by way of special assessments or special taxes for local improvements upon property specially benefited. The removal of trees is not such a local improvement. (*City of Chicago* v. *O'Brien*, 111 Ill. 532; *City of Chicago* v. *Blair*, 149 Ill. 310.)"

As to question No. 2, we refer you to the same opinion wherein Mr. Grossman states (p. 140):

"The City may not remove trees from private property without the consent of the property owner unless such trees are a nuisance and endanger public travel. If the City undertakes the removal of such trees it may charge the property owner for the cost thereof only by agreement. The City has other remedies however to compel the removal of decayed and dangerous trees by proceeding against the property owner for violation of the City's nuisance ordinances (sec. 32-5—32-19, Municipal Code of Chicago)."

Section 32-5 provides as follows:

"The owner of any lot or parcel of land in the city upon which any tree may be standing adjacent to any public way shall trim or cause to be trimmed to a clear height of ten feet above the surface of said public way all branches thereof which overhang such public way or obstruct or interfere with the passage of light from any street lighting system.

Said owner shall remove from such tree all dead, decayed or broken limbs and branches that overhang the public way and when any such tree is dead the owner shall remove the same."

Section 32-19 provides as follows:

"Any person who violates any of the provisions of this chapter shall be fined not less than five dollars nor more than one hundred dollars for each offense."

ASSIGNMENT OF CITY HALL SPACE

(No. 11493—Commissioner of Public Works—A. F. G.—March 3, 1952.)

In your letter of February 25, 1952 you state that on February 18, 1952 you assigned Room 19 on the 3½ floor of the city hall to the council committee on Building and Zoning. The space referred to has been occupied as an office by two aldermen apparently without your permission. You also state that the city architect has conferred with the occupants of the room and they have agreed to vacate the premises at the end of this week. You then say.

"The purpose of this letter is to ascertain what authority the Commissioner of Public Works has with reference to the assignment of space in the City Hall. Does the Commissioner of Public Works have authority to manage the City Hall in the sense that a real estate agent manages an office building?

The answer to this question involves the answer to my second inquiry which is: In view of the statement of facts presented above what procedure do you advise the Commissioner of Public Works to pursue?"

The provisions of the Municipal Code of Chicago which define the powers of the commissioner of public works over the public buildings belonging to the city are: section 8-5 and section 8-44.

Section 8-5 is in part as follows:

> "It shall be the duty of the commissioner of public works, subject to the provisions hereof and the ordinance of the city, to take special charge and superintendence of the following public places and property:
>
> * * *
>
> All public buildings in the city belonging to the city:
>
> * * *"

Section 8-44 is as follows:

> "The city architect, as head of the bureau of architecture and building maintenance, under the direction and control of the commissioner of public works, shall have the following powers and duties:
>
> Have charge of all architectural service required in the construction, rehabilitation, and repair of city buildings;
>
> Have charge of all labor, materials, tools and appliances required for the maintenance and repair of all city buildings, including the Navy Pier, excepting those operated by the bureau of engineering;
>
> Manage and operate the city hall, and the central police station and courts building, 54 W. Hubbard street building, and such other buildings as the commissioner of public works and the city council may designate;
>
> Manage and operate all telephone equipment and facilities at all city offices and all places for the conduct of the official business of the city."

The power vested in you by the foregoing provisions seems ample to authorize you to allocate space in the city hall or any other public building owned by the city to any department, individual, commission or board entitled to occupy space in such buildings. Your authority is not analogous to that of an agent of a privately owned office building. He rents space, enters into leases, collects rents, pays taxes and does many things in connection with the management of such a building that you are not authorized to do in connection with your power to manage the public buildings of the city.

In answer to your second question, we are of the opinion you followed the proper procedure. You assigned room 19 on the 3½ floor of the city hall to the committee on building and zoning, which required additional space for the work on the general zoning of the city. You directed the city architect to arrange the space allotted suitable for the work of the committee. He found the space was occupied by two individual aldermen who were not chairmen of any committee or any subcommittee and who occupied the space apparently without your consent and apparently without any authority. The architect advised them the space has been assigned to a council committee, whereupon they agreed to vacate the office and at this date have probably done so.

ACCEPTANCE OF RENTAL WITHOUT LEASE

(No. 11588—City Comptroller—F. C. F.—September 25, 1952.)

We acknowledge receipt of your recent letter concerning the lease to Chicago Seaplane Base, Inc., dated December 31, 1947 for use of space on Navy Pier, as authorized by the City Council on April 15, 1948 (C. J. p. 2173). Said lease expired December 31, 1951.

You stated that on November 13, 1951 and on several later dates, your office notified the Commissioner of Public Works of the expiration date. You were informed by the Commissioner of Public Works that a new lease was being negotiated but to date such lease has not been consummated nor has any rent been received, though lessee continues in operation.

You also enclosed copy of a letter dated August 25, 1952 from the Commissioner of Public Works wherein it was stated that the aforesaid lease had expired and the lessee was continuing operations. The Commissioner of Public Works also transmitted under like date a check in the amount of $283.36 to your office, with the request that this check be applied as rent at the same basis as previously expired lease.

You request our advice as to the acceptance of this check and the status of the tenancy of the lessee.

We have examined the ordinance of April 15, 1948 (C. J. p. 2173) and we find there is no provision for the renewal of the lease in that ordinance. The term of the lease ran from January 1, 1948 to December 31, 1951 and as such has now expired.

It is a fundamental rule of Illinois law where a tenant under a lease for years holds over after expiration of term without a new lease or agreement, landlord at his election may either treat tenant as a trespasser and eviet him or treat him as a tenant from year to year thereafter on same terms as in original or modified agreement. *Demarath* v. *Schennum*, 324 Ill. Appel. 584, 1945.

We are of the opinion however, that the City Comptroller can only accept such monies pursuant to a duly executed lease as authorized by ordinance. You should therefore inform the Commissioner of Public Works that a proper lease must first be authorized by the City Council and executed by the interested parties before such monies can be properly applied by your office.

AIRPORT RESTAURANT LEASE

(No. 11594—City Comptroller—F. C. F.—October 7, 1952.)

We acknowledge receipt of your recent letter concerning the above subject. You stated that the contract between the City of Chicago and Marshall Field & Company for the operation of a restaurant at the Midway Airport provides for compensation to the City at 5% of gross receipts, which has been paid monthly. Marshall Field & Company was also to pay 40% of net receipts to be determined annually. Marshall Field & Company has suffered a loss each year and there has been no 40% payment up to this time.

The contract provides for the method of determining the net receipts by deducting from gross receipts all operating expenses and amortization of the amount of investment in the restaurant by Marshall Field & Company. You stated the amount to be amortized is fixed and specified in the contract.

Your audit of the company statement for the year ended February 29, 1952 revealed that the Company has made additional investments in this restaurant since the start of operations amounting to $73,962.29, which is included in the amortization calculation.

You also transmitted a copy of a letter which you propose to send to Marshall Field & Company. You state in this letter to Marshall Field & Company that your audit discloses that the Company has increased the amount of investment on which amortization is calculated over and above the figure set up in the contract by $73,962.29. You take the position that this excess of investment should not be considered and that the amount of the Company's expense prior to the opening can only be considered in the first year's account. You concluded that this treatment does not affect the City's compensation up to this time but may affect subsequent periods.

You ask our advice as to whether or not you are correct in holding that the Company is limited to the amount specified in the contract as the correct figure to be used in the amortization calculation.

We have examined contract number 14192 between the City of Chicago and Marshall Field and Company and we are of the opinion that you are correct in holding that the Company is limited to the amount of $731,707.11 as inserted on page 7 of the instant contract in the calculation of the total investment for amortization.

If, however, any of the expenditures included in the amount of $73,962.29 are operating expenses, they can properly be charged off under article (e) on page 4 of the contract. It would be necessary, therefore, to furnish us with a break-down of the $73,962.29 in order to make a proper allocation of the type of expenses incurred.

LEASING COURTROOM SPACE

(No. 11615—Chief Justice, Municipal Court—H. A. C.—November 19, 1952.)

You have requested an opinion as to whether or not the Municipal Court is authorized to enter into a lease for the property commonly known as the Monarch Food Building. It is contemplated that the building will be rented for a period of ten (10) years for use in connection with traffic courts.

The Municipal Court Act provides (Chap. 37, par. 360, Sec. 5):

> "That said branch courts shall be held at such places in said City of Chicago as may be provided by the corporate authorities thereof. If no place be provided by the corporate authorities, or if the place so provided becomes unfit, said branch court may, by an order signed by majority of judges of Municipal Court * * * ajourn to or convene at a suitable place * * * procured by said judges, within the district * * * until a suitable place therefor be furnished by said corporate authorities."

It is therefore apparent that it is the duty of the City of Chicago to provide facilities for the court and that the only time the Municipal Court may act is upon a failure of the City to furnish such facilities. In our opinion, the authority of the Judges of the Municipal Court would be limited only to finding temporary quarters until such time as the City furnishes proper facilities.

The City Code (Section 7-50) authorizes the Comptroller to execute leases on behalf of the City as lessor or lessee for a term of not more than two (2) years subject to approval of the City Council.

In our opinion it would therefore be impossible to negotiate for a straight ten (10) year lease.

It is suggested that a two (2) year lease with successive options to renew should be obtained, or a long term lease be authorized by the City Council containing a provision for cancellation in the event that appropriations are not voted by the City Council from time to time.

BOSTON STORE LEASE

(No. 11641—City Comptroller—C. P. B.—January 23, 1953.)

With your recent letter concerning the above lease you transmitted notices re existing leasehold estate of the west 50 feet Lot 7 in Block 58 in the Original Town of Chicago, based on original lease from the City of Chicago to William H. Rand, dated June 28, 1888, and since amended and transferred successively to Charles Netcher, Mollie Netcher as trustee, The New Store Inc., which has changed its corporate name to The Boston Store of Chicago, and later to The Madison-State-Dearborn Building Corporation:

A.

Notice that The Madison-State-Dearborn Building Corporation has mortgaged leasehold estate to Chicago Title and Trust Company;

B.

Notice that The Madison-State-Dearborn Building Corporation has assigned said lease to Louis J. Glickman of New York, under date of October 30, 1952, and that said Glickman and wife, under date of October 31, 1952, assigned said lease to Samuel W. Banovitz of Cook County, Illinois.

C.

Attornment by Louis J. Glickman as lessee, to the City of Chicago, as lessor.

D.

Attornment by Samuel W. Banovitz, as lessee, to the City of Chicago, as lessor.

You requested approval of said notices as to form and legality.

An examination of the record revealed the following:

On June 28, 1888, the City of Chicago as lessor, through the authority of the City Council of the City of Chicago, at a regular meeting, leased to William H. Rand, his heirs, executors, administrators and assigns, a revaluation lease of the premises known and described as the west fifty

(50) feet of Lot Seven (7) in Block fifty-eight (58), in the Original Town of Chicago, for a term of fifty (50) years, commencing April 1, 1888, and ending March 31, 1938. The terms of the lease were extremely favorable to the City.

On November 4, 1889, William H. Rand assigned all right, title and interest in the lease to Charles Netcher of Chicago, Illinois.

Charles Netcher instituted an action on the lease alleging certain inaccuracies in the last rental revaluation, demanding certain alleged overcharges, accumulated since 1894, to be repaid to him.

Subsequently, at a regular meeting of the Council of the City of Chicago held on January 26, 1903, the City agreed to modify the terms of the lease and Charles Netcher agreed to dismiss his pending action. The City of Chicago is the lessor, Charles Netcher the lessee.

The terms of the lease as modified and adopted on that day are essentially as follows:

1. Term of Lease: 99 years (May 1, 1903, to March 31, 2002).

2. Rent: $27,000.00 per year for 99 years, payable in quarterly installments.

3. Taxes: Lessee to pay taxes and charges of any and all kinds on the improvements and special assessments on the land during the term of the lease, in due time to prevent forfeitures; evidencing such payments to the City by duplicate receipt delivered to the City within 30 days after any such payments. City agrees to pay all general taxes on the land during the term of the lease and prevent forfeiture. If amount of said general taxes on land ever exceeds $5,400.00 per year, lessee agrees to pay City the difference between the amount City pays and $5,400.00.

4. New Building: Lessee agreed to remove the existing building and to construct a fireproof building at a minimum cost of $200,000.00 in accordance with certain basic specifications set out by the City.

5. Liability and Indemnification: Lessee agrees to save harmless the City from any and all claims which may arise as the result of the construction, alteration or repair of any improvement on the demised premises, during the term of the lease.

6. Old Building: Torn down and disposed of by lessee.

7. Encumbrances: Neither party may encumber the estate of the other party.

8. Insurance: A. Old building insured.

B. New building to be insured against fire loss by lessee in an amount of at least $100,000.00, but not in excess of the full value of the improvement. Said insurance to be approved by the City, policies to be delivered to the City.

C. If new building is injured or destroyed by fire during the term of the lease, any insurance monies paid are to be deposited in trust to insure lessee's restoring improvements to minimum value of $200,000.00. Such restoration must be completed free from liens, etc. within two years after such injury or destruction, unless prevented by strikes, or other circumstances beyond control of the lessee.

D. Any monies remaining after compliance with said restoration provisions to be returned to lessee.

9. Maintenance: Lessee agrees to maintain entire premises in good repair, free of liens, etc., complying with all laws and codes, during the term of the lease. Lessee agrees not to use premises for any illegal purpose.

10. Defense of Suits, Costs, Etc.: Lessee agrees to save harmless the City against all costs, attorneys' fees, etc. incurred in maintaining or using premises, or in enforcing provisions of the lease. Lessee agrees to defend City in any such suits and pay all judgments obtained against City in such suits.

11. Alterations: Lessee may make any repairs or changes in improvements without consent of City so long as specifications provided for hereinbefore are not violated and buiding value remains at minimum value of $200,000.00.

12. Termination of Lease: Upon termination of lease, on March 31, 2002, lessee agrees to surrender possession of premises to City. City shall appoint one appraiser, lessee shall appoint one appraiser, and those two shall select a third appraiser (all disinterested) to appraise the value of the improvements alone and the value of the land with the improvements thereon. City agrees to purchase from lessee the improvements thereon, at the appraisal value, within thirty days after March 31, 2002. Lessee has a valid first lien on the land to insure payment by City of the appraised price of the improvements.

13. Transfers of Interest: Lessee may at any time during the term of the lease convey his estate in whole or in part in the demised premises, provided that at such time all taxes, water charges, etc. have been paid and buildings are not injured or destroyed.

Any assignment, as above provided for, must be evidenced by writing under seal and recorded and shall contain a covenant that such assignee assumes and accepts all terms, conditions, etc. of the lease.

Any assignment not meeting the above requirements is null and void. If above requirements are met assignment is valid and grantor of assignment is released from further obligation under this lease.

Above does not apply re mortgages, etc. by lessee; lessee maintains the right to freely encumber his estate in the lease, in whole or in part.

14. Delinquencies by Lessee: In event lessee becomes delinquent in payment of any tax, water, or other charge, City may make such payment and lessee covenants to repay such amount plus 5% interest within thirty days after date of such advance. City may pay any amount necessary to redeem tax title obtained by reason of default of lessee in non-payment of any obligation assumed by lessee under the lease and lessee agrees to repay City any such amount so paid, but lessee is not bound to repay City more than ten times amount tax title holder is legally entitled to at law.

15. Lien: City maintains a valid first lien on the estate of lessee under this lease to insure performance by lessee of the obligations assumed by the lessee under said lease.

16. Delinquencies by Lessor (City): In event City becomes delinquent in the payment of any tax obligation, etc. assumed by the City under this lease, lessee may make such payment and if City does not repay lessee such advance within thirty days after date of such advance, lessee may deduct such amount from the next installment of rent paid.

17. Redemption of Tax Title by Lessee: Lessee may pay any amount necessary to redeem any tax title obtained through non-payment of any tax by the City covenanted to be paid by the City under this lease and City agrees to repay lessee any such amount paid by lessee, but City is not obligated to repay lessee more than ten times amount tax title holder was legally entitled to at law.

18. Recovery Clause: If lessee becomes delinquent in the payment of rent, in whole or in part, or in any payments, charges or obligations assumed by the lessee under this lease, or shall not build the new building

or purchase or deliver insurance policies, or fails to restore the premises, or keep the premises free from liens, or depreciates the improvements, all as hereinbefore provided in said lease, then written notice shall be given the lessee, mortgagees, etc. of the default and if such default continues for 90 days after such notice, then the lessor may, without further notice, declare the said term ended; lessee agreeing in that event to peacefully surrender the premises and improvements thereon, all in good order and repair. City may, without further recourse to law, re-enter, remove all persons and effects therefrom, using such force as is necessary. In such event all insurance polices and monies, wherever situate, shall become the absolute property of the lessor, not as a penalty, but as liquidated damages.

19. Waivers of Default: Waiver by the City of any default of lessee in any instance does not operate as a general waiver of any other or future default of lessee's.

20. Alley Easement: Lessee may build or construct any type of improvement over the West 10 feet of Lot 7, Block 58, Original Town of Chicago, constituting an alley in which the City has an easement. On expiration of the term, by forfeiture, lapse of time, or any manner whatsoever, lessee agrees to clear said alley of any improvement or obstruction placed or constructed thereby the lessee during the term of the lease, so that the City may have free access to and use of such alley.

REID-MURDOCH PURCHASE

(No. 11778—Commissioner of Public Works—H. A. C.—December 11, 1953.)

Recently you requested that the Law Department prepare an ordinance authorizing the Commissioner of Public Works to give notice to Consolidated Grocers Corporation, that the City of Chicago intends to exercise its option to purchase the Reid-Murdoch Building at 325 N. LaSalle Street, Chicago, Illinois. On November 10, 1953, in accordance with your oral request, we prepared and submitted to you the draft of an ordinance authorizing the City Comptroller to exercise the option to purchase this parcel of property, and also prepared and submitted to you, an order for transmission to the City Comptroller authorizing and directing the City Comptroller to issue and sell Four Million ($4,000,000.00) Dollars City Building Bonds. In our communication of November 10, we recommended that you communicate with the City Comptroller, in order to secure his permission to exercise the option of purchase. We are of the opinion that the aforementioned ordinance, as prepared and submitted to you, would be your authority to exercise the option of purchase.

Paragraph Twenty-one of the lease agreement, dated September 24, 1953, as entered into between the Consolidated Grocers Corporation and the City of Chicago, grants the City of Chicago an option to purchase the Reid-Murdoch Building, prior to February 1, 1954, for $2,130,000.00. The City is required to give not less than fifteen (15) days notice of the date when the City intends to exercise the option, and at the time that the option is exercised, the full amount of the purchase price must be tendered.

B. WATERWORKS AND SEWERS

FILTRATION PLANT

(No. 11125—City Council—J. J. M.—February 26, 1949.)

We have your letter of February 14, 1949, in which you request an opinion as to the legality of locating filtration plant on the Lake shore between Chicago avenue and Navy Pier. You state that objections to the selection of such a site have been raised by the Lake Shore Property Owners' Committee, and that one of its objections is to the effect that location of the plant in this area would be illegal because of an agreement, made in 1891 by the Lincoln Park Commissioners and owners of private property in this vicinity, precluding the erection of any building on the Lake shore.

From our investigation of the facts involved and the laws and Supreme Court decisions applicable, we are of the opinion that the City would have the right to construct such a plant anywhere along Lake Shore Drive between Navy Pier and the line of E. Oak Street as extended eastward provided:

(1) The west line of the project be at least fifty (50) feet East of the breakwater protecting Lake Shore Drive.

(2) The State of Illinois by an appropriate act grants to the City of Chicago, all right, title and interest of the State of Illinois, in and to the bed of Lake Michigan for the area required for construction of the plant.

(3) Permission of the United States Government is obtained to destroy the navigability of the area of submerged land upon which the plant would be constructed.

We are further of the opinion that the City of Chicago would not be precluded from constructing the aforesaid plant under the above conditions, by reason of the agreements entered into in approximately 1891 between the Commissioners of Lincoln Park and the owners of land abutting the shore line of Lake Michigan as it then existed between Oak St. and what is now Grand Ave., nor would it be precluded from doing so by reason of the provisions in the deeds executed pursuant to the aforesaid agreements, by which deeds the grantors conveyed their riparian rights to Lincoln Park.

In arriving at the above opinions we find that title to the submerged lands forming the bed of Lake Michigan adjacent to the City of Chicago and westward of the Easterly boundary line of the State of Illinois extended Northward in Lake Michigan, except those areas which have heretofore been granted to the City of Chicago or the Chicago Park District and its predecessors in title by legislative enactment, is in the State of Illinois as trustee for the public.

The ownership of the State arises from the common law, which has been adopted in the State of Illinois by an act of the legislature (Chap. 28, Par. 1, Ill. Rev. Stats. 1947). At common law ownership of submerged lands was vested in the Crown, but the right to use and control both the land and water was vested in Parliament. In *Cobb* v. *Comrs. of Lincoln Park*, 202 Ill. 249 (1903) the court held (page 431) as follows:

* * * In England, since the time of Lord Hale, it has been treated as settled that the title in the soil of the sea or of arms of the sea, below ordinary high-water mark, is in the sovereign, except so far as an individual or a corporation has acquired rights in it by express grant or by prescription or usuage, and that this title, *jus privatum*, whether in the sovereign or in the subject, is held subject to the public right, *jus publicum*, of navigation and fishing. (*Shively* v. *Bowlby*, 152 U. S. 1.) This is the doctrine of this State as applied to the lands under the navigable waters of Lake Michigan, *People* v. *Kirk*, 162 Ill. 138; *Revell* v. *People*, *supra*.

"The State has granted the land covered by the water of Lake Michigan that lies immediately in front of appellant's lands to appellees, the park commissioners, for certain specific purposes, and the title thereto is now in them for the purposes declared in the act. Act of June 15, 1895; Laws of 1895, p. 282.) This the legislature was competent to do. *People* v. *Kirk*, *supra*.) * * *

The control of the waters over the submerged land of Lake Michigan is vested in the United States Government by virtue of the commerce clause of the federal constitution and the clause empowering congress to make all laws necessary to carry into execution the federal judicial power in admiralty and maritime matters. (45 C. J. 419). Thus, it follows that permission of the Federal Government is necessary before the navigability of a portion of Lake Michigan can be destroyed. The permission would be obtained from the Secretary of the Army as the successor in duty to the Secretary of War.

With reference to the riparian rights owned by the Chicago Park District as the successor of the Commissioners of Lincoln Park, we find that Lake Shore Drive between Grand Avenue and Oak Street was constructed pursuant to legislative enactment which authorized the Park Commissioners to extend boulevards or driveways over and upon the bed of public waters. (Laws of Illinois 1889, page 214). Under the provisions of that Act, the Lincoln Park Commissioners acquired in 1891 the riparian rights of the owners of land then abutting upon the shore of Lake Michigan. The conveyances of the riparian rights to the Commissioners were upon the condition, among others, that the riparian rights conveyed "shall never be used otherwise than for park purposes and that the lands which may be formed by accretions or otherwise contiguous and belonging to the shore of said lake, thus formed and made by the said boulevard or driveway shall never be used for the erection of buildings thereon for any purpose but those of public park under the management of the Commissioners of Lincoln Park as aforesaid."

Under the aforesaid Act, the legislature also granted to the Commissioners of Lincoln Park a strip of submerged land between the East line of Lake Shore Drive and a line fifty (50) feet East of the breakwater protecting said Drive to be held for the use and benefit of the public as part of said Park and for no other purpose whatever.

Any claim of right which might be asserted by the present owners of land adjoining Lake Shore Drive would undoubtedly be predicated upon the provisions of the above mentioned deeds.

We are of the opinion that any possibility of reverter or Right of Entry for breach of condition subsequent in their grantors could not be conveyed and in any event would be barred by the provisions of the Act relating to Rights of Entry or Reentry for breach of condition subsequent and possibilities of reverter. (Chap. 30, paragraphs 37B and 37H inclusive) Ill. Rev. Stat. 1947.) *Storke* v. *Penn. Mutual Life Insurance*, 390 Ill. 619 (1945), Illinois Law Review, Volume 43, page 90.

FILTRATION PLANT

(No. 11247—Commissioner of Public Works—C. B. C.—February 6, 1950.)

In your letter of recent date concerning the above subject, you call attention to Section 49-11 of the Revised Cities and Villages Act, Chapter 24, Revised Statutes of Illinois, 1949, whereby any municipality is authorized to reclaim submerged land under any public waters within the jurisdiction of or bordering upon the municipality for the purpose of constructing water purification plants,

> "* * * provided, however, that where any park district holds land abutting upon the shores of Lake Michigan adjacent to the submerged land intended to be reclaimed for the purpose of constructing water filtration plants, the approval of a plan by such park district showing the boundaries of the submerged land to be reclaimed and the character of buildings and structures to be erected thereon shall first be obtained prior to the reclamation of such submerged land by any municipality * * *"

With your letter you transmit a plat showing the location of the proposed Central District Filtration Plant approved by the City Council to be 500 feet East of any property owned by the Chicago Park District and request our advice as to whether approval of the Park District of the site and character of the buildings is required.

Whether or not it will be necessary for the Park District to approve the site and character of the buildings depends upon the interpretation of the word "adjacent" as used in the Act.

The word "adjacent" is defined in the Bouvier's Law Dictionary, Third Ed. (1914) as:

> "next to, or near, neighboring."

In Black's Law Dictionary, Third Ed. (1933), as:

> "lying near or close to; sometimes, contiguous. Adjacent implies that the two objects are not widely separated, though they may not actually touch, while adjoining imports that they are so joined or united to each other that no third object intervenes."

In Webster's International Dictionary, 2d, (1943) as:

> "1. Lying near, close, or contiguous; neighboring; bordering on; as a field adjacent to the highway.
>
> Adjacent, adjoining, contiguous, conterminous, abutting agree in the idea of proximity.
>
> Objects are adjacent when they lie close to each other, but not necessarily in actual contact."

Our Supreme Court in commenting on the definition of the word "adjacent" in the case of *People* v. *Keechler*, 194 Ill. 235 on page 240 in its opinion says:

> "The word 'adjacent' is defined by Webster and other lexicographers to mean, 'to lie near'; 'close, or contiguous.' It is sometimes said to be synonymous with 'adjoining,' 'near,' 'contiguous.' In some decisions courts have held it to mean 'in the neighborhood or vicinity of;' in others, 'adjoining or contiguous to.'"

While the court in the *Keechler* case was not guided in its decision by these definitions and later states that the word has no arbitrary meaning or definition and its meaning must be determined by the object sought to be accomplished by the statute in which it is used, nevertheless, in the case of *Husser* v. *Fouth,* 386 Ill. 188, the court on page 194 of its opinion in discussing the words compact, contiguous and adjacent says:

> "To hold that these words are shrouded with a mystery demanding a judicial interpretation in addition to the commonly accepted dictionary interpretation is but to add confusion to the law. Words should be given their commonly accepted meaning unless otherwise defined by the legislature. The word 'adjacent' was defined in its common meaning in *People ex rel. Sackmann* v. *Keechler,* 194 Ill. 235, to be synonymous with contiguous,* * *"

Our examination of Section 49-11 above referred to discloses no definition of the word "adjacent" by the legislature. We are therefore of the opinion it should be defined and construed in its common meaning, that is, close to, contiguous or adjoining.

We are further of the opinion that property owned by the Chicago Park District being at its nearest point 500 feet West of the submerged land sought to be reclaimed is not adjacent to said land, and approval by the District of the plans for the City's Central Filtration Plant is unnecessary.

SEWER CONNECTIONS OUTSIDE CITY

(No. 11326—City Council—J. D. M.—August 10, 1950.)

Your letter of June 16, 1950 with enclosed communication, dated April 13, 1950 from the Commissioner of Public Works deals with the question of sewer connections by municipalities and individuals outside of the city limits of the City of Chicago.

Your letter informs us that on October 7, 1936, the City Council authorized the Village of Evergreen Park to connect their new sewer system into the city sewers, (C. J., p. 2378). This connection was to be made by the Village of Evergreen Park without compensation for the use. A further provision of the ordinance provided that this permit was to expire at the end of three years. The three years passed and the City did nothing about outside sewer connections until the 21st day of August, 1945 (C. J., p. 3903) when all existing permits for sewer connections outside the limits of the City of Chicago were cancelled, and the same ordinance required anyone connected to the city sewer to secure a permit for further use of its connection.

The Village of Evergreen Park although notified many times to disconnect its connection with the city's sewer system did not comply with any of the notifications and refused to enter into any contract with the City of Chicago for the payment of a sewer fee. They continued to use the connection with the city sewer system until the Sanitary District of Chicago, on March 31, 1950 connected the Evergreen Park system to their new outfall sewer at which time the Village of Evergreen Park system was disconnected from our own sewer system.

The question now arises as to whether or not the City of Chicago can collect from the Village of Evergreen Park or its inhabitants for the use of its sewer connection from August 21, 1945 to March 31, 1950.

The question under consideration has been presented to the department several times. In a letter to the Commissioner of Public Works dated August 9, 1948, we referred to a previous letter dated September 1, 1943 where this office stated that there was no law requiring the City of Chicago to permit any person to connect his sewers to the City's sewers, nor was there any obligation upon the City or its taxpayers to construct and maintain a system of sewers for another municipality.

On June 8, 1945, in an opinion rendered by this office it was stated:

> "Manifestly it would be prejudicial to the City of Chicago and its taxpayers were owners of property located without the corporate limits of the City to be permitted under ordinary circumstances to connect their sewer drains to the City sewers without paying to the City reasonable compensation for the privilege. (*Carr* v. *City of Athens* (1922), 304 Ill. 212, 216)." (22 Opinions, Corp. Counsel, 126, 127).

Section 22-37 of the Revised Cities and Villages Act (Ill. Rev. Stat. Chap. 24, 1949) authorizes the corporate authorities of a municipality to contract with any municipality or any person for the collection and disposal of sewage originating outside of municipalities. The City Council of the City may therefore authorize outside connections with the City's sewers upon terms and conditions fixed by the City Council.

The order of August 21, 1945 definitely establishes the necessity of a permit for outside connections, and the rates to be paid therefor.

The power to regulate and control sewers and drains carries with it as a necessary incident thereto authority to compel, regulate and control all indispensable, desirable or convenient connections subject, of course, to the observance of private property rights. As the municipal corporation has full control of its sewers and drains, property owners have no right to connect private sewers with a public sewer without the consent of the municipality, which may prohibit the connection without written permission from designated officers. As a rule, the right given a property owner to connect with a municipal sewer is in the nature of a license only, and does not become a vested right merely because he was put to considerable expense in constructing a drain from his premises and connect with the sewer. The municipality has a right, therefore, if the sewer with which the connection is made becomes a nuisance, to require such drain to be disconnected therefrom without being liable to the owner of the drain for damages. (Volume 11, McQuillin, Municipal Corporations, Section 31.30, 31.31).

The original contract was between the City of Chicago and the Village of Evergreen Park and was entered into on October 7, 1936, (C. J. p. 2378). Since this contract gave to the Village of Evergreen Park, as a municipal body, the right to connect its sewer system without compensation to the city sewer system, it is our opinion that no lawsuit would lie against the residents of the Village of Evergreen Park as individuals. Any suit for the collection of claimed compensation would have to be brought against the Village as a municipal corporation.

There are no cases in Illinois covering this exact subject. In the case of the *City of Lexington* v. *Jones, et al.*, 289 Ky. 719, the court said:

> "The effect of the ordinance was to withdraw use of the system and plant from those who, exercising their own will, choose not to continue; if they choose to continue, they should assist in meeting the expense in maintaining the system. The question as to whether the charges fixed were unreasonable, was not an issue before the court and is not discussed; but so long as they take advantage of the facilities of the city's property, the outsiders should pay reasonable charges."

In another jurisdiction (*in Re Petition of Philadelphia*, 340 Pa.) the Pennsylvania Supreme Court held:

> "The right of the City of Philadelphia to receive such payments for the use of its sewer facilities was expressly recognized in *Williams* v. *Samuel, supra* 332 Pa. (265), at page 271, 2 A 2d 834. These charges are not taxes, nor a substitute for taxes, but charges made without discrimination, for an industrial service rendered in value equal to the respective sums charged; by using the facilities with knowledge of the rates charged, the consumer, by implication, contracts and agrees to pay the rates, and his obligation to make payment rests upon contract rather than upon any exercise of the taxing power."

Although Illinois Courts have not had occasion to pass on this subject, we are of the opinion that our courts will follow the precedents in other states. It is therefore, our opinion that a suit for recovery of the money on the basis of an implied contract should be brought against the municipality of Evergreen Park.

It is suggested that in the future where people or communities outside of the City of Chicago are granted permits to connect with the city sewer system, such permits make suitable provision for termination if and when the property served is annexed to an incorporated village, town or city. As soon as an area is incorporated, the City should arrange to disconnect at once all sewer connections and keep them disconnected until such time as the newly incorporated village or town enters into a sewer contract with the City of Chicago.

SEWER CONNECTIONS OUTSIDE CITY

(No. 11329—Commissioner of Public Works—H. A. C.—August 11, 1950.)

Your letter of May 1, 1950, refers to the Council Order passed on August 21, 1945 (C. J. pps. 3903-3904) which cancelled all permits issued to make sewer connections with the City's sewers for disposal of sewage originating outside the corporate limits of the City, and which further provided that no further permits shall be issued authorized by the City Council upon condition that the owners or occupants of the premises served by such connections shall pay monthly service charges for such connection as provided in the order. You further inform us that the Bureau of Sewers has checked to determine existing connections to the City's sewers from properties outside the City limits both with and without permits and that notices were sent to the owners and occupants of such premises to comply with the Council Order; and that although a considerable number of said owners have complied with the notice, a greater proportion have not complied.

Your communication states that one particular group of such owners who did not comply is located on the streets immediately west of Harlem Avenue and south of Foster Avenue, being Oconto, Octavia and Odell Avenues, south from Foster Avenue, and that despite repeated urging from your office, the residents of that area a year ago organized the Village of Harwood Heights for the reason, apparently, as you state, to fight the City of Chicago on sewer and water matters.

Your further advise that a subdivision adjoining this area on the west was developed by a Mr. William Witwicki, including the west side of Oketo, Osceola and Olcott Avenues for two or three blocks south from Foster

Avenue; Mr. Witwicki applied for sewer connections with the City of Chicago for properties included in his subdivision and included in his contracts for sale and deeds for properties a provision that the purchaser would assume the responsibilities for his individual property that had been agreed upon by Mr. Witwicki in his original agreement. The Village as organized includes the Witwicki subdivision and the Village took over his sewers and water system.

Included in the provisions of Mr. Witwicki's agreement was that he would not allow any connections to be made to his system without a permit from the City of Chicago.

You have informed us that since the organization of the Village, attempts have been made to connect the Village properties to the Witwicki sewer system without permits or without applying for any permits, that the City house drain inspector has repeatedly stopped work on connections that were being made without permits, but that on April 28, he found workmen excavating for such a connection at Carmen Avenue and Oketo Avenue in the Village of Harwood Heights. The inspector stopped the work, but on April 29, 1950, on a re-visit to the site he found other workmen making the connection under the supervision of Village trustees and several Village police. The inspector was informed that he had no authority in the village, and despite his protests the connections were made to the Witwicki sewer system, thereby, connecting them to the City of Chicago sewers without authority of the City Council.

You summarize the situation by stating that where the property owners in the Witwicki subdivision are compling with the City Council Order, and are paying the sewer service charges, outlaw connections are being made upstream from them and that if the Bureau of Sewers should cut off the connection of the said sewers, the only place it could be done on said property would be at Olcott Avenue and Foster Avenue where the discharge line from the Witwicki subdivision enters the City limits but, that such action would cut off the service to the people who are paying and complying with the law as well as the outlaw connections upstream who are not complying. The Bureau of Sewers, could, however, cut off the connections for the properties on Oconto, Octavia and Odell Avenues at their junction with the City sewers in Foster Avenue.

You request that we advise you as to the proper action to be taken.

The question under consideration has been presented to the department several times. In a letter to the Commissioner of Public Works dated August 9, 1948, we referred to a previous letter dated September 1, 1943 where this office stated that there was no law requiring the City of Chicago to permit any person to connect his sewers to the City's sewers, nor was there any obligation upon the City or its taxpayers to construct and maintain a system of sewers for another municipality.

On June 8, 1945, in an opinion rendered by this office it was stated:

> "Manifestly it would be prejudicial to the City of Chicago and its taxpayers were owners of property located without the corporate limits of the City to be permitted under ordinary circumstances to connect their sewer drains to the City sewers without paying to the City reasonable compensation for the privilege. *Carr* v. *City of Athens* (1922), 304 Ill. 212, 216.)" (22 Opinions, Corp. Counsel, 126, 127.)

Section 23-37 of the Revised Cities and Villages Act (Ill. Rev. Stat., Chap. 24, 1949) authorizes the corporate authorities of a municipality to contract with any municipality or any person for the collection and disposal of sewage originating outside of municipalities. The City Council of the City may therefore authorize outside connections with the City's sewers upon terms and condititons fixed by the City Council.

The Order of August 21, 1945 definitely establishes the necessity of a permit for outside connections, and the rates to be paid therefor.

The power to regulate and control sewers and drains carries with it as a necessary incident thereto authority to compel, regulate and control all indispensable, desirable or convenient connections subject, of course, to the observance of private property rights. As the municipal corporation has full control of its sewers and drains, property owners have no right to connect private sewers with a public sewer without the consent of the municipality, which may prohibit the connection without written permission from designated officers. As a rule, the right given a property owner to connect with a municipal sewer is in the nature of a license only, and does not become a vested right merely because he was put to considerable expense in constructing a drain from his premises and connecting with the sewer. The municipality has a right, therefore, if the sewer with which the connection is made becomes a nuisance, to require such drain to be disconnected therefrom without being liable to the owner of the drain for damages. (Volume 11, McQuillin, Municipal Corporations, Sections 31.30, 31.31.)

The group of owners or occupants located at Oconto, Octavia and Odell Avenues having made their connections without authority of the City Council and without paying for such service, we are of the opinion that they had no right to make such connections and have no right to use the City's sewers without a City permit as well as paying to the City reasonable compensation, and as they have refused to comply with notices sent to them, we are of the opinion that the City of Chicago has the power and authority to cut off the connections of these properties at their junction with the City sewers in Foster Avenue.

The matter of he Witwicki subdivision creates a more difficult problem in that the owners and occupants of that subdivision, according to your letter, are complying with the City's regulations, but outlaw connections are being made by the Village of Harwood Heights apparently with the protection of the Village police. The City of Chicago can properly serve notice upon the residents in the Witwicki subdivision that it no longer intends to allow them to connect with the City's sewers but should allow these residents a reasonable time in which to make other arrangements.

We have prepared and transmit herewith a form of Council Order providing for the cancelling of existing permits and the giving of notice to the Village of Harwood Heights and all licensees that the City of Chicago will sever the connections on a day certain unless satisfactory arrangements for compliance with the ordinances of the City of Chicago are made. The order also provides for the authorization to make the disconnections if such arrangements are not made.

WATER SUPPLIED TO M. T. S. OUTSIDE CITY

(No. 11535—Municipal Tuberculosis Sanitarium—May 15, 1952.)

We acknowledge your letter of April 4, 1952 with reference to charges for water furnished by the City of Berwyn to your North Riverside Division of the Municipal Tuberculosis Sanitarium. Your letter requests our advice on the following points:

1. Are we within our legal right in refusing to pay for water supplied to the North Riverside Division of the Municipal Tuberculosis Sanitarium by the City of Berwyn?

2. Do we have a claim for refund of payments previously made to the City of Berwyn for water supplied to the North Riverside Division of the Municipal Tuberculosis Sanitarium?

We have reviewed your file on the matter and find that the contract between the City of Chicago and the City of Berwyn does not require the City of Berwyn to furnish free water to your North Riverside Division. We find that there is an implied contract between the Municipal Tuberculosis Sanitarium and the City of Berwyn under which you are liable for the water service charge claimed and under which you have already paid for such service charges.

In our opinion you are liable to the City of Berwyn for its water service to your North Riverside Division and you have no valid claim for refund. If the present arrangement with the City of Berwyn is unsatisfactory to you, you, of course, have the right to seek a new agreement.

SEWER CONNECTIONS OUTSIDE CITY

(No. 11565—Commissioner of Public Works—H. A. C.—July 22, 1952.)

Your letter of April 30, 1952 with enclosed communication dated April 18, 1952 from the Department of Highways of the County of Cook, again raises the question of sewer connections by municipalities outside of the City limits of the City of Chicago.

Your letter informs us that the Cook County Department of Highways has requested approval of their plans for improving the highway on 87th Street between Kedzie Avenue and Pulaski Road. This street is on the boundary of the City of Chicago, the north half being within the City and the south half being outside the City limits. It is proposed to drain the entire pavement through city sewers without compensation.

Section 22-37 of the Revised Cities and Villages Act (Ill. Rev. Stat., Ch. 24, 1951) authorizes the corporate authorities of a municipality to contract with any municipality or any person for the collection and disposal of sewage originating outside of municipalities. This office has previously advised your Department that there was no law requiring the City of Chicago to permit any person to connect sewers to the City's sewers nor was there any obligation upon the City or its taxpayers to construct and maintain a system of sewers for another municipality. On June 8, 1945, in an opinion rendered by this office, it was stated:

> "Manifestly, it would be prejudicial to the City of Chicago and its taxpayers were owners of property located without the corporate limits of the City to be permitted under ordinary circumstances to connect their sewer drains to the City sewers without paying to the City reasonable compensation for the privilege. (*Carr* v. *City of Athens* (1922), 304 Ill. 212, 216.)" (22 Opinions, Corp. Counsel, 126, 127).

In like manner, on August 11, 1950 we quoted from the opinion of June 8, 1945 and advised your Department that the City has the power and authority to cut off connections made without authority and without payment for services.

On August 21, 1945 the City Council of the City of Chicago (C. J., p. 3903) by order cancelled all existing permits for sewer connections outside the city limits and establishes the necessity of a permit for outside connections and the rates of charge therefor.

Your communication indicates that there are other County Highway projects and that the County representatives have assumed that they do not have to pay for any sewer connections, having assumed as you say "the attitude that the County is making a gift to the City of Chicago of the particular paving improvement in question and that the City to illustrate an old adage should not look a gift horse in the mouth; that the improvement will be held in abeyance pending word of approval from your office." Your letter refers to the controversies that the City is having at the present time with different municipalities with regard to the payment of billing for sewer connections and that in your opinion this is not an engineering question but is a question of broad public policy.

All of our opinions in the past regarding this question have definitely advised that the City has the power to demand compensation for sewer connections. We are unable to find any law which would change our opinion and therefore advise that the City of Chicago authorities have the right to request compensation from any other municipalities for the collection and disposal of sewage originating outside of the city limits.

DUTY TO FURNISH PRUDENTIAL BUILDING WATER SUPPLY

(No. 11572—Commissioner of Public Works—J. L. F.—July 31, 1952.)

Your letter of June 20, 1952 requests our examination and opinion as to the form and legality of a proposed ordinance for the installation of one thousand one hundred eighteen (1118) feet of twenty-four inch outside diameter electric welded one-half inch wall steel water pipe with valves, fittings and Dresser couplings and six hundred thirty (630) feet of seventeen inch outside diameter electric welded, one-half inch wall steel water pipe with valves, fittings and Dresser couplings, including part of insulation and heating appurtenances, and also to install the above described pipes to furnish water, for fire protection only, for the Mid-America Home Office of the Prudential Insurance Company.

Your letter further seeks the answers to the following questions:

1. What obligation does the City have to furnish water to the Prudential Building for Fire Protection purposes?

2. Is the City of Chicago assuming any obligations which it is not required to?

3. Should any requirements or restrictions be incorporated in the proposed authorization for the advantage of the City of Chicago?

Supplemental material furnished by your office discloses that the proposed water main is to be installed in a gallery under the Lake Street viaduct, will be a stub-end water main from which there will be no connections directly to private property, but that the entire purpose of the water main is for an increased volume of water under greater pressure for the purpose of fire protection only for the subdivision lying east of Michigan Avenue and north of Randolph Street in the air rights above the Illinois Central Railroad right-of-way.

You further advised us that the water in this main will flow only during fires and in order to protect it from freezing the pipe will be insulated with fiber glass blanket through which electric current will flow.

We have examined the ordinance and have revised it so that in its present form we are satisfied that it provides for a public expenditure of municipal funds for public purposes inasmuch as the main will service only fire protection needs of the inhabitants of this city and is not intended to provide water for consumption by the owners of property abutting the viaduct under which the water main is laid. If the water in this main were to be consumed by any owners of adjoining properties the provisions of Sections 185-17, 185-18, 185-19 and 185-24 would be applicable. These sections are intended to require owners of private property to pay, guarantee or advance the costs of water main extensions where the water is to be made available for use to said owners.

In response to your specific questions, please be advised that:

1. In our opinion there is no obligation on the City to furnish water for fire protection to this building or other specific buildings. However, under the provisions of Section 75-1 of the Revised Cities and Villages Act (Illinois Revised Statutes, 1951, Chapter 24, Section 75-1) the City has the power (as opposed to the obligation) to lay water mains for fire protection purposes. Under this power the City may of course, expend such public funds as in the discretion of its corporate authorities, are required to perform the function authorized.

2. In our opinion, in extending this water main the City is performing a governmental function in pursuance of its discretionary powers to furnish fire protection wherever in its discretion, it is deemed essential for the public welfare. As in the case of any discretionary power, such as the location of streets, the furnishing of police protection, establishment of airports, etc., there is no direct obligation as to the manner in which the function may be performed and therefore in the strict sense, the establishment of this particular water main could not be called an obligation. (McQuillin on Municipal Corporations, Volume 13, Section 37.04.) It is however, a furtherance of a function which the City may perform in a manner deemed advisable and in the best interests of the public, by the City Council.

3. The agreement contemplated by your letter should contain the matters set out as terms 1 and 2 of the proposed ordinance and should in addition provide that the agreement thus entered into cannot be considered in any sense a recognition by the City of any duty or obligation on the part of the municipality to furnish fire protection to this property owner and that the execution of the agreement shall not be construed as a waiver by the municipality of the "governmental function defense" to any cause of action by this property owner against the City of Chicago.

We would suggest that the form of agreement be forwarded to this office for examination before execution so that further study of the wording of the proposed agreement could be made prior to its execution.

Insofar as paragraph 3 of the proposed ordinance, which you submitted to us relative to electrical current required to heat the entire pipe line, is concerned, we should like to inform you that we have held several conferences with the attorneys for the Prudential Insurance Company and they contend that under the Lake Front Ordinance, as amended, they are under no duty or obligation to maintain the water mains, pipe line or hydrant involved in this project, and therefore they should not be charged for the electrical current required to heat the pipe line. They further point out that the Prudential Company is under no duty to construct the gallery provided for in the Lake Front Ordinance, if said gallery is constructed only for a water pipe, nor is the Prudential Company under any duty to pay the installation costs of the

water main or to maintain anything except the supports of the galleries. Section 7 of the October 24, 1929 amendment to the Lake Front Ordinance applies only to the housing of the water pipes and under Section 26 of said amendatory ordinance, if galleries are constructed for *joint* use, then the costs of *construction and maintenance* shall be jointly borne; since the gallery is not being used jointly, then the said provisions of the amendatory ordinance are not applicable.

Furthermore, upon a complete survey of the Lake Front Ordinance, and the amendments thereto, we are fearful that imposing a charge upon the Prudential Company for the electrical current for heating the pipe line might be construed as vesting in said Prudential Company the right to participate in the control, operation, maintenance and manner of supervision of the water mains, hydrants, pipe lines and water supply for this project generally, thus being contrary to the said Lake Front Ordinance, as amended, which grants to the City the sole authority for the control, operation, maintenance and manner of supervision of the said water supply system.

We are therefore of the opinion that the cost of electrical current required to heat the entire pipe line described in "B," "C," "D" and "E" be borne by the City.

We have therefore revised the ordinance which you have submitted to us so as to have it now conform to the above analysis, and we have indicated our approval as to form and legality upon the ordinance, which we are returning as revised.

LIABILITY OF NEW OWNER FOR UNPAID SEWER AND WATER BILLS

(No. 11680—Commissioner of Water and Sewers—H. A. C.—April 14, 1953.)

With your recent communication you submitted a bimonthly sewer service bill indicating that sewer charges have accumulated for the above property and that there is now $199.60 due and owing to the City of Chicago. It seems that the new owner recently purchased this property. You also submitted a check to the Superintendent of Water in the sum of $4.60 and advise that the present owner has refused to pay the delinquent portions of the bill.

In view of the fact that the new owner proposes to pay sewer charges only for the services rendered since he owned the property, you have requested that we advise you whether the City shall accept payment for the immediate services or if the present owner is liable for the entire outstanding charges.

Despite the fact that the Chicago Title & Trust Company letters of opinion do not reflect the possibility of any outstanding water or sewer service bills, we are of the opinion that it is the duty or obligation of the purchaser, or his attorney to check the possibility of such outstanding bills. It has beome a practice, as a matter of fact, for such bills to be discussed and prorated along with insurance, title charges and other bills.

We have rendered numerous opinions to your office advising the City is entitled to reasonable compensation for allowing owners of property living outside of the city limits to connect their sewers to city sewers. On July 22, 1952 in a letter addressed to the Honorable Oscar E. Hewitt, we advised that the City has the power and authority to cut off connections

made without authority and without payment for services, and by that letter we referred to an opinion of June 8, 1945 (22 Opinions of the Corporation Counsel, 126-127) wherein we stated:

> "Manifestly, it would be prejudicial to the City of Chicago and its taxpayers were owners of property located without the corporate limits of the City to be permitted under ordinary circumstances to connect their sewer drains to the City sewers without paying to the City reasonable compensation for the privilege. *Carr* v. *City of Athens* (1922), 304 Ill. 212, 216.)"

The City may properly refuse to accept only a part of the outstanding service charge, and we are of the opinion that steps may be taken to secure payment of these bills, including the revocation of such sewer permits and the cutting off of the connections.

SEWER CONNECTIONS OUTSIDE CITY

(No. 11686—Deputy for Sewers—H. A. C.—April 21, 1953.)

Your letter of March 11, 1953 again raises the question of sewer connections to city sewers from premises outside the corporate limits of Chicago, the specific applicant being Mr. Arthur E. Nelson, who expects to develop the premises lying east of Central Avenue and described as Nos. 5400 to 5560 W. 47th Street.

Your letter further advises that you have added to the standard application form a statement, the form of which has been previously approved by us, wherein and whereby Mr. Nelson agrees that in all of his contracts for the sale or lease of parcels of property in the area, and in all conveyances he will include provisions wherein purchasers will agree to pay the City of Chicago for the use of its sewer service and wherein Mr. Nelson further agrees that he will notify the Superintendent of Sewers promptly within thirty days of the sale or lease of each parcel.

You further state that in former cases, after a project has been finished and parcels sold, that it has been difficult to maintain collections on some of those properties.

Specifically you ask for a reply to the following questions:

1. Would it be advisable or proper for the Bureau of Sewers to require the original applicant to file a bond with the city to guarantee payment of the sewer service charges as they develop?
2. How long a period should such a bond cover if required?
3. How could this bond be made to apply to any purchaser?
4. Should the Bureau of Sewers require some other provision in lieu of bonds, such, for instance, as a cash deposit, and if so, for what period of time should such deposit be held?

From time to time, in answer to inquiries from your office, we have advised you that there is no law requiring the City of Chicago to permit any person to connect sewers to the city's sewers, nor is there any obligation upon the city or its taxpayers to construct and maintain a system of sewers for another municipality.

In our letter dated August 11, 1950 addressed to the Commissioner of Public Works, we rendered a lengthy opinion in which we referred to many previous opinions rendered by this office and on July 22, 1952 we

again made a comprehensive report to the Commissioner of Public Works wherein we advised that the City definitely has the power to demand compensation for sewer connections, and referred to our opinion of June 8, 1945 wherein it was stated:

> "Manifestly, it would be prejudicial to the City of Chicago and its taxpayers were owners of property located without the corporate limits of the City to be permitted under ordinary circumstances to connect their sewer drains to the City sewers without paying to the City reasonable compensation for the privilege. *(Carr* v. *City of Athens* (1922) 304 Ill. 212, 215). (22 Opinions, Corp. Counsel, 126, 127.)"

We therefore are of the opinion that the answer to your first question is that the Bureau of Sewers may require an applicant to file a bond with the City to guarantee the payment for sewer service charges as they may develop. It is suggested that a cash bond in an amount deemed satisfactory to the City would be preferable to a surety bond.

The answer to your second question would obviously be that the bond should cover a period until after the conveyance by the subdivider, accompanied by the payment of all outstanding charges.

In reply to your third question, the Bureau of Sewers, upon establishment of a policy, could, if it sees fit, require a bond from all future applicants, the term and conditions to be such as the Bureau would deem reasonable.

The above answers have included the reply to your fourth question but specifically answering your fourth question we are of the opinion that the Bureau of Sewers may require a cash deposit in an amount deemed reasonable and that the Department may provide that such cash deposit is to be retained for a period as deemed desirable by the Bureau.

It is our further opinion that the preferable manner in which to handle the situation would be to require a cash deposit by the applicant for each new housing or industrial project. The applicant should be required to deposit an amount of cash deemed reasonable and necessary by the Bureau of Sewers to secure payment of sewer service charges. Such deposit should be based upon collection experience of your department and should be conditioned that it will be returned upon evidence of a sale or transfer of title for each individual housing or industrial project upon payment of all outstanding charges to date of such transfer and upon the new owner making a cash deposit in an amount deemed advisable and reasonable by the Bureau. The Bureau, in our opinion, could take reasonable steps from time to time in the event of a delinquency to demand payment thereof and if necessary to sever the connection. In addition to obtaining a cash deposit from the applicant it is further suggested that the subdivider's agreement to notify the Superintendent of Sewers be changed so as to provide that the subdivider definitely undertakes to pay all outstanding sewer service charges up to and including the date of a sale or transfer, and it is further recommended that each of said agreements be recorded with the Recorder in the County where the property in question is located, as such recordation would serve to definitely notify all parties interested of the claim of the City of Chicago for sewer service charges.

PARTIAL PAYMENT FOR SEWER CHARGES

(No. 11718—Commissioner, Department of Water and Sewers —H. A. C.—July 21, 1953.)

Your communication of June 24, 1953, again raises the question concerning the acceptance, by your department, of partial payments from

owners of property outside the City Limits, for sewer service charges, for connections with the Chicago system of sewers. You now state that perhaps you should have advised us that most of the delinquent accounts for out-of-town sewer service, are not based on any permits, but have been discovered by your investigators in checking up on connections which have mushroomed out beyond any connections that may be authorized by a permit from the City Council. You further advise that upon discovering such unauthorized connections that bills are rendered for sewer service, as determined by your department inspectors or investigators. Upon notifications by your department, it seems that some of the property owners only send a payment for the current bill with no comment as to the arrearages and that occasionally, one sends in a payment for the current bill and a partial payment on the arrearages. Your letter states that, in your opinion, it does not appear to be good business practice to refuse to accept a payment if it can be accepted without invalidating our total claim against the property or jeopardize the City's chance to collect the entire bill at some future time.

Your communication further states that at this time, you desire to be advised if there is a method by which partial payments may be accepted with the right of the City to take steps to collect the entire bill in the future. From time to time we have advised your office that the City is entitled to reasonable compensation for allowing the owners of property, living outside the City Limits, to connect their sewers to City sewers. In our last communication of April 14, 1953, we advised that:

> "The City may properly refuse to accept only a part of the outstanding service charge and we are of the opinion that steps may be taken to secure payment of these bills, including the revocation of such sewer permits and the cutting off of the connections."

We are of the opinion that the City has the power in instances where it has issued a permit for a sewer connection, to revoke the permit and cut off the connection upon nonpayment of sewer service, that it necessarily has the power to cut off unauthorized connections, particularly where the service charges are not paid. Your office may therefore adopt any policy deemed reasonable by you, and if it is your policy to accept payments on account, an endorsement containing the following language should be stamped on the check and on the service bill: "This payment is accepted as payment on account of sewer service charges," and it is our opinion that by doing so the City will have reserved its rights to take additional action to collect the entire amount of the sewer service charges.

C. TAXATION OF CITY PROPERTY

CITY PROPERTY IN DU PAGE COUNTY

(No. 11100—City Council—J. C. M.—January 11, 1949.)

In your letter of January 7, 1949 you make the following request:

"Will you advise the Committee on Aviation and Recreation, at as early a date as possible, whether it will be possible for the authorities in Du Page County to tax Chicago on this land."

The land referred to is that part of the airport located in Du Page County according to the ordinance of February 6, 1948 (C. J. 1888-1892).

It is our opinion that the lands within the airport area, whether situated in Cook County or Du Page County, are not taxable except as provided by Chapter 120, Section 19 (6) Illinois Revised Statutes 1947, the application of which we will point out later herein.

The legislature has granted authority, under the Cities and Villages Act, Chapter 24, Sections 22-3 and 23-96, Illinois Revised Statutes 1947, to municipalities to establish public airports either within or without the corporate limits of the municipalities. It is under such authorty that the Chicago Orchard (Douglas) Airport was acquired and is being enlarged.

The Supreme Court in *People ex rel. Lawless* v. *City of Quincy*, (1946), 395 Ill. 190, held that a municipal airport located outside the limits of the municipality which acquired it under authority of Article 24 of the Revised Cities and Villages Act and which is open to the public generally and is not limited to the use of the citizens of the municipality, is exempt from taxation under paragraph (9) of Section 19 of the Revenue Act of 1939 even though the city may charge a fee or rental for the use of the airport facilities as authorized by the statute. The court said (p. 201):

> "We held in *People ex rel. Curren* v. *Wood*, 391 Ill. 237, that there is no essential difference, so far as the public interest is concerned, between the operation of a public airport and that of a public highway or public park, and that the purposes and functions of the airport authority in that case were public rather than private. The same observations must be made as to the purposes and functions of the City of Quincy in maintaining its Municipal Airport."

It follows that the lands situated within the area of the Chicago Orchard (Douglas) Airport are not subject to taxation generally by either Cook County or Du Page County.

The statute in question does except from its application certain of the property for specific taxable purposes as will be noted from the language thereof. This reservation was particularly necessary because of outstanding school district bonds. Such obligations are protected by the Constitution of the United States of America and of the State of Illinois and had to be recognized and the payment thereof provided for lest the statute, in so far as its application to the large area of land involved, be deemed unconstitutional.

That part of paragraph 6 of Section 19 of the statute that is applicable is further designated as Section 500 of Chapter 24 (pages 2813-2814, 1947 Statutes) and reads as follows:

> "and all property owned by any city or village outside of the corporate limits of the same if used exclusively for municipal or public purposes, provided that if at the time of the acquisition of property to be used for public airport purposes the city, village, township or school district in which said property is located is indebted for any amount for payment of which it provided for the collection of taxes, the property acquired for pulbic airport purposes shall be subject to taxation for the payment of said indebtedness in the same proportion as said property bore to the taxable property in said city, village, township or school district immediately before the acquisition thereof, according to the last assessment for taxation."

The exception also appears in paragraph 9 of Section 19. Applying the statute to the outstanding school district bonds, for instance, the property acquired will be subject to taxes for the period necessary to retire such indebtedness. Such expense probably should be charged to operation costs.

CHAPTER XIII — CONTRACTS

A. BIDS AND AWARDS

REDUCTION OF LOW BID

(No. 11109—Commissioner, Public Works—F. T. M.—December 17, 1948.)

This is in reply to your letter of December 11, 1948 pertaining to specifications for steam coal for use by the City, upon which the Republic Coal and Coke Company submitted the lowest bid. Being of the opinion that the Company could afford to further reduce its bid price, you request our opinion as to whether or not there is any legal objection to your attempting to prevail upon the low bidder to reduce its price, and if successful could a legal contract be made at a price below the original bid.

The following sections of the Municipal Purchasing Act are pertinent to your inquiries. Section 22A-3 requires that "all purchase orders * * * involving amounts in excess of $1,000.00 * * * shall be let by free and open competitive bidding after advertisement, to the lowest responsible bidder * * *." Section 22A-15 provides in part that the Purchasing Agent shall "constitute the sole agent of the Corporate Authority in contracting for labor, material, services or work, the purchase, lease or sale of personal property, materials, equipment or supplies, or the granting of any concession in conformity with the provisions of this act." Therefore, the contract in question, being in excess of $1,000, must be let as provided in Section 22A-3, and being for a transaction specified in Section 22A-15, it must be contracted for by the Purchasing Agent.

It is our opinion that though there is no legal objection to an attempt to secure a lower bid from the lowest bidder, such attempt should be made only by the Purchasing Agent who is charged with the duty of contracting for the various departments of the City of Chicago. If, in your opinion, the low bid may be subject to further adjustment to the benefit of the City, facts or information received bearing on such reduction should be transmitted to the Purchasing Agent for such action as he may deem necessary. Informal action by officials other than the Purchasing Agent may disrupt purchasing policies established to the end that the City may benefit through the receipt of bids formulated by the bidders upon the premise that further negotiation would not be required.

The courts have previously passed upon the legality of the reducing of a low bid. In the case of *The Sanitary District of Chicago* v. *McMahon & Montgomery,* 110 Ill. App. 510, the court stated as follows, on page 519:

> "In contemplation of law Green's Dredging Company was not a bidder, because its bid did not conform to the advertised requirements. The contract was let to the next lowest bidder, McMahon & Montgomery Company, at a price less than its bid, without any re-advertising, and it is now claimed that this avoided the contract.

No authorities are cited to sustain the contention. If (so far as this point is concerned) it was lawful to let the company have the contract at the price (twenty-three cents) bid by it—and this is not to be denied—then it was not contrary to the statute, or to public policy, or to the duty appellant owed to the public, for its trustees, by persuasion, to induce that company to consent to a reduction of the price from twenty-three cents to twenty-one cents)."

It is therefore our opinion that you have no authority under the Purchasing Act to negotiate with a low bidder in an attempt to reduce the bid price, authority for such action being vested in the Purchasing Agent. It is also our opinion that if the Purchasing Agent should prevail upon a low bidder to lower the bid price, a legal contract can be consummated based upon the lower price agreed to by the parties.

GRANTING CONCESSION WITHOUT BIDS

(No. 11239—Acting Purchasing Agent—R. J. N.—January 20, 1950.)

Your letters of December 6th and 22nd, 1949 request our opinion on the legality of granting a concession to "The Business Opportunities for the Blind, Incorporated," without advertising as required under the Purchasing Act.

Please be advised that the Purchasing Act (Article 22A of Chapter 24 of the Illinois Revised Statutes, 1949) was amended to provide that the article shall not apply to:

"* * * contracts or transactions, other than the sale or lease of personal property, pursuant to which a municipality is a recipient of money."

Pursuant to this amendment the Purchasing Act no longer applies to concessions granted *by* the City under the terms of which the City is to be the recipient of money.

We are, therefore, of the opinion if the City Council desires to grant this concession it may do so without regard to the Purchasing Act.

CANCELLING PROPOSED CONTRACTS

(No. 11261—Purchasing Agent—J. E. C.—March 2, 1950.)

Your letter of January 3, 1950 transmitted copies of draft letters to Finance Committee, Kennedy Valve Manufacturing Company and a copy of letter dated December 15, 1949 from Commissioner of Public Works pertaining to cancellation of proposed contracts.

You request our opinion as to whether the City has incurred any obligation to recommended bidders where the City Council has authorized the Purchasing Agent to enter into contracts, and on instructions from the Using Department the proposed purchases are abandoned subsequent to the passage of such authorization but prior to the action of the Purchasing Agent in consummating orders in the form of a contract or a purchase order.

You also request that if you have incurred no liability could the two drafts, one to the lowest responsible bidder and one to the Finance Committee of the City be in order in completing the abandonment of this work.

Section 22A-12 of the Municipal Purchasing Act for cities in excess of 500,000 population (Ill. Rev. Stat. 1949, Chap. 24, Section 22A-12) provides:

> "Any and all bids received in response to an advertisement may be rejected by the purchasing agent * * * if the public interest may otherwise be served thereby."

We are of the opinion that from the reading of this statute, the City has incurred no liability. We do not think it advisable however to give any notice to the company other than your regular notification used to reject any and all bids. If it is your desire to have the authorization voided, you may notify the Finance Committee that you have rejected all bids and abandoned the work.

BIDS RECEIVED AFTER SPECIFIED OPENING TIME

(No. 11301—Purchasing Agent—J. E. C.—May 15, 1950.)

You recently requested opinions of this office concerning two specific contracts where the bids were received subsequent to the time mentioned in the advertisement.

In one instance you stated that the bid was postmarked prior to the time mentioned in the advertisement and in the other instance you stated that the bid had been handed to the bid clerk after such time and while bids on a companion project were being opened.

Section 7 of the Purchasing Act provides as follows:

> "Such advertisement shall also state the date, time and place assigned for the opening of bids and no bids shall be received at any time subsequent to the time indicated in said announcement."

Although this office has on two previous occasions permitted contracts to be awarded on the basis of bids received after the designated time, but prior to the opening of bids (Opinions of the Corporation Counsel, Vol XI, p. 782; Vol. II, p. 246) both of those opinions were written prior to the enactment of the Purchasing Act and both were based on the lack of any statutory requirement that the time for opening of bids be mentioned in the advertisement.

Under the present Purchasing Act we must assume that the legislature in requiring that the advertisement state the date, time and place for the opening of bids intended to prevent any suspicion of collusion by requiring that all bids arrive at substantially the same hour. We are therefore of the opinion that you are not authorized under the present statute to award a contract to a bidder whose bid was not received prior to the hour mentioned in the advertisement.

Section 12 of the Purchasing Act, however, permits you to reject all bids in those instances where the public's interest will be subserved by such rejection. Under the circumstances of these cases if you are convinced that a lower bid is obtainable through readvertisement you may effect this saving to the City of Chicago by rejecting all bids and readvertising.

ALTERING ORIGINAL BID

(No. 11409—Purchasing Agent—J. E. C.—August 6, 1951.)

In your letter of July 30, 1951, you cite three provisions of the specifications for mechanical joint special castings on which bids were received on June 27, 1951. One of the bidders, James B. Clow and Sons, submitted the lowest bid. However, attached to their proposal were stipulations made a part of their bid which were somewhat different to the provisions of our specifications. You also state that you received a letter from the above named company dated July 23, 1951, withdrawing the provisions attached to their bid. You request our opinion as to whether the withdrawal of their qualifying provisions by Clow and Sons may be granted.

We are of the opinion that any bid received which does not adhere to the specifications is not a firm bid and a subsequent letter changing the original bid does not cure the defect. This situation would give an undue advantage to the bidder amending his proposal and would be contrary to the intent of the Purchasing Act which is based on a theory that competition would result in lower prices to the municipality.

We are therefore of the opinion that the letter of July 23, 1951, of James B. Clow and Sons cannot be accepted and their original bid must be rejected.

WITHDRAWAL OF BID

(No. 11415—Purchasing Agent—W. H. S.—August 17, 1951.)

We have your letter of August 10, 1951 to the corporation counsel requesting our opinion as to what action should be taken by you in this matter.

Attached to your letter is a copy of the low bidder's letter dated August 6, 1951 to you from J. L. Rissman, its president.

The bids were opened on August 2, 1951 and six bids were received. The lowest bid was that of American Wrecking Company of $4,775.; next lowest was that of Pielet Scrap Iron & Metal Company, $17,300; the third lowest was $29,500 and the highest was $69,325. Compared with the other five bids American Wrecking Company's bid appears to be out of line, the second lowest bid being about four times that of American Wrecking Company and the highest of the six bids being about 17 times that of the low bidder. As of this date American Wrecking Company has not been notified by the city of the acceptance of its proposal.

In his letter of August 6, 1951 to you Mr. Rissman states:

> "* * * In making up our figures for the bid, an error was made in computation in the addition of the figures in the sum of $10,000.00.
>
> "At the time the bid was submitted, I was away from the office because of a death in the family and signed the bid without an opportunity to check the figures. The error was not discovered until a few days ago. Request is hereby made to withdraw the bid

of American Wrecking Company on this job and for the return of the deposit which has been placed in conjunction with said bid."

In our opinion the company's request to permit it to withdraw its bid and also its deposit of $1,200. should be denied.

The only reference to withdrawal of a proposal in the Contract Documents is on page 5, and reads as follows:

> "Bidders may withdraw their proposals at any time prior to the time specified in the advertisement as the closing time for the receipt of proposals. However, no bidder shall withdraw or cancel his proposal for a period of 60 calendar days after said advertised closing time for the receipt of proposals nor shall the successful bidder withdraw or cancel his proposal after having been notified by the Purchasing Agent of the acceptance of the bidder's proposal. No proposal will be opened which has not been received before the specified closing time for the receipt of proposals. Proposals that contain omissions, erasures, alterations, or additions not called for, conditional or alternate bids unless called for, or that contain irregularities of any kind, may be rejected as informal."

The time for withdrawal of proposals having expired when the bids were opened and read aloud on August 2, 1951, you cannot permit the low bidder to withdraw its bid and deposit.

In the Advertisement For Bids, the purchasing agent reserved the right to reject any or all proposals. If in your judgment the best interests of the city will be served by rejecting all the bids and re-advertising for new bids, it is our opinion that you legally may do so.

You have told us that from conversations you have had with Mr. Rissman before you received his letter it seemed doubtful that the company would execute the contract for the work because the return by the city of the guaranty deposit of $1,200. would be less than it now claims it would suffer if it performed the work of removal of the buildings at the lump sum price of $4,775.

The Contract Documents provide that the successful bidder, within 13 calendar days after receiving notice from the purchasing agent so to do shall deliver to the city a contract bond for the faithful performance of the contract and in the event of its failure or refusal so to do within such 13 days the "City shall retain as liquidated damages and not as a penalty, the amount of the proposal guaranty * * *." To carry out the necessary steps would cause a further delay of at least 13 days before the city could proceed otherwise in obtaining a contractor to do the work. Furthermore, if you accept Mr. Rissman's assertion that his company had made an error of $10,000. in its computation of its lump sum bid, its bid corrected to $14,775. would be $2,525. less than the next lowest bid of $17,300. Crediting the $1,200. retained by the city as liquidated damages, the city nevertheless would suffer a net loss of $1,325. if the next lowest bidder should be awarded the contract.

In the circumstances and only for the purpose of having the buildings removed as soon as possible by a responsible contractor at the least cost to the city, if you should decide to exercise your right of rejecting all the bids received on August 2, 1951 and then re-advertising for new bids, we suggest that before so doing you should obtain a written assurance from Mr. Rissman, president of American Wrecking Company, that (a) it in apt time will file with the purchasing agent its proposal to do the work of removal of buildings Nos. 73 and 74 for not to exceed the lump sum price of $14,775. and (b) it will reimburse the city for any and all expense to which the city is put in re-advertising for new bids and will indemnify, keep and save harmless the city against all liabilities, judgments, costs, damages and expenses including court costs and attor-

neys' fees which may in any wise come against the city as the result of the rejection of all the bids opened on August 2, 1951 and the re-advertisement for new bids. If and when such written assurance is received by you a copy of the same should be given to other prospective bidders by making specific reference to such written assurance of American Wrecking Company in the re-advertisements.

Mr. Dick Van Gorp, chief engineer of the department of subways and superhighways, assures us that if you reject all bids and re-advertise for bids the delay in the removal of buildings Nos. 73 and 74 will not interfere with the progress of superhighway construction now under was as the buildings are not located on the site of work immediately planned.

Please advise us as to what you propose to do.

CITY EMPLOYEE MAY NOT RECEIVE CONTRACT

(No. 11476—Purchasing Agent—J. E. C.—February 11, 1952.)

In your letter of November 20th you request an opinion as to whether or not the Citv may award a contract for professional photographic services to an employee of the City of Chicago.

Chap. 24, Sec. 9-91, Illinois Revised Statutes (1949) provides that:

> "No municipal officer shall be interested, directly or indirectly, in any contract, work or business of the municipality, or in the sale of any article, whenever the expense, price or consideration of the contract, work, business, or sale is paid either from the treasury or by any assessment levied by any statute or ordinance. No municipal officer shall be interested, directly or indirectly, in the purchase of any property which (1) belongs to the municipality, or (2) is sold for taxes or assessments, or (3) is sold by virtue of legal process at the suit of the municipality". 1941, Aug. 15, Laws 1941, vol. 2, p. 19 S 9-91.

In *Koons* v. *Richardson,* 227 Ill. App. 477, a city contemplating extensive local improvements, contracted for the services of an engineer on a percentage basis. After executing the contract, the engineer was appointed city engineer, making him a city officer. He was denied all recovery of compensation.

In view of the above cited case, it is our opinion that the city could not legally enter into a contract with a city employee for professional services under the circumstances you outline.

BIDS MUST CONFORM TO PROPOSAL

(No. 11520—Purchasing Agent—F. C. F.—April 23, 1952.)

We have your letter of April 21, 1952 regarding the above subject to which was attached a copy of your request to the Finance Committee for authority to enter into a contract for Motor Generator Sets and Transformers.

You also attached a tabulation of the bids covering the same and a proposed form of council order authorizing the Purchasing Agent to enter into a contract with the lowest responsible bidder, Power Transmission Equipment Company, for six (6) motor generator sets required for use by the Department of Public Works, at the lump sum price of Sixty-three Thousand, Four Hundred and Forty-four Dollars ($63,444.00), plus escalation limited to 10 per cent, in accordance with the Specifications and Contract Documents No. 9-51-27. The invitation to bid called for a firm price and specified delivery.

We note from the tabulation of the bids that all of the bidders save one, namely, the Westinghouse Electric Corporation, included an escalator clause, each with varying conditions. Westinghouse Corporation submitted a bid of $77,947.43, which included 20 per cent for escalation, and a statement which set forth that the motor generator sets and transformers would be billed at a price in effect at the time of shipment, but not to exceed the top figures.

You stated that the Department finds it increasingly difficult to attune specifications to industry conditions as you feel if this work is advertised again prices will be considerably higher.

We are of the opinion that the bids received and opened on January 3, 1952 cannot be accepted by your office since you cannot determine from the bids submitted the exact sales price of the products for which the bids were submitted and the requirements of the Purchasing Act are such that you must determine who is the lowest responsible bidder.

It is a fundamental rule of law that bids on municipal contracts must be in definite terms and must conform to the requirements of the charter, ordinances, advertised proposals and specifications, but that minor variances may be waived (C. J. S. Vol. 63 #1000). In the instant case we are of the opinion that the inclusion of such an escalator clause is a material variance between the City's proposal and the bids in question.

We are of the opinion that to allow the inclusion of an escalator clause when none was set forth in the original proposal would be contrary to the intent of the Purchasing Act. If the Purchasing Agent is of the opinion that the public interest would be subserved by rejecting all bids and readvertising, he is authorized to do so under the provisions of Section 22 A-12 of the Municipal Purchasing Act (Ch. 24, sec. 22A-12, Ill. Rev. Stat. 1951.)

PHOTOGRAPHIC SERVICES

(No. 11539—City Council—J. E. C.—May 19, 1952.)

In your recent letter you request advice as to whether or not technical and professional photographic service may be purchased under Section 22A-4 of the Municipal Purchasing Act (Chap. 24, Ill. Rev. Stats.). You state that on March 14 you received a communication from the Purchasing Agent recommending a contract in the approximate amount of $13,192.50 with the Copelin Commercial Photographer for photographic work required by the Department of Subways and Superhighways.

A telephone conversation was had with Mr. Van Gorp, of the Department of Subways and Superhighways, who stated that the photographic services required by the Department are highly technical and may be necessary in the defense of litigation at some date.

Our opinion, based on the above information, therefore is that this particular photographic service may be purchased without competitive bidding and comes under the exception permitting such contracts to be let where the services purchased are those of an individual possessing a high degree of skill.

TOTAL AMOUNT IN LIEU OF UNIT BID

(No. 11661—Purchasing Agent—J. E. C.—March 12, 1953.)

With your letter of February 9, 1953, you submitted a copy of the specifications and contract document No. 22-52-63, together with a photostatic copy of the non-collusion affidavit, alternate proposal and letter dated February 2, 1953, signed by M. F. McCarthy of the International Harvester Company.

In your letter, you requested our opinion as to whether or not you can accept the bid of the International Harvester Company submitted on February 2, 1953, in response to the public invitation to bid for fifty (50) truck chassis and fifty (50) truck bodies in accordance with the specifications and contract No. 22-52-63.

We have reviewed the above enclosed documents and are of the opinion that the International Harvester Company submitted a bid covering the total amount instead of that requested which was at a unit price. We find that at the opening of the bids, the International Harvester's bid was opened second in numerical order. At that time, it was stated by the representative of the company that the word "each" was a stenographic error which is substantiated by the fact that the company does not make a truck chassis that would sell for $347,820.00.

RESTAURANT CONCESSION

(No. 11676—General Attorney, Chicago Park District—F. C. F.—April 7, 1953.)

Attached hereto is a copy of the letter dated March 25, 1946, from the Commissioner of Public Works, Hewitt, to James Bowler, Chairman of the Finance Committee together with related documents, regarding the restaurant concession to Field's at the Chicago Midway Airport.

Note the Department advertised for bids on January 17, 1946 and fifty-three firms were invited to bids; eight bidders responded: Syrena Caterers, Inc. was the highest bidder. Subsequent to January 17, 1946, Marshall Field indicated an interest and asked for time to check the proposals and present one of their own. Hewitt and Walter Wright recommended that the bid be given to Marshall Field.

Marshall Field received the bid after Hewitt's recommendation and Mayor Kelly's Letter of Preemption and Intent to Field's regarding a prior privilege to negotiate for similar privilege at O'Hara Field. (Letter dated July 10, 1946—appears in Journal of Council Proceedings of July 11, 1946 at page 5997) Field's stated that they were not desirous of making profits at Midway but their primary objective was to advertise the company.

On May 21, 1946 (C. J. p. 5729) the Finance Committee recommended that the Commissioner of Public Works be permitted to enter into the contract with Marshall Field & Company; the Committee report was deferred until the next regular meeting, June 4, 1946 and on that date Hewitt was authorized to enter into the concession agreement with Field's. (C. J. p. 5829)

There was no Purchasing Act in effect at the time of this contract and Hewitt was the contracting party on behalf of the City. There is no indication of any opinion by the Corporation Counsel's Office except a letter by J. Grossman relative to some corrections in amounts and a provision as to notice as authorized by City Council on November 26, 1946 (C. J. p. 6593).

The agreement was drawn up by Wilson & McIlvaine and approved by Grossman on behalf of this office.

There is no file in the Law Department regarding this matter but the enclosed documents transmitted here belong to Commissioner Gunlock's Office and the Bureau of Aviation.

We also direct your attention to an opinion of the corporation Counsel dated January 20, 1950 written by Robert J. Nolan, Assistant Corporation Counsel, to John F. Ward, Purchasing Agent, in regard to the Concessions for Cafeteria, Department of Streets and Electricity Shops and Garage at 37th Street and Princeton Avenue;

> "Your letters of December 6th and 29th, 1949 request our opinion on the legality of granting a concession to "The Business Opportunities for the Blind, Incorporated" without advertising as required under the Purchasing Act.
>
> "Please be advised that the Purchasing Act (Article 22A of Chapter 24 of the Illinois Revised Statutes, 1949) was amended to provide that the article shall not apply to:
>
> "* * * contracts or transactions, other than the sale or lease of personal property, pursuant to which a municipality is a recipient of money."

Pursuant to the amendment, the Purchasing Act no longer applies to concessions granted by the City under the terms of which the City is to be the recipient of money.

We are, therefore, of the opinion, if the City Council desires to grant this concession it may do so without regard to the Purchasing Act.

SUBSEQUENT SUBMISSION OF CERTIFIED CHECK AS BID DEPOSIT

(No. 11689—Purchasing Agent—J. E. C.—May 12, 1953.)

In your recent letter you stated that a low bidder submitted as a bid deposit a company check not certified in response to a public invitation to bid, and that a certified check was substituted at a later date.

We presume that this later date was some time after the bids were opened and if this is true it is in violation of the requirements for bidding and instructions to bidders, which states under the heading of "deposit"

that a proposal shall be accompanied by cash, cashier's check, certified check or comptroller's certificate of monies owed the particular vendor in the sum or sums shown below.

From the facts submitted and the requirements for bidding, it is our opinion that to accept this certified check at this time would be deviating from the opinions rendered to you prior to this date.

B. EXECUTION AND INTERPRETATION

INCREASE IN TAX AS AN "EXTRA"

(No. 11200—Purchasing Agent—J. F. O.—October 28, 1949.)

In our letter of recent date you request our opinion as to whether an increase in the Illinois Retailers' Occupation Tax or any additional taxes which may be levied upon the contractor during the life of a contract can be collected from the City as an extra, where the contract contains the following provisions:

> "Federal Excise Tax does not apply to material purchased by the City of Chicago.
>
> The prices herein must include all other Federal and/or State, direct and/or indirect taxes which apply to the contract."

In a previous opinion of this office, it was stated that such increased or subsequently levied taxes cannot be collected from the City as "extras" without adequate provision having been made in the contract. (18 Op. Corp. Counsel 844, 19 Op. Corp. Counsel 396.)

Contracts are not abrogated by the happening of a contingency that could have been foreseen by the party to a contract on whom such contingency is a hardship. (*Cowles* v. *Morris & Co.*, 330 Ill. 11.)

We are therefore of the opinion that any tax or increase in a tax levied subsequent to the execution of a contract cannot be collected in addition to the contract price unless special provision is made in such contract for such contingency.

EXPIRED CONTRACT—CITY HALL ELECTRICITY

(No. 11204—Commissioner of Public Works—E. L. W.—November 4, 1949.)

You advise in your letter of October 10, 1949, that on October 26, 1915, the City entered into a contract with the Sanitary District of Chicago for electricity for lighting and power purposes to the City Hall; that the price unit in said contract was 1¼¢ per kilowatt hour; that this contract was not renewed at its expiration, but that the Sanitary District continued to furnish electricity to the City Hall under the same terms from that date to March 31, 1949.

You also inform us that on January 26, 1949, the District notified this department that effective March 1st, 1949, the rate per kilowatt hour would be increased to 1½¢; that the March bill was rendered at the rate of 1¼¢ per kilowatt hour, but that the bills for April and subsequent months have been rendered at the increased rate; that the City Comptroller has refused to approve payments of the increased rate and that the unpaid bills are accumulating at the rate of approximately $3,500.00 per month.

You request answers to the following questions:

1. Can bills be paid at the increased rate?
2. If so, what action, if any, by the City Council is necessary?
3. In the event that the bills are unpaid at the end of 1949, should an appropriation be requested in the 1950 Appropriation Ordinance to defray same?

In answer to question 1, we wish to advise that at the expiration of the contract the supply of electricity for power and lighting to Chicago was on a day to day basis. The Sanitary District could have, with reasonable notice, suspended service. Therefore, when the City was notified on January 25, 1949 of the proposed increased rate, it had a right at that time to decline to pay at the increased rate, and arrange for the furnishing of light and power from some other source. Not having done this, and having accepted the electricity after March 1, 1949, it is bound by the new rate.

We understand that in the budget for the year 1949, a lump sum appropriation was made for power and light to the City Hall in the sum of Thirty-five thousand ($35,000.00) Dollars. The bills rendered should be paid from this account.

In answer to question 2, the Council having already appropriated for the payment of electricity, there is no further action necessary at this time.

Should the appropriation for light and power be expended before the expiration of the current year, because of the increased rate, it would be necessary to request that the Council appropriate in its 1950 budget sufficient monies to defray this deficit.

CLAIM FOR EXTRAS

(No. 11299—Commissioner of Public Works—R. J. N.—May 5, 1950.)

Your recent letter requested our opinion as to whether there is any legal basis for consideration of a claim for extra payment to the Zieber Steel Company upon a contract for the boiler room addition to the Roseland Pumping Station executed on November 25, 1940, and completed July, 1947.

The general rule of law to be followed in matters of this nature is stated in an opinion of this office dated November 23, 1945, to the effect that the contractor is bound by his contract regardless of fluctuations of price which might affect his profits and unless there is a provision in the contract which contemplates a change in the contract price, no extra compensation can be allowed. (Opinions of the Corporation Counsel, Volume 21, page 555.)

On July 8, 1946, this office considered the right of a contractor to be excused from performance of a contract entered into on May 16, 1941, for the construction of the North State Street Bridge because of the intervention of the war which made materials for the project difficult to obtain and ultimately increased prices materially. In that case it was held that the contractor should be required to perform his contract or that the City should readvertise the project and recover the increased cost of completing the same from the contractor's performance bond. (Opinions of the Corporation Counsel, dated July 8, 1946, addressed to Honorable James B. Bowler, Chairman, Committee on Finance, written by Joseph F. Grossman, Acting Corporation Counsel)

The contract with the Zieber Steel Company was entered into on November 25, 1940, more than a year prior to the entry of the United States into war but subsequent to the passage of priorities legislation and the contract contained the following clause:

> "It is expressly understood and agreed that no payment shall be made to the said party of the first part for any extra work or material, or if any greater amount of money than herein stipulated to be paid, unless some changes in or additions to the contract requiring additional outlay by said party of the first part shall first have been expressly authorized by the City Council of the City of Chicago and ordered in writing by the Commissioner of Public Works."

It appears that on July 29, 1942, the contractor informed you that certain of the specifications could not be met because of material scarcity and that it would be necessary for him to procure substitutes which required considerable welding and fabrication which would cause him to expend the sum of $1,695 additional in order to complete the contract. That communication requested your acceptance of the substitute materials and an additional allowance for the extra costs. The file submitted to us is silent as to any acknowledgment by you of this communication despite the fact that your express acceptance was requested. It does appear, however, that the substitute materials were used, the project completed and the work accepted by your office on its completion. Under these circumstances we believe there was a waiver by the City of the requirement in the contract that the order for the substitution shall be in writing.

We are of the opinion, therefore, that the $1,695 portion of the claim which is verified by the correspondence in the file may be allowed. We have no facts to support any additional claim for extras.

WAR DELAY CLAIM FOR EXTRAS

(No. 11310—Commissioner of Subways and Superhighways—W. H. S. —June 16, 1950.)

In your letter to us dated March 20, 1950 you state that Contract M-1 included the furnishing and installing of seven escalators for the State Street Subway and two escalators for the Dearborn Street Subway; that this contract was awarded by council authority on October 15, 1940 (C.J. p. 3286); that all work on the State Street Subway was completed in 1943; that two trusses for the Dearborn Street Subway were installed when the remaining work was stopped in 1942 because of the war; and that the theoretical completion date of this contract was November 12, 1941;

That on February 10, 1943 the contractor filed a claim for extra expenses incurred to December 31, 1942 as a result of the delay in completing the contract due to the war; that these claims included the increased labor cost due to an increase in the wage rate and extra wages and expense of bringing workmen from other territories in order to complete the State Street Subway escalators; that the claim was acknowledged by your file letter W-1-122; that your letter M-1-142 dated September 23, 1943 acknowledged the contractor's letters dated May 24, 1943 and August 18, 1943 covering similar claims to June 30, 1943 and advised the contractor as follows:

"1. We will reimburse contractor for cost of insurance on materials in public warehouses.

2. Payment will be made for maintenance of State Street escalators prior to official opening of Route No. 1.

3. Contractor's claim for increased wages would be given further consideration.

4. Disallows contractor's claim for extra cost of bringiny mechanics from out of city to ccomplete State Street Subway.";

that on October 1, 1943 the contractor furnished additional information and requested your reconsideration of items not approved in your letter M-1-142; and that your letter M-1-151 approved the contractor's claim listed under item 2 above and advised the contractor that you could not approve their claims listed under items 3 an 4;

You further state that recently (on March 10, 1950) the contractor resumed work on the Dearborn Street Subway escalators; that in their letter of March 3, 1950 they estimate extra costs which they state will be incurred over their costs if the work had not been delayed which estimate is based on the following:

"1. Present day escalator labor is 25 per cent less efficient now than during the original contract period.

2. Amount of present day wage rate in excess of 1940 wage rate applied to the estimated hours of work necessary to complete the contract.

3. All material had been completed and placed in Chicago warehouses with the exception of rubber handrails as these would have deteriorated during the delay period. It will cost the contractor more to furnish this handrail now than if it had been furnished during the original contract period.";

that these claims as estimated by the contractor amount to $5,037.00.

You request our opinion as to your liability and obligation to the contractor so that you can work out a settlement of the above claim.

Your letter further states that the same condition also pertains to the contractor's claims under Contract M-2 for furnishing and installing sixteen escalators in the State Street Subway and thirteen escalators in the Dearborn Street Subway and that the claim on the latter amounts to $28,547.00.

We were ready to write you our opinion when you learned that certain escalators in the Dearborn Street Subway which had been installed during and prior to 1942 were out of alignment and it would be necessary to discuss that matter with the contractor. Accordingly we have delayed issuing an opinion on the claims.

We have your letter of June 1, 1950 transmitting copies of the contractor's letters dated April 25, 1950, May 3, 1950 and May 23, 1950, referring to the escalator trusses which were installed in the Dearborn

Street Subway during and prior to 1942; and that a recent inspection of the trusses indicates that some of them are out of alignment and require certain corrective work.

You also attached a copy of your letter M-1-110 dated November 5, 1942, accepting the trusses.

Your letter further states that at a recent meeting with the contractor you were advised that they were considering stopping the work until their claims were settled; that at that meeting the contractor indicated that they will accept the following in full settlement of their claims resulting from the unavoidable delay in the completion of their contracts:

"1. Actual increase in rate of wages over original contract wage rates paid or to be paid for erection of Dearborn Street Subway escalators after resumption of work under Contracts M-1 and M-2, on March 10, 1950, and April 20, 1950, respectively, plus insurance and payroll taxes paid on said increased wages.

2. Increase over original cost of actual cost of rubber handrail of improved design remaining to be fabricated.

3. Actual labor cost, including insurance and taxes, to realign trusses previously installed by contractor and accepted by City.

4. The actual cost, if any, of repairing or replacing escalator equipment stored in bonded warehouses which may be found damaged or lost, and which cannot be collected from the warehouse companies."

Your letter further states that the amounts of the proposed settlement of items 1 and 2 have been determined as follows; and that the settlement of items 3 and 4 cannot be determined at this time:

Contract M-1

1. The original estimated labor cost (1941) of installing the two Dearborn Street escalators under Contract M-1, as submitted by the contractor and approved by the City and the Project Engineer PWA, amounted to $6,398.00, as shown on the attached Detailed Estimate. This amount included the sum of $722.00, for installing trusses erected before the work was shut down in 1943. It also included the sum of $1,835.00 for overhead and profit. This leaves a balance of $3,841.00, based on 1941 wage rates, to cover the labor cost of installing escalators subsequent to resuming work in 1950. The present wages are 48 per cent higher now than when the contract was signed. The estimated increase in wages on the remaining work therefore amounts to 48 per cent of $3,841.00 or $1,843.68. The insurance and pay roll taxes on the increased wages amounts to $92.18.

2. Due to restrictions during the war, it was impossible to obtain a priority for furnishing rubber handrails for the Dearborn Street Subway. Further, if such handrails for the Dearborn Street Subway had been furnished and placed in a warehouse they would now be badly deteriorated due to weathering and disuse. The contractor now proposes to furnish handrails for the two Contract M-1 escalators of an improved design and with highest grade rubber, for the additional sum of $378.00.

Contract M-2

1. The original estimated labor cost (1941) of installing the thirteen Dearborn Street escalators under Contract M-2 amounted to $52,728.00. This amount included the sum of $6,201.00 for installing the trusses erected before the work was shut down in 1943. It also included the sum of $15,294.00 for overhead and

profit. This leaves a balance of $31,233.00, based on 1941 wage rates, to cover the labor cost of installating escalators subsequent to resuming work in 1950. The estimated increase in wages on the remaining work therefore amounts to 48 per cent of $31,-233.00 or $14,992.00. The insurance and pay roll taxes on the increased wages amounts to $749.60.

2. The contractor proposes to furnish handrails of an improved design and with highest grade rubber at the additional sum of $189.00 per escalator or a total increase of $2,457.00.

The following is a summary of the proposed settlements:

	Contract M-1	Contract M-2
Increased labor cost of installation	$ 1,843.68	$14,992.00
Insurance and taxes on increased labor cost	92.18	749.80
Additional cost of rubber handrails	378.00	2,457.00
Cost of realigning trusses	Actual Cost to Be Determined	
Cost, if any, to repair or replace equipment in warehouses, which cannot be collected from warehouse companies	Actual Cost to Be Determined	

Your letter concludes as follows:

> "As we consider this a reasonable proposal, we request that you advise us of our liability and obligation to the constractor so that we may work out an agreement covering the resumption of work and compensation to be paid the contractor."

We have carefully considered your two letters to us and the copies of the correspondence which are attached to them.

Contracts M-1 and M-2 contain no provision relative to priorities or for an extension of the time of performance by reason of any delay due to priorities. The Priorities Act (50 U. S. C. A. App. 633.1152) reads in part as follows:

> "No person shall be held liable for damages or penalties for any default under any contract or order which shall result directly or indirectly from compliance with this subsection (a) of any rule, regulation or order issued thereunder, notwithstanding that any such rule, regulation, or order shall thereafter be declared by judicial or other competent authority, to be invalid."

In our opinion it would be inconsistent with the language quoted from the Priorities Act for the City to seek to hold the contractor liable for the payment of labor and material on the basis of 1950 wage rates when the contractor was to receive payment from the City on the basis of the very much lower wage rates which prevailed in 1941 and when the work would have been done and the materials furnished and installed by the theoretical completion date of Contract M-1 which was November 12, 1941.

We had a somewhat similar situation in which we came to the same conclusion in regard to the claim of Westinghouse Electric Company under Contract M-4 in our opinion to you dated August 7, 1947.

In our opinion an adjustment as worked out by you and acceptable to the contractor would be fair and equitable to the parties to Contracts M-1 and M-2.

You should however submit the contractor's claims and your recommenations to the committee on finance of the city council and receive authority from the city council to settle the claims.

FEDERAL FAIR LABOR STANDARDS

(No. 11311—Purchasing Agent—J. E. C.—June 17, 1950.)

In your letter of March 31, 1950, you request our opinion as to how you should protect the City under the Federal Fair Labor Standards Act on purchase orders where you take informal bids as well as formal specifications and contracts.

The Act refers particularly to employers and employees engaged in interstate commerce or in the production of goods for commerce but excludes the United States or any state or political subdivision of a state.

We are of the opinion that the penalty provisions of this Act apply only to persons who resell the goods or use them as raw material in a commodity intended to be sold. Articles purchased by the City are for ulitmate consumption by it and the City therefore is not covered by the Act. Since procuring the certificates would involve additional detail in your office, you should not require them of contractors supplying the City.

RELOCATING WIRING AS EXTRA

(No. 11388—Commissioner of Subways and Superhighways—B. O'H. —May 17, 1951.)

In your letter of May 3, 1951 to the Corporation Counsel, you request us to advise you whether an invoice for $697.38 for relocating certain temporary wiring and appurtenances should be paid by M. J. Boyle & Company, Contractor under Contract F-4.

Such temporary wiring and appurtenances, we are informed verbally by Mr. George Finn of your staff, were erected about the year 1942 by another contractor and on the completion of the work by that contractor, were acquired by the City. Since then the temporary wiring and appurtenances have been operated and maintained by the City, and permission to make use of them without cost to him was given the contractor in Contract F-4. Meanwhile under Contract E-3 the City arranged with Kil-Bar Electric Company for the installation of permanent electric wiring and under the provisions of Contract E-3, the contractor was obligated on the completion of its work to remove at its expense the temporary wiring and appurtenances.

Before the work on Contract E-3 had been completed the contractor on Contract F-4 found it necessary to relocate the aforementioned temporary wiring and appurtenances, as you state in your letter, "in order for the contractor hereunder (M. J. Boyle & Company) to erect walls and perform other work." This work of relocation was performed by the Kil-Bar Electric Company and it is the invoice of that company for $697.38 for performing such work of relocation that is the subject of your inquiry.

You state that you do not believe Kil-Bar Electric Company is chargeable with the expense of relocating the temporary wiring to make possible the work of M. J. Boyle & Company. In our opinion, you are correct in this conclusion since there was no obligation upon Kil-Bar Electric Company to remove the temporary wiring from its location where it found it until it had completed its work under its contract, and that it had not done.

The question then remains, should the invoice be paid by the contractor under F-4 or should it be assumed by the City?

Sec. 9 (d) of the contract, second paragraph beginning at the bottom of page 23 and ending on page 24, in the case of appliances or structures not owned by the City and which are to be removed, relocated, rearranged or adjusted, provides:

(a) where, in the opinion of the Engineer, the removal, relocation, rearrangement or adjustment is necessary in order to make possible the performance of the work under the contract the resultant cost shall be borne by the owner of the appliance or structure; but

(b) where, in the opinion of the Engineer, other practical means exist for the performance of the work of the contract but, notwithstanding and to facilitate his work, the Contractor desires such removal, relocation, rearrangement or adjustment, the cost of any such removal, relocation, rearrangement or adjustment approved by the Engineer shall be borne by the Contractor.

The clear intent, in our opinion, is to hold the Contractor liable for the cost only when the removal, relocation, rearrangement or adjustment is for his convenience. Where in the judgment of the Engineer he can perform his work even though with less facility under the contract without such removal, relocation, rearrangement or adjustment he must bear the attendant expense. In the present case we conclude from a careful reading of your letter that there is no dispute concerning the necessity of relocating the temporary wiring. It was not a relocation merely for the convenience of the contractor or to facilitate his contractural operation. On the contrary, it was necessary that M. J. Boyle & Company, contractor under Contract F-4, could erect walls and perform other work as required by its contract.

M. J. Boyle & Company in its letter of April 87, 1951 to you refused to pay the sum of $697.38, and returned the invoice to you, copy of which letter you have transmitted to us. M. J. Boyle & Company in that letter sets up as the basis of its disclaimer of liability this distinction between relocation made necessary so that the Contractor can get to its work and relocation merely for the purpose of expediting the Contractor's work. As we have stated there is such distinction made in the contract, but it applies solely and in unmistakably plain language to appliances and structures not owned by the City. It is not applicable to appliances and structures owned by the City.

Article 34 (C II) of General Conditions, Section II of SSSC, provides that the City-owned electric conduits, cables, vaults and appurtenances located inside the neat lines of the tunnel or open cut excavations will be supported, protected and maintained or removed, replaced, relocated, rearranged, adjusted or repaired by the City without cost to the Contractor. It would seem to us that M. J. Boyle & Company is relying upon this provision in its contention that it is not liable for the relocation expense since the relocation was a matter of necessity and not of expediency.

But this provision in said Art. 34 (C II) is not a part of Contract F-4. At page 23 of the Contract Requirements it is stated that the Contractor shall disregard all of paragraphs (c) and (d) of said Art. 34 and substitute therefor new paragraphs (c) and (d) in the language set out on pages 23 and 24 of the Contract Requirements. The provision in SSSC to which we have referred and under which the City assumes liability for the expense of certain relocations of City-owned property is entirely eliminated by the substituted paragraphs (c) and (d) of Contract F-4. It appears to us that the cost of relocation of the temporary wiring and appurtenances was to be included in the bid price and that all bidders were charged with notice of such substitution in the Contract Documents.

Furthermore, the temporary wiring and appurtenances were not only mentioned specifically in the contract but were on the site of the work at the time of the required visit and inspection by the bidder prior to the submission and opening of bids. All bidders had the opportunity to observe the existence and location of such temporary wiring and appurtenances and that their removal would be necessary before the Contractor could proceed with the work under Contract F-4, that part of the SSSC under which the City assumed liability for certain necessary removals having been stricken and the matter having been fully covered by the substitute language. The Contractor thereby was required to include in its bid price the cost of the relocation of the temporary wiring and appurtenances which from its examination on the site of the work it (as a bidder) knew would have to be relocated in order to protect it in its covenant "to keep the City harmless against all liabilities, judgments, costs, damages, and expenses which may in any wise come against the City for or on account of injuries to real or personal property owned by the City." (Page 23 of the Contract Requirements, Sec. 9.)

We think it unnecessary to go further into the provisions of the contract safeguarding the City's property and to which you have referred in your letter for the reason that the entire content of the substituted paragraphs (c) and (d) is devoted to the obligation of the Contractor properly to protect the City's property and that part of sub-paragraph of Art. 34 (C II) in SSSC under which the City obligates itself to assume the cost of necessary relocations of certain City-owned appliances and structures was eliminated.

In our opinion the invoice for $697.38 for the cost of relocating the temporary wiring and appurtenances should be paid by M. J. Boyle & Company, Contractor under Contract F-4.

MATERIAL STOLEN FROM BUILDING TO BE DEMOLISHED

(No. 11396—Purchasing Agent—W. H. S.—June 13, 1951.)

In your letter of May 25, 1951 to the Corporation Counsel you request our opinion as to whether the City is liable for the claim asserted by Bosley Wrecking Company, Contractor for the Removal of Building No. 42—West Route Superhighway on Specifications No. 71-51-2, in the sum of $2,908.50 for (1) materials removed from the building before the Contractor was allowed to take possession and (2) watchman service from March 26 to May 13, 1951.

Bids for the removal of building No. 42, a 10-story brick structure at 415-423 S. Franklin Street were advertised on December 21, 1950. The bids were opened on January 11, 1951 and on March 2, 1951 the City Council authorized the making of the contract with the Bosley Wrecking Company, who was the lowest bidder. (C. J. pp. 7923-24.)

You state in your letter than on May 11, 1951 the Purchasing Department transmitted the fully executed contract to the company with instructions to proceed with the performance of the work under the contract but only upon receipt of written instructions so to do from the Commissioner of Subways and Superhighways. Mr. J. Walter Grimm of the Department of Subways and Superhighways has furnished us with a copy of the written notice sent by the Commissioner to the Company directing it to commence work on its contract on May 14, 1951. There was an interval of time of approximately 19 weeks between the date of advertising for bids and the date the Contractor received directions to proceed with its

work. There was a lapse of about 10 weeks between the date of the order making the award by the City Council, and the date upon which the Contractor was directed to proceed with its work.

On May 16, 1951 Bosley Wrecking Company, in a letter to you, copy of which you transmitted with your letter to us, acknowledged receipt of the direction to start work from the Commissioner of Subways and Superhighways and stated that, as directed, it did take possession of the site on May 14, 1951. Prior, however, to the time when it was allowed to take possession the Company in its letter to you, dated May 16, 1951, stated that on March 8, 1951 materials had been removed from the building and that to prevent further loss of materials it had been forced to employ a watchman to guard the building. The Contractor places its loss and expense so occasioned at $2,908.50, which amount it claims in reimbursement from the City. It states in its letter of May 16, 1951:

> "Inasmuch as we are paying the City of Chicago $2,260.00 for the privilege of being allowed to wreck the building and retaining all the salvage, it is of vital importance that we get all the materials in the building. * * *.
>
> "On March 8, we verbally asked permission of the Dept. of Subways and Superhighways to begin work on the contract as we discovered that people were getting into the building. The permission was refused because he had not received a formal contract. On March 26, we discovered some radiators and other materials had been removed.
>
> "Therefore, to protect our interests we were forced to employ a watchman to guard the building, * * *."

Specifications and Contract Documents No. 71-51-2 provide that if as of the date of acceptance of proposal the building or buildings to be removed be vacant, the starting date shall be determined by the Commissioner but will not be later than 30 calendar days after the date of acceptance of proposal. On page 6 (third paragraph) the successful bidder is required to execute the contract and the contract bond executed by the sureties thereon in 8 counterparts. It is further provided (p. 7) that the contract shall be in force and effect on and after the date of said acceptance. This acceptance by the City of the executed contract and surety bond tendered by the Company required examination and execution of all of the eight counterparts by a number of city officials whose signatures were necessary to give it validity. On May 11, 1951 the contract was fully executed, and within three days thereafter, well within the 30-days limitation provided in the contract, the Company was directed to take possession of the site and to proceed with its work. The City having abided faithfully by the only provision of the specifications and contract documents as to the time for commencement of work cannot rightfully be complained against by the Company on that score. Until the contract had been executed the Commissioner was without authority to permit the Company to take possession of the building.

If prior to the effective date of the contract and the direction to the Contractor to proceed with its work, the Company employed a watchman to protect the property from possible loss through vandalism the expense thereof could not be shifted to the City without the City's prior agreement, and which would require council authority. It was a service engaged by the Company for its own peace of mind and without the sanction of the City, which continued to rely upon the efficiency of its own watch service, as described by Mr. Grimm of the Department of Subways and Superhighways in an inter-office memorandum dated June 1, 1951, as follows:

> "From the time the building was vacant the City of Chicago, through its Agents, Geo. Lurie & Co., employed the Central Watch Service, 19 S. Wells Street, in guarding the property for any van-

dalism. The dates of employment of this service was from September 29, 1950 to May 15, 1951. The service rendered by this company was between the hours of sundown and sunup daily to check that all doors and windows were locked and that the building had not been broken into. Their services did not require them to enter the building to check for missing materials. I had Mr. McKenney check with Geo. Lurie & Company and the Central Watch Service for any reports of breaking into or entering the building during the time their service was in effect. Both companies reported that they had nothing of record that the building had been entered."

Despite the precautions taken by the City, the Contractor claims that when he took possession on May 14, 1951 some of the materials in the building had been removed. We are informed verbally by Mr. Girmm that on the day the Company took possession Mr. Harold Wakefield, resident engineer of the Department of Subways and Superhighways, inspected the premises in the company of Mr. Bosley and reported in an inter-office memorandum that it was indicated that 57 radiators, 18 section type, had been removed, as well as 41 flushometers, 100 water faucets, 6 lavatories and 1 water closet.

If the Contractor can establish to the City's satisfaction that all or any of such fixtures were removed from the building between the time it inspected the site prior to submitting its bid and May 14, 1951, when the Contractor took possession, it is our opinion that it is entitled to recover from the City the value of the fixtures removed, said value to be determined by the current prices obtaining in the salvage market wherein the Company disposes of like materials. It was the obligation of the City to turn over to the successful bidder the building with all the salvagable mtaerials therein substantially as they were at the time of the bidder's inspection of the site prior to submission of its bid. If during the period of possession by the City, between the date of submission of bids and the effective date of the contract, materials were stolen or otherwise removed from the building we think there can be no doubt of the City's liability to the Contractor in an amount equal to that which the Contractor might have realized from the sale of the materials as salvage. The burden, however, is upon the Contractor to establish (1) that the materials were in the building at the time it inspected the site in the preparation of its bid and (2) that said materials were not in the building when it took possession.

In our opinion, the City is not liable for any expense incurred by the Contractor for watch service during the period of the City's possession.

REIMBURSEMENT FOR PRIVATE WATCH SERVICE

(No. 11419—Purchasing Agent—W. H. S.—B. O'H.—September 5, 1951.)

In your letter of August 24, 1951 to the Corporation Counsel, you state that you have a letter from the department of Subways and Superhighways dated August 22, 1951, copy of which is attached to your letter, requesting that authority be obtained from the city council to issue a Change Order to the Kil-Bar Electric Company in the amount of $4,335.40 for reimbursement of said company for furnishing special watch service which was required to protect materials and equipment installed in the subway tubes prior to the scheduled opening date.

You request our opinion as to whether payment for this service may be made under the Purchasing Act and Ordinance after approval by the city council.

The chief subway engineer, in his letter of August 22, 1951 to you, states:

> "This service was necessary as a means of safeguarding the critical materials and equipment installed in the Dearborn Street Subway in order that the formal opening of the subway would not be delayed because of the acts of prowlers and vandals. It is also our opinion that the contractors are not obligated to assume the cost of this special watch service."

As the Dearborn Street Subway was nearing completion, and when practically all of the critical materials and equipment had been installed in the Subway tubes, the chief subway engineer states that his department was confronted with the problem of keping prowlers and vandals out of the subway tubes as "in the event any of this material or equipment was damaged or stolen it would be replaced only after a long delay," and that this would necessitate the postponement of the formal opening of the subway as scheduled. There were twelve stations and numerous other locations were trespassers could gain entrance.

The chief subway engineer also states that he discussed the matter with the police department and "found they did not have sufficient men available to guard the many entrances to the subway during the night hours and week ends when our contractors were not using the entrances." He also states that the problem was discussed with the Central Watch Service and others, and that his department received from the Central Watch Service a proposal for checking the entrances to the subway every half hour at a cost of $995. a month.

The chief subway engineer further states:

> "On October 20, 1950, we called a meeting of the various contractors working in the subway and requested them to furnish without cost to the city, a watch service similar to that proposed by the Central Watch Service. Although the contractors did not agree to assume this cost, they did agree to employ such a service with the understanding they would be permitted to file a claim for reimbursement from the city at a later date.
>
> "It was agreed by the attending contractors that the Kil-Bar Electric Company would act as their representative, and that each contractor would share the cost of this service, pending the subsequent determination of the city's responsibility to assume the cost."

The question whether it was the obligation of the City or of the Contractors to defray the expense of the special watch service which the Commissioner thought prudent to engage we assume was one of the matters discussed at the conference on October 20, 1950 and on which no agreement was reached, the Contractors nevertheless agreeing to go ahead with the work with the right reserved later to file claim for reimbursement.

If the obligation was the City's, and not the contractual obligation of the Kil-Bar Electric Company and of the other subway contractors, and the Commissioner nevertheless deemed the work necessary to be done and the Contractors were willing to assume its performance at the City's expense, the matter would have been covered by the provisions of Article 26, General Conditions, Section I, Standard Specifications for Subway Construction (9th paragraph, page 9) and Chapter 26-15 of the Municipal Code of Chicago, governing extra work and payment for extra work. Said provisions require (1) a report to the city council by the purchasing agent, setting forth fully what extra work, labor or materials, are desired, the necessity therefor, and the estimated additional expenditure required for such extras; (2) prior express authority of the city council for such

extras and for the expenditure of the amount to be paid therefor; and (3) written order by the purchasing agent to the contractor or contractors to perform the extra work. We understand that none of the above conditions was complied with.

The arrangement whereby the subway contractors acted jointly in furnishing the special watch service, through their designated agent, the Kil-Bar Electric Company, thus would appear to have been regarded as a separate transaction under which the Contractors advanced the expense of the watch service with the understanding that they would be permitted to file a claim for reimbursement from the City at a later date. The power of the City, however, to enter into a contract of any nature whatever for the furnishing of labor, services or supplies is subject to the provisions and limitations stated in Article 22 A-3 of the Cities and Villages Act, which states that purchase orders and contracts of whatever nature for labor, services or work involving amounts in excess of $2,500, shall be let by free and open competitive bidding after advertisement. The exemptions in Article 22 A-4 and 5 to the requirements for public bidding after advertisement we do not think are applicable in the present instance.

As the City was without power to enter into a contract directly with the Central Watch Service when the amount involved exceeded $2,500, unless such contract was let by competitive bidding after advertisement, it follows that the limitation upon its power to contract could not be removed by an arrangement whereby the Kil-Ber Electric Company actually entered into the contract with the Central Watch Service and later was reimbursed by the City.

In view of the fact that the furnishing of special watch service at the expense of the City if considered as extra work under existing contracts required among other things prior council authorization and if considered as a separate contract on purchase order required competitive bidding after advertisement, neither of which conditions was present, the presumption is that the contractors in proceeding with the arrangement as recited by the chief subway engineer either (a) accepted the furnishing of said service as part of their respective contractual obligations or (b) regarded the expense entailed thereby as a justifiable investment in insurance against possible theft and demolition losses to them occasioned by acts of transpassers prior to the completion of contract and acceptance by the City.

All subway contracts are explicit in placing upon the contractor the obligation to furnish at his expense watchmen to protect the public, workmen on or near the site, materials, tools, machinery and equipment, also all work performed until completed and accepted. The provision in Contract E-3, which is similar to that in other subway contracts, beginning on line 24 on page 37, reads:

> "The Contractor shall also furnish watchmen not only to protect the public, and those who work at or in the vicinity of the work under this contract, but to protect all materials, tools, machinery and equipment to be incorporated into or used in the work as well as all work performed by the Contractor until said work has been completed and accepted by the Engineer."

The service of the Central Watch Service covered the entire area in which six contractors were engaged in the performance of their respective contracts. Mr. Dick Van Gorp, chief subway engineer, verbally informs us that the contractors regarded it as a special service supplementing that furnished by their own watchmen.

Article 12 of the Standard Specifications for Subway Construction, General Conditions—Stction II, at the top of the left hand column on page 16, states:

"The Contractor shall assume all responsibility for the security and safety of everything he may have on the property of the City or other owners."

Contract E-3, which in this regard is similar to all other Subway Contracts, on page 19, third paragraph, states that the contract price

"* * * includes * * * all loss or damage arising out of the nature of the work or from the action of the elements or from any unforeseen obstruction or difficulty encountered in the prosecution of the same; and includes all risks of every description connected with the work."

Regardless of the extent to which the contractors were obligated to go in the matter of furnishing watch protection, it is clear that the financial loss resulting from thefts or other acts of trespassers were among the risks for which they, and not the City, were responsible. It is reasonable to suppose that the employment of the special watch service as recommended by the Commissioner greatly reduced this risk and to that extent operated as a distinct benefit to the contractors. The City likewise benefited inasmuch as thefts and acts of trespassers, the financial burden of which would have fallen on the constructors, nevertheless would adversely affect the public use and convenience is probable delay in putting the subway into operation.

It is understandable, too, that refusal of the contractors to make immediately possible the commencement of such service in the manner described might have defeated the protective purpose desired as during the period required either to obtain council authorization or to advertise for bids unrestrained vandalism might already have wrought the damage feared.

In our opinion there is no legal validity to the claim of the contractors for reimbursement by the City since they were charged with knowledge of the limitations on the power of the City and the authority of the Commissioner and the Purchasing Agent.

The facts and circumstances, however, would justify a settlement based upon equitable principle which the city council legally may approve.

These may be summarized as follows: (a) that the employment of the special watch service benefited equally the City and the Contractors; (b) that the Contractors proceeded immediately in furnishing it on request of the chief subway engineer and for such mutual advantage; and (c) that the action of the contractors prevented delays which might have been harmful both to the Contractors and the City.

If consideration is given to this suggestion an equitable settlement in our opinion would be for the City and the Contractors to divide the cost of the service, and the City to pay to the Contractors $2,167.70 as its half.

Article 22 A-3 of the Cities and Villages Act provides that purchase orders and contracts which shall involve amounts of $2,500 or less.

"* * * may be let in the open market in a manner calculated to insure the best interests of the public, after solicitation of bids by mail, telephone, or otherwise."

As the chief subway engineer consulted not only the Central Watch Service but others, and submitted the proposal of the Central Watch Service to the contractors so that any one of them might suggest another responsible party to do the work at less expense, the provisions of Article 22 A-3 as regards purchase orders or contracts $2,500. or less appear to have been complied with.

In our opinion, if Kil-Bar Electric Company and the other contractors agree to a settlement of their claims in the amount of $2,167.70 the city council may legally approve the settlement and authorize its payment.

ADDITIONAL GASOLINE TAX

(No. 11447—Purchasing Agent—J. E. C.—November 19, 1951.)

Your letter of October 3, 1951, requests our opinion as to whether the City is liable for an additional one cent per gallon upon gasoline which contractors must now pay under an amendment to that tax which became effective August 1, 1951.

An examination of the contract discloses that the contract is for delivery of gasoline as needed, for the period ending December 31, 1951, with the right in the City to extend the period for an additional 150 days.

The contract carried the following provisions:

> "The prices herein include all Federal and/or State, direct and/or indirect taxes that apply.
>
> The bidder shall offer a price in cents per gallon below, equal to or above such published price, which variation, if any, shall be the net change resulting from the deduction of the Federal Tax which is usually incorporated in the published price, and the inclusion of any other taxes the Contractor is subject to.
>
> For all deliveries the price billed shall include the State of Illinois Tax of 3 cents per gallon, as this will be paid by the Contractor to the State.
>
> The bidder shall also state a maximum or limiting price in cents per gallon. In no event will the price paid by the City exceed the limiting price."

In general contracts are to be construed so that the intentions of the contracting parties will be carried out. (Opinions of the Corporation Counsel, Volume 18, Page 846). In the instant case it appears that although the contracting parties agreed that the bid price which would take into consideration all taxes to be paid by the contractor, both parties understood at that time that the Illinois tax was 3 cents per gallon. It thus appears that the parties intended that the contractor should take into consideration only the 3 cents per gallon tax in computing the amount to be charged the City.

However, the parties further contracted for a maximum or limiting price. The purpose of placing this maximum or limiting price per gallon upon the gasoline was to have a firm figure beyond which the City could not go in the event that the variable published price, which was to be the key to the cost of the product, would for one reason or another get too far out of line. The effect of placing such a ceiling would be to protect the City in the event of a rapidly rising market due to increased labor or transportation costs. The City would thus have a firm figure which could be budgeted.

Under these circumstances, we are of the opinion that your office is not authorized to pay an amount per gallon which exceeds the maximum or limiting price and that the bidder, when the specifications call for such a limiting price, assumes the risk of rising costs (including tax costs) and if a loss results because of the rising market, the loss must fall on the bidder who voluntarily assumed the risk of the bid under these terms.

Although we are of the opinion that you can pay no more than the maximum or limiting price, we see no objection to paying the amount due based on the limiting price less any discounts provided for the contract. The attorneys for the contractor have agreed to accept payment in this manner without prejudice to the rights of either party in any dispute which might arise on the question of whether a greater amount is due.

FEDERAL CONSTRUCTION PERMIT

(No. 11453—Purchasing Agent—J. C. M.—November 26, 1951.)

In your letter of October 18, 1951 you request an opinion as to whether or not (1) the Purchasing Agent may award and consummate a contract on construction regulated by CMP Regulations, without obtaining Federal permission to begin construction with necessary allotments as required by these regulations, and (2) if so, what the City's liability would be to contractor if the construction permit was not approved by the Federal Government and the construction failed to proceed.

As to (1), the Purchasing Agent, by authority of the City Council, may award and consummate contracts for public improvements without Federal permission.

As to (2), the proposed contract, (p. 4), (p. G-5, G-6), contains provisions as to delay in the starting of the work, the progress thereof, the stoppage of work and that there is to be no additional monetary compensation on account of delays.

While these provisions are not as comprehensive as might be desired, they probably will suffice to cover the particular project. In view of the public need for the improvement, the Federal Government, with the cooperation of the State, will probably relax the restrictions as to critical materials required for the improvement.

Under the proposal (p. 4) the contractor agrees to complete all work, including all working drawings, under the contract within eighteen months, except as specified in regard to delays and extensions of time. Provision for extension of time is made on pages G-5 and G-6 equivalent to such delay. We mention this because of the difficulties that may arise by reason of the National Defense Act. No one can anticipate, with any degree of certainty, what difficulties may be encountered in a project of this kind and both parties to the contract have to take risks if the job is to be done.

EMERGENCY PURCHASE

(No. 11509—Purchasing Agent—J. E. C.—April 2, 1952.)

In your letter of March 2, 1951 you referred to a requisition from the Division of Bridges for a supply of steel grating, to be used in the repair of the roadway of the Throop Street Bridge over the Chicago River.

Prior to the receipt of this letter, your Mr. O'Connor was in the office at which time he left a memorandum signed by R. B. Berry, dated February 23, 1951, a letter from the Commissioner of Pubilc Works dated February 14, 1951 and three sets of maps.

You state in your letter that the cost of materials will require an expenditure of approximately $9,500.00 which could be procured under the emergency provision of the Municipal Purchasing Act and you request our opinion as to whether or not procurement should be recognized as an emergency.

Section 5 of the Municipal Purchasing Act (Chap. 24, par. 22-A-5, Ill. Rev. Stat. 1949) makes provision for emergency contracts. That section provides that in the case of an emergency affecting the public health and safety, so declared by the council, the City Council may authorize the letting of contracts to the extent necessary to resolve such emergency without public advertisement.

That section further provides that the Purchasing Agent may purchase "any supplies, materials or equipment for immediate delivery to meet bona fide operating emergencies where the amount thereof is not in excess of Ten Thousand Dollars ($10,000.00)."

Under the last quoted provision, it is apparent that the necessity must clearly arise from a "bona fide operating emergency." Speculation, unsupported by substantial evidence, that a shortage of a given item impends, would not meet the requirements of the statute, nor would the rerouting of traffic caused by the closing of a bridge in the absence of a showing that the use of the bridge is of great importance.

Consultation with the staff of the Bureau of Engineering discloses the following:

That steel grating is a new method of surfacing the roadway of bridges, which support heavy truck traffic in a far superior manner; that the delivery of steel has been quoted at 15 months from date of order; that no substitute for the steel grating should be used on this bridge due to the heavy truck traffic, for the reason that the life of same would be very short and the bridge would be closed for repairs frequently. The surfacing with steel grating would cause the closing of the bridge for approximately four months.

We are of the opinion that this section of the Purchasing Act does not authorize the purchase of steel grating for the repair of this bridge since the only emergency is the delay in procuring the product. If there is normally a fifteen month delay in any event, a delay of a few additional weeks while Council approval of a contract is pending cannot justify the exercise of the extraordinary authority granted under this section of the statute.

We are returning herewith the blue prints, the requisition and letter of February 14, 1951 transmitted from the Office of the Commissioner of Public Works.

LOSS OF SALVAGEABLE MATERIAL

(No. 11543—Purchasing Agent—B. O'H.—May 22, 1952.)

In your letter of May 6, 1952, to the corporation counsel you request our opinion as to the liability of the city relative to the claim of Cleveland Wrecking Company, contractor, for the loss of salvageable materials from building No. 55 situated at 540-552 S. Wells Street, Chicago.

With your letter you transmit copies of

(a) letters to you from the department of subways and superhighways dated January 21, 1952 and March 25, 1952,

(b) letter from Cleveland Wrecking Company to department of subways and superhighways dated January 10, 1952 enclosing itemized statement of radiators alleged to have been stolen from the building at 540-552 S. Wells Street.

(c) letter to you from Cleveland Wrecking Company dated January 30, 1952, and

(d) inter-office memorandum of the department of subways and superhighways to Mr. Grimm from Mr. Wakefield dated January 16, 1952 and described as a "comprehensive report of all known incidents and observations pertinent to the above subject."

The claim of Cleveland Wrecking Company against City is in the total amount of $3,380.90, based upon the price of 146 radiators (with 10,803 feet radiation at 20 cents per square foot) and 700 pounds of heavy copper cable (at 20 cents per pound) alleged to have been stolen from the building between June 21, 1951, the date on which bids for contract No. 16110 were opened, and November 13, 1951, the date of the execution of said contract No. 16110. Mr. Wakefield in his inter-office memorandum of January 16, 1952 states that 'the exact number of cast iron radiators which had been removed from the building prior to October 24, 1951" was 136 and that the "total area of radiation for all missing radiators would therefore be 10,530 square feet, which is slightly under the total area on which the Contractor has estimated his claim." Mr. Wakefield does not dispute the copper cable item as regards the quantity of missing cable.

On June 13, 1951 in the case of the Bosley Wrecking Company, contractor on specifications No. 71-51-2, in an opinion to you, approved by the Corporation Counsel, we said:

> "If the Contractor can establish to the City's satisfaction that all or any of such fixtures were removed from the building between the time it inspected the site prior to submitting its bid and May 14, 1951, when the Contractor took possession, it is our opinion that it is entitled to recover from the City the value of the fixtures removed, said value to be determined by the current prices obtaining in the salvage market wherein the Company disposes of like materials. It was the obligation of the City to turn over to the successful bidder the building with all the salvageable materials therein substantially as they were at the time of the bidder's inspection of the site prior to submission of its bid. If during the period of possession by the city, between the date of submission of bids and the effective date of the contract, materials were stolen or otherwise removed from the building we think there can be no doubt of the City's liability to the Contractor in an amount equal to that which the Contractor might have realized from the sale of materials as salvage. The burden, however, is upon the Contractor to establish (1) that the materials were in the building at the time it inspected the site in the preparation of its bid and (2) that said materials were not in the building when it took possession."

In the present case it appears from the documents furnished us that there is agreement by contractor and city that (a) certain radiators and cable were in the building at 540-552 S. Wells Street at the time of the inspection of the site by the bidders prior to the submission of bids, and (b) that at the time of the execution of the contract and the taking of possession of the site by the contractor, a large number of radiators and cable were missing, having been stolen or otherwise removed during the period the city was in possession of the building.

It is our opinion that the city is liable to the contractor for reimbursement of its loss in an amount to be determined by the current prices obtaining in the salvage market wherein the contractor disposes of like material, *less the cost the contractor would have had in removing the material from its location in the building and preparing it for sale and delivery to the salvage market.*

We suggest that (a) the claim of contractor on the radiator item should be based upon 10,530 square feet radiation as established by Mr. Wakefield, (b) you should satisfy yourself that the price figures furnished by contractor are approximately those obtaining currently on the salvage market and (c) that a proper amount should be deducted to cover the saving to the contractor which it otherwise would have in removing the material and preparing and transporting it to the salvage market.

The value of material on the site and prior to wrecking and removal is obviously less than its value after the work of wrecking and processing has been done.

While the city is liable to reimburse the contractor for its actual loss, the contractor should not be permitted to make a profit by charging for missing material the same price it could have received for the materials after wrecking the building, processing the material and delivering it to the purchaser.

BRIDGE ELECTRICAL SUPPLY

(No. 11553—Purchasing Agent—J. E. C.—June 25, 1952.)

With your letter of May 20 you attached three electric service agreements in quadruplicate for the supply of electric power for the bridges over the Calumet River at 92nd Street, 100th Street and 106th Street prepared by the Commonwealh Edison Company at the request of the Department of Public Works.

Your request our opinion as to whether or not these contracts should be executed by the Purchasing Agent or by the Commissioner of Public Works. Your attention is called to the "Opinions of the Corporation Counsel," Volume XXII, page 133, at 138. This opinion was written by Mr. Alexander J. Resa on October 10, 1947, and on page 138 he states:

> "It is our opinion that a fair interpretation of the entire section requires us to conclude that all purchase orders or contracts involving amounts of One Thousand ($1000.00) Dollars or less must be signed by the Purchasing Agent and by the Comptroller and that in the more important matter of contracts involving in excess of One Thousand ($1000.00) Dollars there must be added to these signatures the signature of the Mayor or his agent."

In reply to your question we state that the above is the opinion of the Corporation Counsel and in line with same these contracts should be executed by the Purchasing Agent instead of the Commissioner of Public Works; however, an amendment to the law has increased the amount from $1000. to $2500.

TAX EXEMPTION CERTIFICATES

(No. 11579—Purchasing Agent—R. J. N.—September 9, 1952.)

You recently transmitted to this office your file on Contract No. 16237, being the Cofferdam contract for the Central District Filtration Plant and requested our opinion as to your authority to execute an exemption certificate, exempting the contractor from the payment of a charge of six cents per cubic yard for the obtaining of dike material from the bed of Lake Michigan to be used in the construction of the Cofferdam for the Central District Filtration Plant.

You informed us that after specifications were made available to contractors, the following question was asked by a prospective contractor:

> "If the clay for the dikes is obtained in the State of Illinois, will the contractor have to pay any fee to the State for depletion of resources,"

The department then issued Addendum No. 1 to the specifications which read in part as follows:

> "Where the City of Chicago is exempt from any of the aforementioned taxes, fees or other charges, the City will furnish necessary exemption certificates."

Although the contract provides that the dike material will be furnished by the contractor, the question propounded and the answer made indicate that both the contractor and your office were mindful of the provisions of Section 18 of *"An Act in Relation to the Regulation of the Rivers, Lakes and Streams of the State of Illinois,"* approved June 10, 1911, as amended, Chapter 19, Section 65A, Illinois Revised Statutes 1951, which provides in substance that where the material taken from the bed of the stream is to be furnished by a municipality in connection with any public project and the municipality is not acting on behalf of others who are required to furnish the material, the State may exempt such municipality from the payment of the charges therein provided.

Under these circumstances, it is apparent that the contractors who bid on the project and the City of Chicago intended to reduce the cost to the City by procuring the exemption provided for under the statute above referred to.

We are therefore of the opinion that you have authority to request an exemption from the tax on the theory that the material is furnished by the City of Chicago for use in a public project.

GARBAGE REMOVAL EQUIPMENT

(No. 11599—Department of Streets and Electricity—J. C. M.—October 17, 1952.)

In your letter of October 16, 1952 you request an opinion as to whether the City of Chicago is authorized under the provisions of Chapter 24 (Cities and Villages Act), Section 40-1 to enter into contracts for a period not exceeding five years for deferred payment purchase of equipment required by your department in the transportation of garbage and refuse.

That statute was enacted in 1897 and Section 40-1 provides:

> "Any city having a population of more than 5,000 as shown by the last preceding school or federal census has the power to make contracts for more than one year and not exceeding five years relating to the collection and final disposition of garbage and ashes."

In *Consumers Co.* v. *City of Chicago,* (1924), 313 Ill. 408-417, the court held:

> "The power to remove and dispose of garbage, refuse and other waste includes the power to create and use the necessary means effectually to accomplish the purpose. (*Dutton* v. *City of Aurora,* 114 Ill. 138; *County of Mercer* v. *Wolff,* 237 *id.* 74; *City of Chicago* v. *Wisconsin Lime and Cement Co.,* 312 *id.* 520). Moreover, the city is expressly empowered to acquire and hold real and personal property for corporate purposes."

That statute was before the Supreme Court in the case of *Avery* v. *City of Chicago,* (1931), 345 Ill. 640, where the city sought to enter into a contract for the removal of dead animals on the basis that the language in Section 40-1 was sufficient to cover that subject. The court held that the removal of dead animals did not come in the category of the removal of garbage. However, the court recognized that contracts relating to the collection and final disposition of garbage and ashes for periods of more than one year and not exceeding five years could be made and that under Section 40-2 it then becomes the City Council's duty to include in the annual appropriation ordinance for the then current fiscal year an appropriation of a sum of money sufficient to pay the amount which, by the terms of the contract, will become due and payable during the year.

The purchase of equipment for the transportation of garbage and refuse certainly relates to the collection and final disposition of garbage and refuse. It is our opinion that a contract for the purchase of such equipment, providing for the payment thereof over a period not exceeding five years, may be entered into when authorized by the City Council. If such a contract is authorized, the City Council would be required to include in the annual appropriation ordinance for each year of said period an appropriation of a sum of money sufficient to pay the amount to be due in each of the fiscal years covered by said contract, as provided in Chapter 24, Section 40-2.

WAGE SCALE CHANGES

(No. 11655—Purchasing Agent—J. G. O.—March 4, 1953.)

Your letter of February 2, 1953 requested an opinion as to whether changes in pensions and other fringe benefits paid miners constitute a change in 'wage scales' as stated in paragraph entitled "Price Changes," page 8, of Specifications and Contract Documents No. 11-53-2, for Steam Coal.

The question presented here necessitates the determination of the meaning of "wage scales,' as used in Specifications and Contract Documents No. 11-53-2, page 8, which reads as follows: "The price of coal to be paid by the City shall be at unit prices as shown on proposal sheet unless there occurs (a) change in freight rate over the rates shown in "DATA ON COAL PROPOSED" on proposal and/or (b) change in the cost of producing coal at the mine or mines from which the coal covered by this contract is to be shipped caused only by (1) change in wage scales

and/or hours of employment; (2) enactment of Federal or State legislation; (3) imposition by Federal or State statutes of a tax on sale or mining of coal, or changes in rates of such taxes; (4) imposition by Federal or State statutes of a levy on tax on payrolls."

Our Supreme Court construed the meaning of the word "wages" in the case of *Massie* v. *Cessna*, (239 Ill. 352, 1909.) The Court said (page 359): "Wages is usually restricted to sums paid as hire or reward to domestic or menial servants and to sums paid to artisans, mechanics, laborers and others employed in various manual occupations, while salary has reference to the compensation of clerks, bookkeepers, other employees of like class, officers of corporations and public officers."

Webster's New International Dictionary, Second Edition, defines "wages" as follows: "Pay given to labor, usually manual or mechanical, at short stated intervals, as distinguished from salaries or fees" and defines "wage scale" as "a series of rates of wages paid for related tasks."

The validity and construction of a contract must be determined by the law of the place where the contract is made.

Harris v. *American Surety Co. of New York.* (1939, 372 Ill. 361; 40 I. L. R. 181.)

Where plain, common words are used in their ordinary meaning, they must be accepted in that sense.

(*Shell Oil Co.* v. *Manley Oil Corp.*, 124 F. 2, 714).

A contract is not ambiguous if court can determine its meaning without any guide other than a knowledge of the simple facts on which, from the nature of language in general, its meaning depends. (17 C. J. S. contracts No. 494; *No. Pacific Ry. C.* v. *U. S., D. C.* Minn. 70 F. Supp. 836 (1946 Aff'd. C. A. 188 F. 2, 277).

If there is no ambiguity in terms of contract instrument itself is only criterion of intention of parties.

Dormeyer v. *O'Connell*, 364 Ill. 467 (1936).

Green v. *Ashland Sixty-Third State Bank*, 346 Ill. 174 (1936).

Englestein v. *Mintz*, 345 Ill. 48 (1931).

Rules of construction have no application if intention may be ascertained from wording of contract.

Dormeyer v. *O'Connell*, 364 Ill. 467 (1936).

We have examined the letter dated January 2, 1953, written to Mr. John Scott, Vice President, Republic Coal & Coke Company, by Mr. Joseph J. Loverde of the law firm of Jonas and Jonas. The reference made therein to the Taft-Hartley Act and the W. W. Cross & Company case has no application to the present contract as both the National Labor Relaions Act and the Taft-Hartley Act are primarily concerned with the bargaining relationship of employer and employee, and the findings of the National Labor Relations Board have no judicial significance beyond the scope of the Act.

In view of the foregoing, it is our opinion that changes in pensions and other fringe benefits do not constitute a change in "Wage Scales."

COMPENSATION FOR REMOVAL OF TREES

(No. 11667—Superintendent of Sewers—W. V. L.—March 23, 1953.)

We acknowledge receipt of your letter of recent date together with four memoranda attached thereto in which you state that the construction

of a new sewer in Logan Boulevard will require the destruction of a line of about 135 fine trees together with about 65 other trees not in the main line of the construction work.

You state that you have had numerous conferences with representatives of the Chicago Park District about obtaining a permit for such construction work, and that in your conferences you offered to replace said trees with new young trees 6 inches in diameter. You further state that the Park District desires to be compensated for the "full book value" of the trees which are in the way of said construction work. The Park District contends that if 6-inch diameter trees are substituted by the City under its sewer contract, they will insist upon compensation for their trees, based on the difference in cost between the new young trees 6 inches in diameter and the "full book value" of the existing trees.

You request our opinion as to whether or not it is proper for the City to use sewer bond funds for paying the "full book value" of the trees or whether our liability is limited to replacing the trees destroyed with reasonable size trees such as trees having a 6-inch diameter. You also request our opinion as to whether or not the City could acquire a right-of-way for the sewer by condemnation proceedings against the Chicago Park District and, if so, would the court be likely to award the Park District the "full book value" of the trees instead of the cost of restoring substitute trees.

Logan Boulevard is under the jurisdiction of the Chicago Park District, and the City of Chicago has no authority to interfere with that jurisdiction unless reservations are made to the City; *(West Park Commissioners* v. *Chicago,* 152 Ill. 392). We have investigated the Park District's jurisdiction in Logan Boulevard and found that Logan Boulevard (formerly named Humboldt Boulevard) extending between N. Western Avenue and W. Diversey Boulevard was purchased by condemnation by the West Chicago Park Commissioners in the year 1896; that Logan Boulevard extending west of Western Avenue to Logan Square was purchased by condemnation by said Park Commissioners in the year 1869. You have not informed us whether the Park District has granted any rights or sewer easements to the City in Logan Boulevard, and we have been unable to find any record of any documents referring to any reservations to the City in the aforesaid area. In examining your sewer plats we did find that at the present time there is a city sewer in Logan Boulevard which was constructed about the year 1892. This sewer work was authorized pursuant to special assessment proceedings commenced by the Department of Public Works about the year 1890. From these facts, we conclude that the City had acquired the right to construct a sewer in Logan Boulevard.

Therefore we have the right to construct, operate and maintain a new sewer in said street without the necessity of instituting condemnation proceedings at the present time.

Chapter 105, Section 8-11, Illinois Revised Statutes, 1951, reads as follows:

> "To all municipalities lying within the limits of any park district is hereby expressly reserved the right to lay and repair water and sewer pipe under the surface of any boulevard or park therein in the same manner and to the same extent it could have been done before the organization of such park district; provided said property shall be restored to original condition by said municipality on completion thereof."

Since the Park District's jurisdiction over its streets is paramount and exclusive, it will be necessary for you to obtain a permit before work is done by the City in Logan Boulevard. Sewer construction and maintenance is not a governmental function. *(Seben* v. *City,* 165 Ill. 598.) The portion of the boulevard that will be excavated for installing said sewer will have to be restored to its original condition as nearly as may be done.

If, in the performance of said work any property belonging to the District is taken or damaged, the District would be entitled to compensation for the value of taking or damaging its property including the value of trees which would be destroyed in the process of construction work. In our opinion that value would be measured by the cost of restoring the existing trees, and not necessarily the "full book value."

The use of sewer bond funds in payment for said trees would be a proper charge because removing and replacing said trees would be a consequence of the construction of the sewer.

The question of compensation to the Chicago Park District, that is the difference between the value of 6-inch diameter trees and the "full book value" of the existing trees, is a matter for negotiation between the City and the Park District. If you are unable to agree upon restoring the trees or the cost thereof, we suggest that you proceed with the construction of the sewer as a matter of right and leave the question of compensation for damages on account of said trees to be disposed of in an action at law by the Chicago Park District against the City of Chicago.

REMOVAL OF PROPERTY FROM EASEMENT

(No. 11670-A—Finance Committee—W. V. L.—March 24, 1953.)

On July 2, 1952, (C. J., p. 2643) the City Council passed an ordinance for the acquisition of properties to be used in connection with the construction of the Central-South Side sewer in a sum not to exceed $500.00. After the offer of the aforesaid sum was made pursuant to the terms of the ordinance, the attorney for the owner of the property sought to be acquired called our attention to the fact that the land sought to be acquired is presently used for storing structural steel members, and miscellaneous steel angles in connection with his client's business; that it will cost the owner about $300 to remove the material from the area to be used during construction work and later replace it to the same area after sewer work is finished and the surface is restored to its original condition, as nearly as may be.

The land sought to be acquired has no building on it, and the property is stored in the open. In arriving at our original offer of $500.00, we took into consideration only the fair cash market value of the land as land burdened with an easement. No consideration was given to the expense of removing and replacing the personal property, resulting from the temporary occupancy of the premises by the construction work. Ordinarily, the removing of personal property situated in a building sought to be acquired is not compensable. However, in Illinois, compensation is allowed for the cost of removing personal property if the cost is not hypothetical or speculative in character. In this case we feel that the owner is entitled to compensation for the cost of moving his property because the cost is a necessary consequence of the work and not hypothetical or speculative. *St. Louis R. R. Company* v. *Copps*, 67 Ill. 607; *Chicago Railway Co.* v. *Hock*, 118 Ill. 587; *Atchison, etc.*, v. *Schneider*, 127 Ill. 144; *Metropolitan Railway Company* v. *Siegel*, 161 Ill. 638.

After extended negotiations with the owner, we have tentatively agreed, subject to your approval, to pay $750 for the permanent and temporary easements in lieu of the $500 previously offered.

We are submitting herewith for your consideration an amendment to the ordinance passed on July 2, 1952, to give the Comptroller authority to acquire and pay for the easements as set out above.

C. PURCHASING AGENT

MICROFILMING PURCHASING RECORDS

(No. 11459—Purchasing Agent—A. F. G.—December 14, 1951.)

In your letter of December 5, 1951, you ask if "it will be permissible for the Department of Purchases, Contracts and Supplies to microfilm procurement documents, such as requisitions, purchase orders, contracts and all related correspondence, to send such original documentation, then to scrap or salvage and to employ thereafter microfilm record in lieu of the original documents".

The act which authorizes municipalities to microfilm records and destroy original records after the same have been microfilmed was enacted at the last session of the General Assembly. It was in the form of an amendment to an Act which permitted the microfilming of records of counties and courts. (Paragraphs 31 to 34, incl., chapter 116, Ill. Rev. Stat. 1951, Vol. 2.)

Section 1 of the said Act is as follows:

> "Any elected or appointed officer of any county, municipal corporation or political subdivision of the State of Illinois or the clerk of any court may cause any or all public records, papers or documents in his custody or under his supervision to be photographed, microphotographed or otherwise reproduced on film. The film shall comply with the minimum standards of quality approved for permanent photographic records by the National Bureau of Standards and the device used to reproduce the records on the film shall be one which accurately reproduced the content of the original."

Section 4 of the Act provides the manner of submitting lists of records to be filmed to the city council for approval and is as follows:

> "Any such officer or clerk of court before causing any records, papers or documents to be photographed, microphotographed or reproduced on film, as provided in Section 1 hereof, shall file with the county board of his county or with the city council, board of trustees or other governing body of the municipal corporation or political subdivision, as the case may be, a statement signed by him listing the records, papers and documents he desires to cause to be so photographed, microphotographed or otherwise reproduced on film and stating that, subject to the prior approval of the county board, or the city council or board of trustees or other governing body of the municipal corporation or political subdivision, as the case may be, he proposes to cause the records, papers and documents so listed to be reproduced on film and subsequently destroyed. A copy of such statement shall be posted, in a public place in the office of the county, city or village clerk, or in the office of the governing body of the municipal corporation or political subdivision, as the case may be, and in the office of the officer or clerk of court signing such statement. The county board, or the city council or board of trustees or other governing body of the municipal corporation or political subdivision, as the case may be, at any regular or special meeting held not less than thirty days after the filing and posting of such

statement, shall consider said proposal and any objections thereto and may authorize the officer or clerk of court signing such statement to cause any of the records, papers and documents listed in the statement to be photographed, microphotographed or otherwise reproduced on film and to cause such records, papers and documents when so reproduced on film to be destroyed in accordance with the provisions of Section 3 hereof."

Section 3 of the Act, and with which the destruction of records must accord as provided in section 4, is in part as follows:

"Whenever such reproductions are placed in conveniently accessible files and provision is made for preserving, examining and using the same, any such officer may authorize or provide for the destruction of his original records, papers or documents which have been on file for ten years. Original records, papers or documents created prior to 1870 may not be destroyed. * * *"

From the foregoing it appears that the city council may authorize the filming of any records of the municipality, but may not cause the destruction of original records so filmed which have not been on file for ten years.

PURCHASES BY MUNICIPAL COURT

(No. 11613—Purchasing Agent—J. E. C.—November 12, 1952.)

In your letter of October 29, 1952, you request a legal opinion as to whether or not there are any conditions or set of circumstances under which the Municipal Court of the City of Chicago and its agencies can procure or make purchases of supplies, materials or services outside the scope of the Municipal Purchasing Act. You refer to five requisitions for furniture the cost of which exceeds $2,000.00 which have already been purchased by the Chief Justice of the Municipal Court and received by them without any action or approval of the Purchasing Agent or without the Purchasing Agent taking competitive bids on these requirements.

This question was decided in an opinion by Mr. Resa on October 10, 1947, in which he stated that it is our opinion that authority over purchases and contracts for the Municipal Court is vested in the Purchasing Agent under the Municipal Purchasing Act. The full opinion is recorded in the Opinions of the Corporation Counsel, Vol. XXII, p. 134.

PURCHASING AGENT'S DUTIES STOCK INVENTORIES

(No. 11578—Purchasing Agent—R. J. N.—August 18, 1952.)

Your recent letter pertaining to warehouse and store controls, requests our opinion as to "how you shall function" with respect to the responsibility and accountability for inventory, and inventory records of all stocks and materials, supplies and equipment contained in city storerooms, stock yards or warehouses of the city.

Your letter states that these commodities are stored in four types of warehouse or storeroom as follows:

1. General warehouse for diversified stocks which are drawn on by all of the using departments of the City.

2. Service storerooms such as the Department of Streets and Electricity shop at 37th and Princeton Avenue where inventories of parts are kept to facilitate specific servicing of vehicles.

3. Storerooms for commodities which are not of common usage but where the time lag between order and delivery is so great that standby stocks are necessary to carry on the functions of the using department such as the keeping of electric light poles.

4. Storerooms where commodities which are being consumed daily are kept pending consumption such as departmental stocks of pencils, soap, etc.

Your duties in regard to all supplies purchased by the city are outlined in paragraph 15 of the Municipal Purchasing Act, (Chapter 24, Section 22-A-15, Illinois Revised Statutes, 1951, which states in part as follows:

> " * * * The purchasing agent shall: (a) adopt, promulgate and from time to time revise, rules and regulations for the proper conduct of his office, * * * (j) transfer materials, supplies and equipment to or between the various requisitioning agencies and to trade in, sell or dispose of such materials, supplies or equipment as may become surplus, obsolete or unusable, (k) control and maintain adequate inventories and inventory records of *all stocks of materials, supplies and equipment* contained in any storeroom, stockyard or warehouse of such municipality, * * *"

From the foregoing, it would appear that the legislature intended that the sole responsibility for inventory, both as to quantity and keeping of records would be in the purchasing agent, otherwise it would have been meaningless to authorize him to make transfers between departments and to require him to maintain complete inventories.

It is therefore our opinion that you are responsible for all Commodities purchased and kept by city departments until the commodities are expended. The manner of performing the responsibility thus imposed under the statute is not a legal question but a question of internal procedure in your department.

Since under the statute you also have authority to make rules for the conduct of your department, we would suggest that you may provide by rule as to when a commodity will be considered as expended, but until that point is reached, knowledge of the whereabouts of each specific item should be available to you so that you may properly perform your duties in transferring commodities where needed and disposing of obsolete items.

LEASING RADIO EQUIPMENT TO FIRE DEPARTMENT

(No. 11653—Purchasing Agent—J. F. G.—February 26, 1953.)

Reference is made to your letter of February 18, 1953, in which it is stated that requisition has been received from the Chicago Fire Department for authority to expend $95,000.00 for ultra-high frequency two-

way radio equipment chargeable to fire department equipment bonds, Appropriation Account No. 451-X-10. It is proposed to publish advertisement for bids on three bases: 1. Outright purchase, 2. Lease, and 3. Lease with option to purchase.

It appears that Illinois Bell Telephone Company is engaged in a study for installation of wire and wireless facilities for fire department communication, which is within the purview of the franchise ordinance authorizing that company to operate a telephone system in the city of Chicago, passed July 20, 1931.

The question submitted for our consideration is whether the telephone company is subject to the conditions of the public advertisement for bids to be made on the three bases proposed.

Illinois Bell Telephone Company is a public utility. It is authorized to acquire, construct, own, control, operate or manage for public use any plant, equipment or property, used or to be used, "for the transmission of sound signals or other means of communication by means of electricity (including television)" within the city of Chicago, all subject to the orders, rules and regulations of the Illinois Commerce Commission, and as to communcation by wireless equipment, subject to license by the Federal Communications Commission. It has no power to engage in the business of installing or selling equipment or appliances which is not intended to be used in its service as a public utility. By section 27 of the Illinois Public Utilities Act the company cannot, without the consent and approval of the Illinois Commerce Commission, sell or otherwise dispose of any equipment or other property which is useful in the performance of its public service. The company's contracts affecting its charges for any service performed by it are subject to approval by that commission under section 33 of the Public Utilities Act. It is understandable that the telephone company will not undertake to sell any communication equipment to the City.

The Municipal Purchasing Act (Section 22A-4 of the Revised Cities and Villages Act) exempts from competitive bids contracts for utility services. However, the telephone company has no exclusive rights under its franchise ordinance, although no person may engage in the business of a public utility in competition with the telephone company without a certificate of public convenience and necessity from the Illinois Commerce Commission. There is nothing in the telephone franchise ordinance or in the Public Utilities Act which intereferes with the right of the City of Chicago to acquire by purchase, lease, or otherwise, any equipment for operation of a communication system to be used exclusively by the fire department. That is not a public service within the meaning of the Public Utilities Act. It is permissable for the purchasing agent to advertise for bids from manufacturers of radio equipment for the installation and purchase or lease of such equipment by the City, which would exclude Illinois Bell Telephone Company as a qualified bidder.

Your inquiry to us is directed to the sole question whether it will be incumbent upon Illinois Bell Telephone Company to submit a proposal in conformity with the competitive bidding requirements of the Municipal Purchasing Act. That question has been answered. Yet we would be remiss if we failed to direct your attention to the fact that the proceeds of the fire deparment equipment bonds may be used only for the purchase of fire department equipment and not for leasing such equipment. There is no other account in the annual appropriation ordinance for the year 1953 which would authorize you to advertise for bids for leasing of communication equipment.

There is an appropriation (Account 51-D-5) for purchase of communication equipment in the amount of $10,000, which we believe can be supplemented by any amount authorized by the city council to be paid from the bond issue (451-X-10). *Tribune Co.* v. *Thompson,* 342 Ill. 503. There is also an appropriation of $5,000 for telephone service (Account

51-L-5) to which transfer may be made of funds appropriated for other purposes of the fire department after July 1, 1953, and may be expended for leasing any communication facilities installed by the telephone company.

No appropriation can be made or used for purchasing or leasing. The designation of an account for purchasing equipment does not include within its meaning hiring equipment; nor would an appropriation for hiring equipment include the purchase thereof. "In such an appropriation the combination of expenditures, part of which will be consumed during the current year, and the other part of which will be invested in equipment which will last many years, does not follow the statutory requirement of itemization for a single purpose, as contemplated by law." *The People* v. *Sage*, 375 Ill. 411, 419.

RECLASSIFYING TRUCKS

(No. 11684—Purchasing Agent—J. E. C.—April 18, 1953.)

In your letter of April 14, 1953, you request our opinion as to whether the Purchasing Agent shall reclassify a truck shown in the "stake" or "dump" class to the "special class" under the terms and conditions of the Truck Hire Agreement, form CP-70, where investigation and inspection discloses that the truck or trucks shown in either the "stake" or "dump" class have dividers for materials, shelters for tools and equipment, or are compartmentalized in one form or another for special services.

You also state that the O'Donnell Trucking Company submitted proposals, accompanied by a rider, covering 25 "stake" bodies which the Purchasing Agent has shown in the priority list under Class "2½ Stake," and on 37 "dump" bodies which are classified by the Purchasing Agent under Class "2½ Dump."

You further state that the contractor maintains that by virtue of compartmentalization certain of these trucks should be classified as a "2½ Special." The two photographs attached to your letter show the special features of the trucks.

It appears that in analyzing the bids of the O'Donnell Trucking Company for the three body types, you adopted the designation which the bidder had made in the proposal by inserting after the question "type of body" the description of "dump," "stake," or "special." Reference to the rider or inspection of the particular trucks would have indicated to you that the designation of trucks listed as "dump" or "stake" could have been expanded to include particular trucks in the listing for "special" because of compartmentalization or other features which would permit these trucks to be used as "special" trucks as well as for one of the other categories specified in the form.

If you accede to the request of the bidder, the result would be that some of its trucks would now be listed in the class 2½ special category. Examination of the bid prices indicate that in such event these trucks would be given priority numbers ahead of but one bidder, the high bidder, who has priority number 31 for one truck. The advantage thus gained by the O'Donnell Company would be minimal. We have repeatedly insisted upon a strict application of the law in regard to bidding and believe that there would be no justification for departing from that policy in this instance.

It is suggested, as a simple solution to the problem, that such trucks as the O'Donnell Company have which can qualify as class 2½ special be placed on a supplemental list and utilized when the present award list is exhausted or the trucks required by the using departments cannot be obtained from such award list, until you have an opportunity of taking new bids for class 2½ special trucks.

SALE OF SALVAGED TREES

(No. 11716—Purchasing Agent—M. I. W.—July 16, 1953.)

We have your letter of July 7, 1953 to which you attach your "Specifications and Contract Documents No. 70-53-52 for Sale of Salvage Trees Removed from City Parkways." Under one proposition of this specification it is planned that the city will make use of prisoner help at the House of Correction to trim branches, split logs and feed into wood processing machines to reduce the wood into chips for which the contractor will pay the city a unit price per ton.

Your request that we review the law relative to the use of prison labor and advise you of any adverse findings that would prevent you from going ahead with this project.

In a comprehensive opinion dated August 15, 1917 in which appropriate statutes and opinions were examined we concluded "that the products of the House of Correction can be placed upon the market." 10 Op. Corp. Coun. 397.

This opinion was based in part on language found throughout Chapter 67 of the Illinois Revised Statutes which in authorizing cities to establish houses of correction clearly expressed legislative intent that persons held in custody shall work, and that receipts from their labor shall be properly used. That Act has remained substantially intact to this date. (Ill. Rev. Stat. 1951, secs. 5, 10, 13.)

The fourth amendment to the Illinois Constitution was adopted in 1886 and reads as follows:

> "Hereafter, it shall be unlawful for the commissioner of any penitentiary or other reformatory institution in the State of Illinois, to let out by contract to any person or persons, or corporations, the labor of any convict confined within said institution."

It should be noted that the language in the "House of Correction Act" was broad enough to permit construction authorizing the use of prisoner labor in a fashion later prohibited by the constitutional amendment. With reference to the application of this amendment to houses of correction the opinion cited above said:

> "This amendment may seem to apply only to prisoners of state reformatory institutions, but I am of the opinion that considering the words 'reformatory institution' in the light of authorities on such phrases that it would include such an institution as the House of Correction." 10 Op. Corp. Coun. 397.

The effect of this opinion was to rule out the contracting of labor to private persons while at the same time approving manufacture of products and sale thereof.

In view, however, of subsequent legislation, we feel this latter conclusion must be reviewed.

The provisions of the House of Correction Act have not been modified since the adoption of the above amendment. However, other legislation has been adopted which bears on the question before us.

Section 83a, Chapter 108 Ill. Rev. Stat. (1951) provide as follows:

> "The labor of convicts and prisoners in penal and reformatory institutions of the political divisions of this State after the necessary labor for the manufacture of all needed supplies for said institution *Shall be primarily devoted to the respective political divisions in which such institution is located* and the public institutions and buildings thereof and to the manufacture of supplies for said political division and for manufacture of supplies for the public institutions owned or managed and controlled by said political division and secondly, to the State and the public institutions and buildings thereof and supplies therefor: Provided that nothing contained herein shall be construed to prevent the production of crushed limestone and lime dust in the penal and reformatory institutions of the State nor the sale to the public by the Department of Public Safety of crushed limestone and lime dust for agricultural and horticultural purposes." (Emphasis added.)

The question is whether the use of the labor of prisoners for the purpose you describe is "devoted to the respective political division in which such institution is located," that is, will such labor be devoted to the City of Chicago? If so, it is a proper use and if not, it is a use which falls under no other permitted use in this section and might clash with the policy enunciated by the Prison Industries Act to "avoid competition of the products of convict labor with the products of free labor, or the competition of such labor with free labor." *People* v. *Hughes*, 370 Ill. 255 (1938).

It is our understanding that the program of removal of the trees is part of project to remove trees whose growth threatens efficient and proper operation of city sewers. As such the removal operation is a proper purpose in which the city may engage. We further understand that prior to this time, trees were removed and disposed of not only without benefit to the city but often at additional cost. The process in which the prisoners will engage will be that of reducing the size of the salvaged trees to such proportions as to render the salvaged wood marketable instead of mere waste. The city may dispose of personal property by competitive bidding (Ill. Rev. Stat. (1951) Ch. 24, Sec. 22A-3) and we fail to see why the work performed in reducing an otherwise wasted product to a size where it becomes marketable (work which the city could properly use its regular employees to do) does not constitute work "devoted" to the City of Chicago within the meaning of the statute.

It is, therefore, our opinion that there is no objection to your proceeding as planned.

CHAPTER XIV — PUBLIC IMPROVEMENTS

A. CONSTRUCTION

USE OF ILLINOIS AND MICHIGAN CANAL FOR HIGHWAY

(No. 11142—Commissioner of Subways and Superhighways—J. G. S. —W. H. S.—May 9, 1949.)

We have your letter of March 24, 1948. It is as follows:

"On August 5, 1947, Governor Dwight H. Green sent a letter to Mayor Martin H. Kennelly requesting that an agreement be drawn whereby the cost of construction of the Southwest Superhighway (I. & M. Canal) in the city limits would be shared equally by the State of Illinois, County of Cook and City of Chicago. A copy of this letter is attached. This agreement was consummated on December 9, 1947, and a copy is attached.

A part of the letter stated that 'The Eightieth Congress of the United States passed an Act which enables the State of Illinois to use the lands now occupied by the Illinois and Michigan Canal for highway, park, recreational or any other public purpose. The Sixty-fifth General Assembly of the State of Illinois accepted the terms and conditions of this Act.

In order to fully utilize the right of way of the Illinois and Michigan Canal and reserve strips, this department revised the location of the Southwest Superhighway from that shown on the general plan of the Comprehensive Superhighway System dated April 23, 1945 to the new location shown on a general plan of the Comprehensive Superhighway System revised as of June 25, 1947. These two plans are also enclosed.

Subsequently this department made a preliminary study of existing facilities that occupy the right of way of the I. & M. Canal and found between Ashland and Damen Avenues the I. & M. Canal right of way is occupied by the Chicago Produce Terminal Company and the Diamond Glue Works. The Chicago Produce Terminal Company is owned by The Atchison, Topeka and Santa Fe Railway Company and the Illinois Central Railroad Company.

Investigation disclosed that a stipulation and an agreement had been entered in the Circuit Court of Cook County on September 15, 1928, between the State of Illinois and the Atchison, Topeka and Santa Fe Railway Company, the Illinois Central Railroad Company and the Diamond Glue Company, which provide that the above mentioned railroad companies and Glue Company shall have the right to occupy the I. & M. Canal right of way between Ashland and Damen Avenues in return for a grant of right of use of certain of

their lands by the State of Illinois. The stipulation and agreement of the Circuit Court of Cook County numbered B-46240 in Chancery has been previously submitted to you.

Your opinion is requested as to the rights of the City and/or the State of Illinois to use the right of way of the I. & M. Canal and reserve strips for highway purposes between Ashland and Western Avenues.

If the railroads are occupying the Canal right of way illegally, what steps must be taken to establish the right of the governmental agencies to the right of way so that they may proceed with construction in the area?"

The problem you present grows out of legislation and events beginning more than a century and a quarter ago. It involves controversies over interests in land, some of which are adverse to the interests and title of the State, and over the interpretation of statutes. Litigation may be needed to settle these controversies. Accordingly it has been necessary for us to read and consider many decisions of State and Federal Courts to acquire a comprehensive view of the problem. This explains in a measure why we have been unable to answer your request before this.

The State of Illinois acquired title in fee *in trust* to the bed of the canal and the two 90-foot strips on each side of the canal for canal purposes by virtue of certain Acts of Congress passed on March 30, 1822, March 2, 1827, March 2, 1833 and confirmed by an Act of the Congress passed July 1, 1947. The Act of March 30, 1822 enacted "That the State of Illinois be, and is hereby authorized to survey and mark through the public lands of the United States, the route of the canal connecting the Illinois river with the southern bend of Lake Michigan; and ninety feet of land on each side of said canal shall be forever reserved from any sale to be made by the United States, except in the cases hereinafter provided for, and the use thereof forever shall be, and the same is hereby vested in the said State for a canal, and for no other purpose whatever; * * *".

The Act of March 2, 1827 granted a quantity of land to the State of Illinois, for the purpose of aiding in opening a canal to connect the waters of the Illinois river with those of Lake Michigan.

The Act of March 2, 1833, amended the Act of March 2, 1827 by providing "that the lands granted to the State of Illinois by the Act to which this is an amendment, may be used and disposed of by said State, for the purpose of making a railroad instead of a canal as in said act contemplated; * * *".

The Act of July 1, 1947 confirmed the grant made by Congress on March 30, 1822 and authorized the State of Illinois to build a highway along the right-of-way of the Illinois and Michigan Canal.

The original grant to the State by the Act passed March 30, 1822 by the Congress conveyed on that date a present interest in the bed of the canal and the two 90-foot strips. In *Van Wyck* v. *Knevals*, 106 U. S. 360 (1882) the court said (p. 365):

> "When that route is thus established the grant takes effect upon the sections *by relation as of the date of the act of Congress.*" Emphasis ours.)

It is contended by some persons that the State did not acquire title to the portions of the two 90-foot strips contained in the even numbered sections. This contention fails however when it is seen that the two strips were granted *in praesenti* on March 30, 1822 before any selection of even numbered sections was made by the Federal Government and before Patrick Welch and Richard Bickerdike, as hereinafter noted, acquired by re-

ceiver receipts or otherwise any interest whatever in section 30. In other words the Congress did not by the Act of March 30, 1822 grant only broken strips of land in the odd numbered sections, separated by section lines, for the reason that the act says that "ninety feet of land on each side of said canal shall be forever reserved from any sale to be made by the United States, except in the cases hereinafter provided for, and the use thereof forever shall be, and the same is *hereby vested* (emphasis ours) in said State for a canal, and for no other purpose whatever; * * *".

The act of March 30, 1822 granted the two unbroken 90-foot strips the full length of the canal. It was apparent that the two 90-foot strips were to be used for tow-paths (*Werling* v. *Ingersoll*, 181 U. S. 131, 132 (1901) and for enlarging the capacity of the canal whenever required. (Act of the General Assembley of January 9, 1936.)

Under the Welch and Bickerdike entries the Atchison and Central companies acquired only the land in the southeast quarter and the east half of the southwest quarter of section 30 remaining in the United States after the grant of the canal lands to the State on March 30, 1822.

The northeasternly terminus of the canal is at S. Ashland Avenue at about W. 24th Street and is in the southeast quarter and the east half of the southwest quarter of section thirty (30). Under the doctrine laid down by the Supreme Court of the United States in the *Knevals* and other cases the State acquired title in trust to the bed of the canal and to the two 90-foot strips throughout the entire length of the canal but from this point on we will deal only with the portion of the canal in the southeast quarter and the east half of the southwest quarter of section 30 as the same is involved in case No. B-46240 in the Circuit Court of Cook County presently referred to.

Inasmuch as the Federal Government has never declared a forfeiture or sought by any judicial proceeding to forfeit the title of the State the title in trust still remains in the State subject only to the control of Congress to see that the trust is executed. Forfeiture "can be asserted only by the grantor, the United States, through judicial proceedings or through the action of Congress. *Schulenberg* v. *Harriman* 21 Wall. 44," as held in *Van Wyck* v. *Knevals*, 106 U. S. 360 (1822) at pages 368-369. There is the exeception as to the "aid lands" which were granted by Congress to the State by the Act of March 2, 1827, to be sold by the State under authority of that Act to create a canal construction fund.

We now consider things done or attempted to be done which interfere with, obstruct or entirely prevent the construction of a highway in the bed of the canal and in the two 90-foot strips by the City, County and State. Between S. Ashland Avenue and S. Damen Avenue the canal lands are now and since prior to September 15, 1928 have been occupied by the Chicago Produce Terminal Company, the Atchison and Illinois Central compaines' railroad tracks and the Diamond Glue Works. Your letter states that the Chicago Produce Terminal Company is owned by the Atchison and Illinois Central companies.

I.

THE PEOPLE OF THE STATE OF ILLINOIS EX REL EDWARD J. BRUNDAGE, ATTORNEY GENERAL, AND THOMAS G. VENNUM, ACTING DIRECTOR OF THE DEPARTMENT OF PUBLIC WORKS AND BUILDINGS OF THE STATE OF ILLINOIS—CIRCUIT COURT OF COOK COUNTY, NO. B-46240

The Complaint:

In October 1918 Edward J. Brundage, Attorney General, and Thomas G. Vennum, Acting Director of the Department of Public Works and Buildings of the State, filed the complaint (a) to establish the title of the State to the portion of the canal lands in section 30, (b) that the defendants be adjudged to have no right, title or interest in the canal or other lands in section 30, and (c) to enjoin defendants and other persons from encroaching on the property of the State in section 30 and from dumping in the canal and from filling up or obstructing the canal and feeder and (d) from entering upon said property of the State and from building structures upon the canal lands in section 30.

Answer of Atchison Company

In March 1921 the Atchison company filed its answer in which among other things it admitted that the State was the owner of the canal except such portions thereof lying within the even numbered sections as had been abandoned; denied that the State had any title whatever to the land on which canal structures were formerly situated; denied that the State was the owner in fee simple of a strip of land 90 feet wide on each side of the canal and feder canal in section 30; admitted that the Congress passed the acts of March 30, 1822 and March 2, 1827 and that the General Assembly passed an act to provide for constructing the canal which was in force January 22, 1829; admitted that on or about December 25, 1829 the State returned to the Treasury Department of the United States a complete map of the route of the canal showing the proposed route and also the sections granted to the State and those reserved to the United States under the act of March 2, 1827 and that section 30 was one of the sections selected by the Commissioner of the United States Land Office and reserved to the United States; admitted that th Congress passed the act of March 2, 1833; admitted that the General Assembly passed an act entitled "An Act for the construction of the Illinois and Michigan Canal" which was in force January 9, 1836; admitted that the State commenced the construction of the canal in 1837 and completed it in the year 1847 and that upon completion of the canal through section 30 there vested in the State the right to maintain and operate the canal as constructed and located through section 30 for such period of time as the State desired so to do; alleged that patents were issued by the United States for the southeast quarter and the east half of the southwest quarter of section 30 upon receiver receipts issued in 1834 and prior to the construction of the canal and that the patentees thereby acquired the title in fee simple to those portions of section 30 subject only to the easement and right of the State to use for canal purposes only the land upon which the canal, as completed in 1847, was located and that upon the abandonment of the canal through section 30 the State was divested of all its right, title and interest in and to the property upon which the same was situated; alleged that the pumping works structures and appliances long ago had decayed and disintegrated and had ceased to exist and by reason of the abandonment the State had lost all title or interest which it might have derived from its occupation; denied that the State "is now" the owner in fee simple of the lands or any part thereof or has any right, title or interest therein; denied that the State entered into the possession of the 90-foot strips of land on each side of the canal and feeder in section 30; denied that the State was for a period of more than fifty years or any period in the open, notorious, actual, visible, exclusive or uninterrupted possession hostile to all adverse claimants of the 90-foot strips in section 30; that if the State had acquired any title or interest in the 90-foot strips, such right or interest long since had been lost by reason of the abandonment of the canal through section 30, and denied that the State at any time had possession of that portion of the 90-foot strips lying within those portions of section 30 owned by the Atchison Company.

Answer of Illinois Central Company

On April 2, 1921 Illinois Central filed its answer in which it adopted, as far as applicable to its rights and interests, the answer of the Atchison Company.

Stipulation and Agreement

On November 2, 1928 the State and the defendants filed a "*Stipulation and Agreement*" in the proceeding. The Stipulation and Agreement stated that the Atchison and the Illinois Central companies through certain land entries made on October 2, 1834 by one Patrick Welch and on November 4, 1834 by one Richard Bickerdike and through mesne conveyances had acquired title in the southeast quarter and the east half of the southwest quarter of section thirty (30).

Section 3 of separate sections of the Constitution of Illinois provides:

> "The Illinois and Michigan Canal, or other canal or waterway owned by the State shall never be sold or leased until the specific proposition for the sale or lease thereof shall first have been submitted to a vote of the people of the State at a general election, and have been approved by a majority of all the votes polled at such election. * * *"

Deed from Atchison Company to State

Notwithstanding this provision of the constitution, on September 15, 1928, the Atchison company and the attorney general on behalf of the State in compliance with the terms of the Stipulation and Agreement entered into two agreements (1) a deed by which the Atchison company conveyed to the State by metes and bounds certain lands in the southeast quarter and in the east half of the southwest quarter of section 30 but not including any lands in the bed of the canal or in the 90-foot strips, used and to be used for water terminal premises.

On November 2, 1928 a final decree was entered. It recited that the conveyance by the Atchison company was made upon the express condition that should the decree ever be reversd, annulled, set aside or held for naught then all the right, title and interest in and to the premises by it conveyed to the State should thereupon cease and determine and the title to the premises should thereupon revert to and revest in the Atchison company, its successors and assigns; (2) the second agreement was between the Atchison and Illinois Central ocmpanies, Chicago Title and Trust Company as Trustee in Trust No. 15350, parties of the first part, and the State party of the second part, whereby the Atchison and Central companies covenanted and agreed that upon the request of the Department of Purchases and Construction of the State, to be made only if and when a substantial portion of the Illinois and Michigan Canal in the City of Chicago, west of and adjoining Western Avenue Boulevard, is rehabilitated and placed in condition for use as a waterway, or concurrently with such rehabilitation, from time to time, to furnish the necessary funds to enable the Department to carry on and complete or cause to be carried on and completed the work of constructing a connecting channel along the east line of Western Avenue Boulevard extending from the Main Channel of the Illinois and Michigan Canal to the Sanitary and Ship Canal or Main Channel of the Sanitary District of Chicago, such connecting channel to be of not to exceed the same width as the Illinois and Michigan Canal and of such depth as the Department may deem advisable; and the Atchison and Central companies agreed concurrently with the construction by the State of said connecting channel, and for the purpose of carrying all then existing railroad tracks over said channel, to construct a bridge or bridges thereover of one clear span with the same clearance above water level and the same horizontal clearance as the then existing bridge which carried the railroad tracks of the Atchison and Central companies over the main

channel of the Illinois and Michigan Canal between Western Avenue Boulevard and Damen Avenue; and the Atchison and Central companies severally covenanted and agreed that upon the construction of said connecting channel, title thereto and to the land upon which the same was situated should thereupon vest and be in the State and that the State should have the right to enter upon adjoining property to the extent necessary for the purpose of maintaining and operating said connecting channel and that the connecting channel should thereupon become a part of the Illinois and Michigan Canal.

The Atchison and Central companies also covenanted and agreed that upon written request being made by the Department of Purchases and Construction of the State, not earlier than one year from the date of the agreement, to furnish, as the work progressed, the necessary funds (but not to exceed in the aggregate two hundred thousand dollars) to enable said Department to improve or cause to be improved the Water Terminal Premises in section thirty (30) (conveyed by the Atchison company to the State by deed of even date) and any adjoining premises acquired by the State for water terminal purposes in such manner as might be determined by said department.

The Atchison and Central companies granted to the State the right to construct the connecting channel. The Trustee covenants and agrees that the obligation of the Atchison and Central Companies from time to time to furnish to the party of the second part the necessary funds to enable it to construct the said connecting channel and improvements as provided in Sections 1 and 2 hereof shall constitute a lien upon all the property now held by the Trustee, lying within the area bounded by Ashland Avenue, the West Fork of the South Branch of the Chicago River, the Sanitary and Ship Canal (Main Channel of the Sanitary District of Chicago), Western Avenue Boulevard and the northerly right of way line of the Central Company, in the City of Chicago, County of Cook and State of Illinois; and that all the property with respect to which a lien is hereby given and granted, or so much thereof as is necessary, may be sold under directions of a court of competent jurisdiction in an appropriate proceeding, to provide funds for the construction of said connecting channel and/or said improvements on said Water Terminal Premises and/or adjoining premises in the event the Atchison and Central Companies shall fail to furnish such funds as hereinabove provided. This agreement recited that it was made pursuant to the STIPULATION and AGREEMENT and upon the express condition that if the decree to be entered concurrently with the delivery of the agreement, shall ever be reversed, annulled, set aside or held for naught, all obligations of the Atchison and Central companies therein contained should thereupon cease and determine and the title to any premises or property which under its terms may have vested in the State should then revert to and revest in the Atchisn and Central companies, their successors and assigns.

It seems to us to be obvious that the purpose of the two agreements was to have the State maintain the portion of the canal lands in section 30 as canal or waterway property and thereby to fortify and protect the Atchison and Illinois Central companies, Chicago Produce Terminal Company and Diamond Glue Company. The STIPULATION and AGREEMENT was carried into effect by the decree entered November 2, 1928 which ordered that the complaint be dismissed against all defendants except the Atchison and Illinios Central companies, Chicago Title and Trust Company, as Trustee, and Diamond Glue Company. The decree after reciting that the cause had come on to be heard upon the complaint and answers of the defendants and the STIPULATION and AGREEMENT of the parties providing among other things for the compromise of the suit, the court found that it had jurisdiction of the parties and of the subject matter and that by reason of and as a result of the STIPULATION, AGREEMENT and COMPROMISE all the right, title and interest of the State in and to the premises described in the complaint had vested in the

defendants, the Atchison and Illinois Central companies, Chicago Title and Trust Company as Trustee, and Diamond Glue Company; that the "equities in said cause are *now* with the said defendants and that the said bill should be dismissed for want of equity."

It was ordered, adjudge and decreed that the State "*now* has no right, title or interest in and to those portions of section thirty (30), * * * formerly occupied and used by complainant for canal purposes, or to the ninety (90) foot strips on each side of the main channel of the Illinois and Michigan Canal in said Section thirty (30) and on each side of the feeder canal in said Section thirty (30) or to the property in said Section thirty (30) formerly occupied and used by complainant for pumping works or to any of the property in said Section thirty (30) described in the bill of complaint. It is further ordered, adjudge and decreed that the bill of complaint be and the same is hereby dismissed for want of equity."

It was further ordered that the "rights of the State and any claimants in and to any portion or portions of the canal and ninety (90) foot strips adjoining thereto and on each side thereof beyond the boundaries of said Section thirty (30) are not involved in the suit and shall not be affected in any way by this decree which is entered without prejudice to any and all such rights."

II.

THE ALLEGED ABANDONMENT.

The admissions in the answers of the Atchison and Central companies fully recognize the title of the State of Illinois to the canal lands. The doctrine of abandonment of title cannot be used to support any claim by them of title to the right-of-way of the canal. The Congress alone could declare a forfeiture of the State's title thereby effecting the revestiture or reversion to the United States. Abandonment of real property or a right therein is a voluntary relinquishment thereof by its owner or holder with the intention of terminating ownership, possession and control and without vesting ownership in a stranger. Abandonment is distinquished from all other modes of parting with the title to real property or right therein by its purely voluntary character and by its failure to transfer title to or ownership of the thing abandoned. (See 1 *Corpus Juris Secundum*, sections 1 and 2.) In view of the efforts of the State from March 30, 1822 to July 1, 1947 in constructing, operating and maintaining the canal it cannot be said that the State ever abandoned the project or abandoned the use of the bed of the canal and of the 90-foot strips.

III.

THE STATUTE OF LIMITATIONS.

The weakness of the position of the Atchison and Central companies is apparent. They cannot legally invoke the statute of limitations in support of their claim of title particularly against the State or against the title of the State of Illinois or against the title of the United States. *Gibson* v. *Chouteau*, 80 U. S. (13 Wall) 92 (1871). The State's own statute of limitations cannot be invoked against it.

IV.

JURISDICTION.

The vital question to be considered is, did the Circuit Court of Cook County sitting in equity have jurisdiction of the subject matter to enter the decree it entered in case No. B-46240?

The bill of complaint was filed by the attorney general to establish the title of the State to the canal lands and to restrain the defendants from

dumping waste material of any kind in the canal, from constructing any structures on the canal lands and from encroaching upon any land of the State in section 30. After about ten years of inaction the then attorney general abandoned the relief prayed for in the complaint. In 1928 the attorney general and the railroads and two other defendants enterd into a "compromise" which is set forth in the "STIPULATION and AGREEMENT," and when the compromise was completed agreeably to the railroads, Chicago Title and Trust Company, as Trustee, and Diamond Glue Company the suit was dismissed for want of equity. The then attorney general and the director of the Department of Purchases and Construction had authority to bring a suit to establish the title in trust of the State to the canal lands, to enjoin encroachments upon the canal but had no authority or power to abandon the State's title, to ignore the provision of the constitution and to enter into the STIPULATION, AGREEMENT and COMPROMISE. When they did so what authority had the Circuit Court further to retain jurisdiction of the subject matter and enter a decree foreign to the complaint and in violation of the constitution?

No submission to a vote of the people as required by section 3 of the separate sections of the Constitution was ever had. The so-called compromise was the medium used by the parties which intentionally or otherwise circumvented that provision of the constitution.

The net result of that suit was that the then attorney general abandoned the establishment of the State's title to the canal lands and acceped from the Atchison company a deed to other lands in section 30 lying outside of the right-of-way of the canal. In substance the parties attempted to make a sale of canal lands in violation of the constitution.

There never has been an abandonment of the canal lands by the State and it is still asserting its title to the canal lands including the two 90-foot strips as confirmed by the act of Congress passed July 1, 1947.

V.

ACT OF JUNE 17, 1949.

On June 17, 1919 the general assembly passed an act in relation to the Illinois and Michigan Canal and the canal lands, the protection, preservation and disposition thereof, and to repeal all acts and parts of acts in conflict therewith.

Section 2 of the act provides:

> "Section 2. No claim, other than that of the State, to any of the said lands and premises, shall be recognized by said Department of Public Works and Buildings or by any other officer of the State, except in cases where such claim is based upon the valid deed, contract, lease or permit of the proper officers of the State. It shall be the duty of the said Department of Public Works and Buildings to protect the rights of the State against any one who may have improperly seized or occupied any of said lands or premises and to that end it may employ any and all means which may be lawfully used in protecting the property of the State."

Section 3, in part, provides:

> "Section 3. The Department of Public Works and Buildings is authorized and directed to protect against and prevent encroachments upon said Illinois and Michigan Canal through its entire course as originally constructed, and to preserve its navigable condition throughout said entire course, and it may, when the permission of the Federal government is obtained, change and improve said canal to provide terminal and harbor facilities for interchange of freight or for any other use in connection with transportation which said department may deem advantageous to the State. * * *"

Section 4 provides:

"Section 4. The Attorney General of the State of Illinois is hereby authorized and directed to institute in the name of the People and to prosecute whatever suits are necessary to protect and maintain the rights of the State in and to said Illinois & Michigan Canal thoughout its entire ninety-six mile course from the south fork of the south branch of the Chicago River to the point at which it connects with the Illinois at LaSalle.

It has been suggested that this controversy might be compromised by permitting the Atchison and Illinois Central railroad companies and the Diamond Glue Company to continue using the portions occupied by them upon supplying to the State a right-of-way for the Southwest Superhighway in lieu of the companies vacating their present occupancies. In our opinion such a compromise would have no better standing legally than does the present occupancy of the canal right-of-way in section 30 by these companies and would likewise violate the constitution.

In our opinion the present occupancy of the right-of-way of the canal by Atchison and Central railroad companies and by Diamond Glue Company is an illegal purpresture or encroachment upon the lands of the State of Illinois in section 30 known as the Illinois and Michigan Canal.

VI.

ARTICLE IV, SECTION 26 OF CONSTITUTION.

In our opinion the Attorney General, when he entered into the *Stipulation, Agreement* and *Compromise* and consented to the entry of the decree thereby made the State of Illinois a defendant in violation of Article IV, Section 26 of the constitution which provides:

"The state of Illinois shall never be made defendant in any court of law or equity."

Therefore the decree of the Circuit Court of Cook County in case No. B-46240 fails for want of jurisdiction. (*People* v. *Sanitary District*, 210 Ill. 171, 173 (1904).) The immunity of the State from suit cannot be waived by the Attorney General. (*Noorman* v. *Department of Public Works*, 366 Ill. 216, 219 (1937).)

VII.

CONCLUSION.

In our opinion (a) Chicago Produce Terminal Company, The Atchison, Topeka and Santa Fe Railway Company, Illinois Central Railroad Company and Diamond Glue Company are illegally occupying the right-of-way of the Illinois and Michigan canal including the two 90-foot reserved strips between S. Ashland and S. Western Avenues; (b) the title to the canal right-of-way and the two 90-foot strips is in the State to be used for highway purposes; (c) the enactment into law of H. B. 753 and H. B. 754 which we drafted and which were introduced on April 20, 1949 will be necessary to enable the City of Chicago to construct a portion of the superhighway; and (d) appropriate legal steps probably will have to be taken by the State to oust the intruders on the property.

SEWER INSPECTION

(No. 11233—Superintendent of Sewers—J. G. S.—W. H. S.—January 11, 1950.)

We have your letter of December 9, 1949 in which you request an opinion as to the legality of certain charges against the appropriation of

M. F. T. funds for the construction of the Congress Street Superhighway by the Department of Subways and Superhighways for inspection fees to cover the salary of a masonry inspector assigned to this work by the Bureau of Sewers.

In your letter you indicate that you believe your action in assigning an inspector from your department to this work is in compliance with certain sections of the Municipal Code of Chicago which you refer to and state that this is the same procedure that has been followed in making charges for similar inspection for paving projects constructed under the Motor Fuel Tax Law and the 1949 budget.

We are of the opinion that under the provisions of the Municipal Code of Chicago relating to the duties of the Commissioner of Subways and Superhighways he is charged entirely with constructing superhighways and appurtenant facilities, of which we understand the Main Drain for the Congress Street Route to be one.

We understand further that this drain is exclusively for the drainage of the expressway and in no way connects with the city sewers which carry both storm and sanitary sewage. This sewer is being constructed entirely for storm water drainage from the Congress Street Superhighway area according to the information furnished to us by the Department of Subways and Superhighways. The contractor engaged by the City through its Department of Subways and Superhighways has complied with the provisions of the Code requiring securing a permit from the Department of Public Works and is licensed as a sewer and drain layer.

We therefore are of the opinion that all the provisions of the Code have been complied with as regards the Department of Public Works, Bureau of Sewers, and that it was not the intention of the Code to require duplication of inspection as regards sewers built by other City departments, as is the case in this instance.

B. AIRPORTS

AMPHITHEATER AIRSTRIPS

(No. 11157—City Council—E. H.—July 7, 1949.)

We have your communication of June 14, 1949 in which you set out a copy of a letter from the law firm of Litzinger, Gatenbey & Spuller under date of June 10, 1949. Mr. Spuller of this law firm states that he is attorney for Maynard Schryver and quotes him to the effect that the permission of the State is being waited on from Springfield to classify as a restricted landing area the Amphitheater Parking lot located in the stock yards. He is further quoted as asking whether or not there is any ordinance of the City of Chicago prohibiting the designation of this property as a restricted landing area. Mr. Spuller then states that it is his understanding that in order to accomplish the purpose of establishing this restricted landing area it will be necessary for Mr. Schryver "to make application to the city for a private airport." He then requests that your committee consider his letter as such application and asks such consideration as it warrants. You state that the committee directed that the subject matter of this communication be referred to the law department with the request that it be furnished with any and all information necessary to properly consider this matter.

In reply to your request we wish to advise that under the provisions of section 22.42, subsection 3, of the Illinois Aeronautics Act approved July 24, 1945, (Chap. 15½, par. 22, Ill. Rev. Stats. 1947), the Department of Aeronautics of the State of Illinois created under the act has the exclusive power "to classify and approve airports and restricted landing areas and any alterations or extensions thereof." Section 22.47 of the same act enumerates the matters which must be set out in an application for a certificate of approval of an airport or restricted landing area. Section 22.46 provides the standards for the guidance of the Department of Aeronautics of the State in its determination as to whether or not such certificate of approval shall issue. Included in such standards are the proposed location, size and layout, the relationship of the proposed airport or restricted landing area to the then current national airport plan, the then current state airport plan, and the then current state airways system to determine whether there are safe areas available for expansion purposes, whether the adjoining area is free from obstructions based on a proper glide ratio, the nature of the terrain, the nature of the uses to which the proposed airport or restricted landing area will be put, the possibilities for future development, and such other factors as under the circumstances it regards as having an important bearing thereon. Section 22.51 provides for a hearing before the department, and section 22.60 provides that the department may issue an order granting or denying a certificate of approval for an airport or restricted landing area without a hearing in the first instance provided that the department shall have served upon the applicant and any other persons, municipalities, or other political subdivision affected at least fifteen days before the entry of such proposed order written notice of the department's intention to enter such order which notice shall state in reasonable detail the nature and terms of such proposed order, and which extend opportunity on the part of those notified to submit within such fifteen days objections to or comments upon the subject matter of such proposed order. Section 22.61 provides that "no license shall be required to operate an airport or restricted landing area for which a certificate of approval has been issued by the department."

It appears from the language of these sections of the statute that exclusive control over the establishment of restricted landing areas and private airports has been reserved by the legislature in the department of Aeronautics of the state, while the establishment and control of public airports in municipalities is in the corporate authorities. The courts will presume that public officials will perform their duties in accordance with the statutes. There is a presumption therefore that in this particular case the department of Aeronautics will apply the standards set out in the statute before granting permission to operate a restricted landing area or private airport in the stock yards. Airports are one of the special uses permissible for property zoned for industrial purposes. Therefore no application for a variation to permit the establishment of a private airport on this property is required.

It is respectfully suggested that the City Council may desire to express its opposition to the issuance of a certificate by the Department of Aeronautics prior to such time as the city might be given the 15 days notice provided by Statute if the Department proposes to issue the certificate.

MIDWAY AIRPORT PARKING AREA

(No. 11410—City Council—F. C. F.—August 6, 1951.)

We acknowledge receipt of your recent letter wherein you requested our opinion on the following propositions in connection with proposed additional parking facilities at Midway Airport:

(1) The use of Bond Issue moneys for the proposed parking lot.

(2) The status of a parking lot not physically located within the present boundaries of Midway Airport.

(3) The question of whether the City could extend the agreement with the operators of the present lot to cover the proposed parking facilities.

In reply to item (1), it is our opinion that said Bond Issue moneys can be used for the construction of proposed additional parking lot facilities at Chicago Midway Airport, subject to the approval of the City Council, in accordance with Section 7 of an ordinance appearing in Journal of Council Proceedings of April 16, 1945 at page 3246.

As to item (2), we wish to state that the property in question is now in possession of the City of Chicago, save lots 6 and 7, which are the property of one M. Caffarello and are located directly opposite the Airport Terminal Building. The sole revenue being derived by the City from the area on the east side of Cicero Avenue at the present time is the leasing of space for billboard purposes.

As regards item (3) it is our opinion that the City can enter into an agreement with the operators of the present parking lot to cover the proposed additional parking facilities after authorization is granted by the City Council.

FEDERAL RIGHTS AT O'HARE FIELD

(No. 11546—City Council—J. C. M.—May 29, 1952.)

On May 28, 1952 you made a verbal request for an opinion as to the rights of the United States Government in the land purchased by the City which lies outside of the 1,081-acre tract acquired from the government.

The pertinent provisions of the grant from the government (C. J. March 14, 1946, p. 5347) are:

> "B(1) That the Government shall at all times have the right to use the airport in common with others; Provided, however, that such use may limited as may be determined at any time by the Civil Aeronautics Administration or the successor Government agency to be necessary to prevent interference with use by other authorized aircraft, so long as such limitation does not restrict Government use to less than twenty-five (25) percentum of capacity of the airport. Government use of the airport to this extent shall be without charge of any nature other than payment for damage caused by Government aircraft.
>
> "(2) That during the existence of any emergency declared by the President or the Congress, the Government shall have the right without charge except as indicated below to the full, unrestricted possession, control, and use of the landing area, building areas, and airport facilities or any part thereof, including any additions or improvements thereto made subsequently to the declaration of the airport property as surplus; Provided, however, that the Government shall be responsible during the period of such use for the entire cost of maintaining all such areas, facilities, and improvements, or the portions used, and shall pay a fair rental for the use of any installations or structures which have been added thereto without Federal aid.

"C That no exclusive right for the use of any landing area or air navigation facilities included in the above described real estate shall be granted or exercised."

There is a difference of opinion as to the interpretation of Clause B(2). The position of the Corporation Counsel has been and is that this recapture clause, as to the right of the government during the existence of any emergency to take possession and control of the airport without charge, is confined to the 1,081-acre tract conveyed by the government. The airport referred to in the deed of conveyance and the ordinance is the "Orchard Place Airport" including the "Tow Target Area," which airport and area are described therein. The words "additions or improvements thereto" when considered with the provision that the government "shall pay a fair rental for the use of any installations or structures which have been added thereto without federal aid," and the reference to "the above described real estate" in paragraph C, indicate that it was the intention of the parties that the government could retake possession of that which it had parted with, under certain circumstances, without charge, and nothing more.

At the hearings last July before the Panel of the Air Coordinatng Committee we were supported in this conclusion that the recapture clause applied only to the 1,081-acre tract by the representative of the Civil Aeronautics Administration.

In order to obviate any contrary construction of these provisions and as a further aid in marketing airport revenue bonds at some future date, it would be well for the City Council to request the Civil Aeronautics Administrator to cancel Paragraph B (2). He has the power to do so under Title 50, Appx. 1622C of the Federal Code.

EXCLUSIVE CONTRACT TO PROVIDE BUS SERVICE TO MIDWAY FIELD

(No. 11725—Commissioner of Police—J. F. G.—July 31, 1953.)

Reference is made to your letter of July 7, 1953 requesting our opinion upon a complaint made by Continental Air Transport Co., Inc., that the traffic control provisions contained in its agreement with the City of Chicago dated July 28, 1950 have not been enforced.

Examination of the agreement referred to, which in substance was published in the Journal of the Proceedings of the City Council of May 25, 1950, page 6253, authorizing execution of the agreement, discloses the following provision, page 6254:

"The aforesaid Agreement shall provide that the Commissioner of Public Works shall issue and enforce rules and regulations prohibiting taxicabs and bus operators, other than employees of the Company, from soliciting passengers at the Airport and from parking in the circular vehicle driveway in front of the new Terminal Building, except for the purpose of loading after having been summoned from the taxicab parking lane adjacent to and west of the bus parking land upon being dispatched by proper signal from the taxicab call or signal board, and except for the purpose of unloading passengers."

It appears from the complaint of the Company that two police officers on foot are assigned on each of three shifts during a twenty-four hour period to enforce provisions against soliciting passengers at the Chicago Midway Airport and from parking in the circular vehicle driveway serving

the terminal building; that the policing of this activity is so ineffective that the Company suffers substantial loss of revenue upon which compensation is paid to the city. The Company contends that in addition to the police officers who patrol the approaches to the terminal building at the airport, officers on three-wheel vehicles, who at one time assisted the patrolmen in the enforcement of the traffic control provisions and for some reason were withdrawn from the airport, should be restored for effective enforcement of the agreement. The Company threatens to stop payment of compensation to the city unless the conditions complained of are corrected.

The ordinance provides that the Commissioner of Public Works shall issue and enforce rules and regulations prohibiting competition with the Company's right to solicit passengers in said airport and use the driveways thereon. We assume that the police officers furnished by your department to enforce the rules and regulations of the Commissioner of Public Works were assigned to cooperate in the enforcement of the Commissioner's obligation. There is no doubt that the Company is entitled to adequate protection of its right under the contract. It is not for us to determine whether the complaint is justified. All that is required is substantial performance by the city. In any event, the Company has no legal right to refuse to pay compensation provided for in the contract if it continues to operate at the airport. If there is a substantial breach of the city's obligation the Company may terminate the contract but it cannot accept the benefits of the grant without paying for the privilege, (*Halbert* v. *Turner* 233 Ill. 531; *Chicago Legal News Co.* v. *Browne*, 103 Ill. 317).

PAGE INDEX TO OPINION NUMBERS

PAGE INDEX TO OPINION NUMBERS

Opinion Number	Page Number
11098	304
11099	422
11100	500
11101	541
11102	762
11103	289
11104	457
11105	319
11106	458
11107	1
11108	689
11109	833
11110	122
11111	322
11112	462
11113	602
11114	544
11115	3
11116	272
11117	728
11118	245
11119	349
11120	349
11121	189
11122	503
11123	124
11124	246
11125	817
11126	763
11127	594
11128	260
11129	259
11130	595
11131	649
11132	765
11133	209
11134	222
11135	223
11136	5
11137	210
11138	125
11139	356
11140	247
11141	790
11142	873
11143	692
11144	129
11145	225
11146	547
11147	129
11148	729
11149	377
11150	379
11151	225
11152	548
11153	298
11154	130
11155	549
11156	551
11157	882
11158	552
11159	57
11160	696
11161	132
11162	273
11163	597
11164	132
11165	698
11166	700
11167	133
11168	650
11169	272
11170	459
11171	445
11172	504
11173	505
11174	766
11175	701
11176	460
11177	31
11178	135
11179	553
11180	461
11181	597
11182	554
11183	137
11184	137
11185	138
11186	260
11187	752
11188	462
11189	357
11190	5
11191	139
11192	507
11193	638
11194	464
11195	464
11196	227
11197	229
11198	739
11199	58
11200	842
11201	230
11202	44
11203	139

Opinion Number	Page Number
11204	842
11205	231
11206	277
11207	555
11208	638
11209	730
11210	423
11211	59
11212	508
11213	508
11214	143
11215	668
11216	777
11217	202
11218	248
11219	733
11220	205
11221	203
11222	467
11223	670
11224	792
11225	380
11226	7
11227	555
11228	292
11229	639
11230	488
11231	381
11232	807
11233	881
11234	351
11235	9
11236	232
11237	468
11238	251
11239	834
11240	469
11241	12
11242	143
11243	660
11244	670
11245	807
11246	352
11247	819
11248	767
11249	701
11250	471
11251	473
11252	598
11253	60
11254	475
11255	476
11256	476
11257	510
11258	233
11259	252
11260	61
11261	834
11262	359
11263	62
11264	146
11265	510
11266	89
11267	671
11268	254
11269	720
11270	511
11271	559
11272	560
11273	32
11274	63
11275	33
11276	599
11277	211
11278	13
11279	768
11280	261
11281	353
11282	512
11283	808
11284	261
11285	425
11286	478
11287	512
11288	808
11289	769
11290	147
11291	652
11292	149
11293	148
11294	212
11295	44
11296	703
11297	34
11298	513
11299	843
11300	237
11301	835
11302	778
11303	792
11304	514
11305	640
11306	361
11307	672
11308	769
11309	704
11310	844
11311	848

Opinion Number	Page Number
11312	673
11313	383
11314	64
11315	628
11316	90
11317	447
11318	14
11319	262
11320	674
11321	354
11322	734
11323	426
11324	205
11325	539
11326	820
11327	514
11328	793
11329	822
11330	676
11331	515
11332	540
11333	64
11334	189
11335	384
11336	65
11337	363
11338	238
11339	722
11340	517
11341	561
11342	705
11343	91
11344	479
11345	385
11346	427
11347	630
11348	263
11349	641
11350	770
11351	67
11352	772
11353	254
11354	68
11355	428
11356	641
11357	654
11358	92
11359	150
11360	152
11361	387
11362	45
11363	677
11364	206
11365	293
11366	642
11367	706
11368	794
11369	708
11370	710
11371	600
11372	69
11373	711
11374	723
11375	479
11376	191
11377	213
11378	153
11379	71
11380	518
11381	724
11382	72
11383	35
11384	711
11385	279
11386	518
11387	725
11388	848
11389	694
11390	490
11391	491
11392	73
11393	712
11394	155
11395	74
11396	850
11397	630
11398	48
11399	75
11400	299
11401	207
11402	265
11403	390
11404	37
11405	76
11406	95
11407	391
11408	429
11409	836
11410	883
11411	77
11412	159
11413	158
11414	602
11415	836
11416	280
11417	255
11418	492
11419	852

Opinion Number	Page Number
11420	266
11421	266
11422	300
11423	738
11424	281
11425	49
11426	295
11427	778
11428	281
11429	449
11430	16
11431	78
11432	643
11433	323
11434	563
11435	564
11436	18
11437	680
11438	355
11439	393
11440	50
11441	395
11442	267
11443	726
11444	657
11445	214
11446	366
11447	856
11448	430
11449	564
11450	519
11451	21
11452	325
11453	857
11454	565
11455	432
11456	521
11457	367
11458	795
11459	866
11460	521
11461	433
11462	434
11463	739
11464	694
11465	161
11466	772
11467	162
11468	106
11469	744
11470	522
11471	164
11472	752
11473	603
11474	604
11475	714
11476	838
11477	568
11478	23
11479	569
11480	106
11481	782
11482	282
11483	256
11484	107
11485	268
11486	283
11487	257
11488	523
11489	109
11490	284
11491	269
11492	79
11493	809
11494	715
11495	52
11496	524
11497	525
11498	526
11499	80
11500	681
11501	81
11502	257
11503	435
11504	40
11505	164
11506	436
11507	494
11508	605
11509	857
11510	54
11511	166
11512	326
11513	658
11514	682
11515	215
11516	239
11517	684
11518	167
11519	716
11520	838
11521	168
11522	170
11523	396
11524	111
11525	328
11526	437
11527	527

Opinion Number	Page Number
11528	570
11529	643
11530	451
11531	606
11532	397
11533	439
11534	610
11535	824
11536	172
11537	27
11538	398
11539	839
11540	54
11541	173
11542	661
11543	858
11544	27
11545	173
11546	884
11547	285
11548	288
11549	112
11550	193
11551	527
11552	528
11553	860
11554	216
11555	176
11556	301
11557	193
11558	571
11559	194
11560	240
11561	530
11562	531
11563	801
11564	177
11565	825
11566	632
11567	633
11568	329
11569	801
11570	439
11571	481
11572	826
11573	55
11574	242
11575	634
11576	316
11577	635
11578	867
11579	861
11580	217
11581	572
11582	747
11583	258
11584	41
11585	495
11586	573
11587	452
11588	511
11589	753
11590	482
11591	803
11592	196
11593	574
11594	811
11595	803
11596	178
11597	242
11598	531
11599	861
11600	399
11601	755
11602	645
11603	783
11604	42
11605	575
11606	330
11607	56
11608	42
11609	576
11610	83
11611	577
11612	578
11613	867
11614	453
11615	812
11616	83
11617	684
11618	197
11619	441
11620	484
11621	43
11622	532
11623	198
11624	443
11625	533
11626	784
11627	610
11628	750
11629	454
11630	663
11631	662
11632	804
11633	750
11634	410
11635	332

Opinion Number	Page Number
11636	332
11637	664
11638	402
11639	485
11640	612
11641	813
11642	727
11643	756
11644	332
11645	355
11646	486
11647	332
11648	334
11649	335
11650	404
11651	114
11652	579
11653	868
11655	862
11656	664
11657	120
11658	612
11659	580
11660	405
11661	840
11662	337
11663	773
11664	406
11665	666
11666	534
11667	863
11668	496
11669	685
11670	865
11671	534
11672	646
11673	407
11674	613
11675	407
11676	840
11677	338
11678	296
11679	756
11680	828
11681	341
11682	370
11683	583
11684	870
11685	535
11686	829
11687	584
11688	455
11689	841
11690	758
11691	536
11692	585
11693	786
11694	29
11695	789
11696	456
11697	497
11698	773
11699	615
11700	121
11701	717
11702	616
11703	686
11704	243
11705	586
11706	759
11707	199
11708	457
11709	774
11710	43
11711	179
11712	218
11713	219
11714	777
11715	618
11716	871
11717	587
11718	830
11719	243
11720	201
11721	341
11722	343
11723	536
11724	647
11725	885
11726	636
11727	760
11728	345
11729	790
11730	806
11731	761
11732	624
11733	618
11734	588
11735	270
11736	625
11737	286
11738	287
11739	220
11740	182
11741	372
11742	719

Opinion Number	Page Number	Opinion Number	Page Number
11743	87	11761	591
11744	271	11762	720
11745	648	11763	87
11746	411	11764	416
11747	409	11765	420
11748	347	11766	374
11749	413	11767	222
11750	627	11768	498
11751	184	11769	720
11752	421	11770	244
11753	85	11771	592
11754	30	11772	187
11755	413	11773	593
11756	87	11774	537
11757	487	11775	628
11758	688	11776	43
11759	348	11777	188
11760	415	11778	816

Editor's Note:

Opinions numbered 11098 to 11109 inclusive were not printed in volume 22 due to space limitations. Their importance justifies their reproduction in this volume although they were written prior to January 1, 1949.

INDEX

A

ABANDONED VEHICLES
Removal of, costs, v. 22, p. 476.
Sale of, by Police Department, v. 22, p. 48.

ACTION OVER
Policemen's and Firemen's Benefit Fund Act, Rights under, v. 21, p. 70.

ADVERTISING AND HANDBILLS
Airplanes, Use of sound amplifiers, **v. 23, p. 684.**
Benches, On public parkways, **v. 23, p. 692.**
Deceptive, "police journal 13-13" as, v. 21, p. 10.
Definition of, v. 21, p. 195.
Handbills,
"Advertising matter," Interpretation of, v. 21, p. 195.
Auto windshields, Placing on, **v. 23, p. 694.**
Distribution,
Distribution ordinance, Validity of, v. 21, p. 194; v. 21, p. 195.
Manner of, v. 21, p. 194.
Political, social, or economic pamphlets, v. 21, p. 195; v. 21, p. 198.
Parking meters, Advertising on, **v. 23, p. 694.**
Search lights, Use of, **v. 23, p. 682.**
Signs, State Street, **v. 23, p. 689.**
Traffic signals, Use for, v. 22, p. 469.
Waste containers, City owned, v. 22, p. 457.

AIRPORTS
Abandoned airplanes, Disposal of, v. 22, p. 142.
Aircraft,
Charges for flights, v. 21, p. 7.
Electrical equipment in aircraft buildings, Inspection of, v. 21, p. 214.
Sound amplifiers, Use on, **v. 23, p. 684.**
Warning lights, Tall buildings, **v. 23, p. 597.**
Amphitheater, airstrip at, **v. 23, p. 882.**
Chicago Orchard airport, Use of, in general, v. 22, p. 564.
Fences, Liability of city for, v. 22, p. 537.
Hangars, Regulations regarding construction of, v. 22, p. 400.
Inflammables, Storage of, v. 22, p. 322.
Leases,

AIRPORTS—Continued
Concessions, v. 22, p. 542.
Freight terminal, v. 22, p. 562.
Liquor, Sale of prohibited, v. 23, p. 355.
Marshall Field Restaurant, v. 23, p. 811.
Midway (Municipal),
Bus service to, v. 23, p. 885.
Parking area at, v. 23, p. 883.
Observation deck, Admission fees, Federal tax on, v. 23, p. 298.
O'Hare Field,
Federal rights at, v. 23, p. 884.
In General, Use of, v. 22, p. 564.
Taxation of, DuPage County, v. 23, p. 831.
Taxi service to, v. 23, p. 518.

ALCOHOLICS
Examination of, v. 21, p. 246.

ALIEN PROPERTY
Custody of, by Police Department, v. 22, p. 36.

ALLEYS
See *Streets* and *Alleys.*

AMUSEMENTS AND AMUSEMENTS PLACES
Bicycle races, Refund of license fee, v. 21, p. 164.
Dancing in ice cream parlors, License for, v. 21, p. 160.
Devices,
"Anti-Aircraft Machine Gun," Prohibition of, v. 21, p. 132.
"Automatic Hostess," Prohibition of, v. 21, p. 135.
Keeney's "Flying Bullets" machine, v. 23, p. 481.
"Ride the Champion" machine, v. 23, p. 484.
Talkie-movie machines, License for, v. 21, p. 161.
Ice cream parlors, Dancing in, v. 21, p. 160.
Taverns, Motion pictures shown in, v. 23, p. 459.
Y. M. C. A., Billiard facilities, v. 23, p. 485.

AMUSEMENT TAX ORDINANCE
Activities subject to,
Amusement Park, v. 22, p. 368.
Automobile Show, 1950, v. 23, p. 471.
Board of Education,
Athletic contests, v. 22, p. 366; v. 22, p. 511.
Harrison High School Concert, v. 23, p. 468.
Boxing Show, Carnival of Champions, v. 23, p. 473.
Chicago Business Men's Orchestra, v. 23, p. 486.
Chicago Musical College Benefit, v. 23, p. 479.
Chicago Tribune Outdoors Show, v. 23, p. 464.
Coin-operated machines,
Horoscope machines, v. 22, p. 362.

AMUSEMENT TAX ORDINANCE—Continued
Radio, v. 22, p. 365.
Telequiz machine, v. 22, p. 370.
Hotels, Ballrooms, v. 22, p. 371.
Illinois Children's Home and Aid Society Benefit, **v. 23, p. 478.**
Infant Welfare Society Ice Show, **v. 23, p. 482.**
Kiwanis Club, Black Hills Passion Play performance, **v. 23, p. 460.**
Livestock exhibition, v. 22, p. 373; 1949 show, **v. 23, p. 467**; 1950 show, **v. 23, p. 479.**
Lodge halls, v. 22, p. 364.
Private clubs, In general, v. 22, p. 359.
Private clubs, Computing for, v. 22, p. 363.
Shuffle Boards, Subject to, **v. 23, p. 461.**
Temple Sholom, Lectures at, **v. 23, p. 469.**
Travel shows, Navy Pier, v. 22, p. 360.
University programs, v. 22, p. 357,
Augustana College Concerts, **v. 23, p. 476.**
Concert, **v. 23, p. 462.**
Wisconsin University Play, **v. 23, p. 475.**
West Wide Inter-Club Council, dances, **v. 23, p. 476.**
In general, v. 22, p. 361; **v. 23, p. 458.**
Computation of, State tax, **v. 23, p. 464.**
Exemptions from, **v. 23, p. 457.**
Responsibility for payment of, **v. 23, p. 487.**

ANIMALS
Chickens, Keeping in city, v. 21, p. 135.
Dogs, See that title.
Goats, Keeping in city, v. 21, p. 135.

ANNEXATION
Cemetery, v. 22, p. 108.
"Dry district," Repeal of, v. 21, p. 137; **v. 23, p. 349.**
Lake Michigan, Filled in area, v. 22, p. 9.
Unincorporated territory, Procedure to annex, v. 21, p. 3.

ANNUITY AND BENEFIT FUNDS
See *Board of Election Commissioners Employees' Annuity and Benefit Fund; Firemen's Annuity and Benefit Fund; Firemen's Pension Fund; House of Correction Employees' Pension Fund; Laborer's Annuity and Benefit Fund; Laborer's and Retirement Board Employees Annuity and Benefit Fund; Library Employees' Annuity and Benefit Fund; Municipal Court and Law Department Employees' Annuity and Benefit Fund; Municipal Employees' Annuity and Benefit Fund; Policemen's Annuity and Benefit Fund; Policemen's and Firemen's Death Benefit Fund; Police Pension Fund.*

APPROPRIATION ORDINANCE
Amendment, Time for, v. 21, p. 225.
Passage,
Salaries pending, v. 21, p. 226.
Status of employees pending, v. 21, p. 225.

APPROPRIATIONS
Autos privately owned, Maintenance of, v. 21, p. 32.
Chicago Public Library, Amendments for, v. 21, p. 225.
Election taxicab service, Exceeding appropriation, **v. 23, p. 756.**
Relief employees, v. 21, p. 54.
Salaries of transferees to other departments, v. 21, p. 226.
Subway, Expense of studying tunnel project, v. 21, p. 229.

ARBITRATION
Future disputes, Validity of provision for, v. 21, p. 90.

ARRESTS
Appearance before complaint, Compelling of, v. 21, p. 104.
Fugitive from justice, v. 21, p. 15.
Health Board employees, Power of, v. 21, p. 26.
Notice, Issuance by Board of Health, v. 21, p. 28.
Records, Destruction of, v. 21, p. 21.
Statement of accused, Destruction of, v. 21, p. 9.

ARTERIAL HIGHWAY
Definition of, v. 21, p. 193.

ASSIGNMENTS
Corporations, Authority to execute for, v. 21, p. 262.
Salary checks, v. 21, p. 62.

ATTORNEYS
Fees, City official, Reimbursement of, v. 22, p. 53.
Soliciting personal injury cases, **v. 23, p. 413.**

ATTORNEYS LIENS
Fee, Withholding of, v. 21, p. 44.
Notice, Necessity of filing of, v. 21, p. 240.
Release of, v. 21, p. 230.
Waiver by deceased attorney's estate, v. 21, p. 249.

AUCTIONS AND AUCTIONEERS
Equipment sale on closed premises, v. 21, p. 135.
Jewelry, Regulation of, **v. 23, p. 591.**
Radio programs, Status of, **v. 23, p. 592.**

AUTOMOBILES
See *Motor Vehicles.*

B

BAGATELLE
See *Gambling* and *Lotteries.*

BAIL BONDS
Individual bonds, Release of, v. 21, p. 104.

BAKERIES
Retail stores, License for, v. 21, p. 157.

BEACHES
Lost property, Liability for, v. 21, p. 249.

BEER
Equipment, Demonstration in city-owned building, v. 21, p. 252.
Garden, License for, v. 21, p. 138.
Sale on city-owned premises, v. 21, p. 100.

BICYCLE RACES
License fee, Refund of, v. 21, p. 164.

BIDS AND AWARDS
Advertising for, Requiring union label, v. 22, p. 540.
Alteration of, **v. 23, p. 836.**
Bonds, Effect of use of, v. 22, p. 546.
Cancelling contracts, **v. 23, p. 834.**
City employee, Ineligible for contract, **v. 23, p. 838.**
Coal, From outside state, v. 22, p. 573.
Concession, Without bids, **v. 23, p. 834; v. 23, p. 840.**
Conformity of, **v. 23, p. 838.**
Deposit for, **v. 23, p. 841.**
Low bid, Reduction of, **v. 23, p. 833.**
Photographic services, **v. 23, p. 839.**
Postage stamps, Exempt from, v. 22, p. 570.
Printing, Requiring Union Label, v. 22, p. 540.
Receiving bids, After specified opening time, **v. 23, p. 835.**
Sales tax, Provision in, v. 22, p. 548.
Unit bid, Total amount, **v. 23, p. 840.**
Withdrawal of, **v. 23, p. 836.**

BILLBOARDS AND SIGNS
Billboards, Removal of, v. 22, p. 473.
Illuminated signs,
Overhanging, gasoline stations, v. 22, p. 473.
Permit for, v. 21, p. 158.
Plans, Approval of, v. 21, p. 158.
Removal for delinquent inspection fees, v. 21, p. 45.

BIRTHS
Certificates for, Charge for, v. 21, p. 33.
County clerk, Copy to, v. 21, p. 29.
Illegitimate child, Recording of parents' names, v. 21, p. 27.
Illegitimate child, Registration of, v. 22, p. 86.
Recording, Time of, v. 21, p. 34.
Records,
Inspection of, v. 21, p. 34.
Inspection of, For publication uses, v. 21, p. 28.
Seal on, v. 21, p. 32.
Stillbirth, Copy to county clerk, v. 21, p. 29.
Registration of illegitimate child, v. 22, p. 86.
Reports,
Affidavit, Signature on, v. 21, p. 31.
Delayed report, Signature on, v. 21, p. 31.

BLACKOUTS
Lights in stores, v. 21, p. 136.

BLUE ISLAND RAILWAY COMPANY
Right of way, Forfeiture of, v. 21, p. 203.

BOARD OF APPEALS (ZONING)
Building commissioners decision, Reversal of, v. 21, p. 176.

BOARD OF EDUCATION
Budget, Approval by City Council, **v. 23, p. 3.**

BOARD OF ELECTION COMMISSIONERS EMPLOYEES' ANNUITY AND BENEFIT FUND
Age statements, Change of, v. 21, p. 77.
Annuity, Computation of, v. 21, p. 76.

BOARD OF HEALTH
See *Health, Board of.*

BONDS
See also *Funds.*
Crossing bond, **v. 23, p. 803.**
Expense of Issuing, v. 22, p. 517.
Investment of pension funds in, v. 21, p. 76.
Local Improvement, Status of, **v. 23, p. 806.**
Parking facilities, **v. 23, p. 795; v. 23, p. 801; v. 23, p. 803; v. 23, p. 804.**
Sewers, Water Pipe Extension, **v. 23, p. 792.**
Special assessments, See.
Subway revenue, **v. 23, p. 792.**
Surety bonds, Termination of, v. 21, p. 50; **v. 23, p. 793; v. 23, p. 794; v. 23, p. 801; v. 23, p. 803.**
Voting machines, Status of, **v. 23, p. 790.**

BOULEVARDS
See also *Michigan Avenue.*
Undertaking establishment, Location of, v. 21, p. 173.

BOWLING
"Junior Bowling Alley," Prohibition of, v. 21, p. 133.
Portable table, Classification of, v. 21, p. 131.

BRIDGES
Closing, Power of City, **v. 23, p. 673.**
Control of, By City, v. 22, p. 8.
Fixed bridges, North branch, **v. 23, p. 9.**
Railroads,
Maintenance of, v. 21, p. 203.
Removal, Permit for, v. 21, p. 207.
Sanitary District, See that title.
State Highway, in City, v. 22, p. 556.
Street car tracks, Relocation of, v. 21, p. 217.

BROKERS
Real estate, Revocation of license, v. 21, p. 160.

BROOKFIELD, VILLAGE OF
Bar permits, Prohibition on city leased property, v. 21, p. 100.

BUILDINGS, DEPARTMENT OF
Airplane warning lights, **v. 23, p. 597.**
Airport hangars, v. 22, p. 400.
Alley shacks, Demolition of, **v. 23, p. 600.**
Apartments,
In general, v. 22, p. 404.
Vestibule lights in, v. 22, p. 381.
Aperture, Definition of, v. 22, p. 405.
Balcony, Definition of, v. 22, p. 391.
Business office, Capacity of, v. 21, p. 168.
City owned, See Also *City Property, Leases.*
City Hall, Assignment of space, **v. 23, p. 809.**
Lawler Bath House, **v. 23, p. 807.**
Clocks, Maintenance of, v. 21, p. 192.
Codes,
Enforcement, **v. 23, p. 618.**
Publication of, **v. 23, p. 12.**
Retroactive effect of, v. 21, p. 171; v. 22, p. 387; v. 22, p. 395; v. 22, p. 402.
Use of by outside municipality, v. 22, p. 229.
Commissioner,
Illuminated signs, Approval of plans, v. 21, p. 158.
Revocation of permit, **v. 23, p. 594.**
Zoning conformity decision, Reversal of, v. 21, p. 176.

BUILDINGS, DEPARTMENT OF—Continued
Dangerous structures,
Demolition of, Alley shacks, **v. 23, p. 600.**
In general, v. 22, p. 385.
See "Unsafe" under Buildings, Department of.
Wrongful removal of, v. 22, p. 392.
Day Nurseries, See that title.
Defense housing, Standards for, v. 21, p. 172.
Demolition,
Abandoned, Party wall involved, **v. 23, p. 597.**
Alley shacks, **v. 23, p. 600.**
Emergency measure, **v. 23, p. 604.**
Examination as a precautionary measure, Compelling of, v. 21, p. 169.
In General, v. 22, p. 385.
Insane owner, Procedure, v. 21, p. 170.
Lien for, **v. 23, p. 612; v. 23, p. 612.**
Procedure for, v. 21, p. 167.
Receiver for, v. 21, p. 169.
Wrongful, Liability for, v. 22, p. 392.
Dry cleaning, Ventilation system for, **v. 23, p. 599.**
Electric supply for, **v. 23, p. 598.**
Elevated stations, Control of, v. 22, p. 483.
Elevators, Smoking prohibited in, v. 22, p. 286.
English basement, Counting as story, **v. 23, p. 618.**
Entry on private property, Compelling of, v. 21, p. 169.
Escalators, v. 22, p. 397.
Fire limits, Moving buildings into, v. 22, p. 394.
Fire station, Abandoned, **v. 23, p. 597.**
Flammable liquids, Storage of, v. 21, p. 170; v. 22, p. 322.
Frontage consents, See under that title.
Garage,
Classification of, v. 21, p. 173.
Revocation of, v. 22, p. 414.
Government buildings, Inspection of, v. 22, p. 265; **v. 23, p. 304.**
Hotels, Apartments, v. 22, p. 406.
House numbers, Placing of, v. 21, p. 167.
Inflammable liquids, Handling of, v. 21, p. 170; v. 22, p. 322.
Inspection,
Charitable organizations, v. 21, p. 125.
Compelling of, v. 21, p. 169.
Elevated stations, v. 22, p. 483.
Elevator, certificates photostated, **v. 23, p. 627.**
Fees, Payment by HOLC, v. 21, p. 91.
Government Buildings, v. 22, p. 265; **v. 23, p. 304.**
Mechanical ventilation equipment, **v. 23, p. 602.**
Institutional buildings, Classification of, **v. 23, p. 610.**
Jurisdiction, Building Department, v. 22, p. 408.
Kitchenette apartments, Regulations of, v. 21, p. 5.

BUILDINGS, DEPARTMENT OF—Continued
Lights,
Porches, v. 21, p. 170.
Roofs, Airplane warning, **v. 23, p. 597.**
Vestibules, v. 22, p. 381.
Lot requirements, Legality of, v. 21, p. 170.
Medical center, v. 22, p. 416.
Mezzanine, Definition of, v. 22, p. 391.
Multiple use, Classifying as a business, **v. 23, p. 606.**
Nuisance,
Abating when owner insane, v. 21, p. 170.
Demolition of, v. 21, p. 169.
Unsafe, v. 21, p. 171.
Unsightly, v. 21, p. 166.
Use as constituting, v. 21, p. 172.
Nursing homes, Regulation of, **v. 23, p. 628.**
Office, Capacity of, v. 21, p. 168.
Oil, Permit for storage of, v. 22, p. 326.
Openings, Walls and windows, v. 22, p. 405.
Ordinances, Enforcement of, **v. 23, p. 618.**
Party walls, Frontage consent, Status of building, v. 21, p. 173.
Permits,
During national emergency, v. 21, p. 171.
Refund of fee, v. 22, p. 305.
Revocation,
By Building Commissioner, **v. 23, p. 594.**
Damages from, v. 21, p. 175.
Parking lots, See *Parking.*
Person, Definition of, v. 22, p. 408.
Plumbing, Defense housing, Standards for, v. 21, p. 172.
Police aid to Department, v. 21, p. 10.
Pre-Existing, Status of, **v. 23, p. 595.**
Public buildings, Smoking prohibited in, v. 22, p. 286.
Public halls, Placards in, v. 22, p. 428.
Redevelopment Commission, Powers of, **v. 23, p. 625.**
Remodeling, Advertisements for, **v. 23, p. 624.**
Rooms, Determination of capacity, v. 21, p. 168.
Single dwelling, Exit light, v. 21, p. 166.
Signs, Overhanging, v. 22, p. 473.
Slums, Eradication of, **v. 23, p. 613; v. 23, p. 618.**
Smoking, Prohibited in public buildings and elevators, v. 22, p. 286.
Stairwells in existing buildings, v. 21, p. 171.
State buildings, Control of, v. 22, p. 378.
Storage, In general, v. 22, p. 390.
Storage, Warehouses, Parcel deposits, v. 22, p. 412.
Stockyards, Permits in, v. 22, p. 419.
Tenement house, Definition of, v. 22, p. 404.
Theaters, Seating capacity signs, v. 22, p. 428.
Trailers, Location of, v. 22, p. 420.
Uncompleted buildings, Abatement of, v. 21, p. 166.

BUILDINGS, DEPARTMENT OF—Continued
United States, See that title.
Unsafe,
Abatement of, v. 21, p. 167.
Alley shacks, Demolition of, **v. 23, p. 600.**
Demolition, Procedure for, v. 21, p. 167; v. 21, p. 169; v. 21, p. 171; v. 22, p. 385.
Repairing of, v. 21, p. 169.
Shoring-up of, v. 21, p. 169.
Unsightly, Status of, v. 21, p. 166; v. 21, p. 168.
Ventilation equipment, **v. 23, p. 602.**
Violations, Warrants for, v. 22, p. 384.
Walls,
Openings in, v. 22, p. 382.
Painting of unsightly, v. 21, p. 168.
Water tanks, Height of, v. 22, p. 411.
Wrecking permit fees, Exemption of Housing Authority, v. 21, p. 84.

BURGLAR ALARM
Tear gas device, License for, v. 21, p. 154.

BURIALS
See that title under *Health, Board of.*

C

CALUMET LAKE AND RIVER
Chicago Port Authority, Jurisdiction over, **v. 23, p. 21.**
Title to underlying lands, v. 21, p. 105.

CALUMET PARK, VILLAGE OF
Sewer construction, Liability for damage by, v. 21, p. 101.

CANOPIES
See under *Permits.*

CARNIVALS
City property, Use of, v. 21, p. 255.

CEMETERY
Annexation of, v. 22, p. 108.
Casket, Return to undertaker, v. 21, p. 134.
Clothes of deceased, Removal of, v. 21, p. 134.
Location, Within city limits, v. 22, p. 438.

CHARITABLE INSTITUTIONS AND ORGANIZATIONS
Inspection fees, Exemption from, v. 21, p. 159; v. 21, p. 165.
Play lot operation, Organization for, v. 21, p. 243.
Water charges, Exemption from, v. 21, p. 41.

CHECKS
Deceased employee's, v. 21, p. 39.
Endorsement to another official, v. 21, p. 29.
Photostatic copies of, **v. 23, p. 766.**

CHICAGO AND WESTERN INDIANA RAILROAD
Relocation of tracks, Salvage from, v. 21, p. 206.

CHICAGO HOUSING AUTHORITY
Building wrecking fees, Exemption from, v. 21, p. 84.
City Council, Powers of, **v. 23, p. 289.**
Coal, Purchase of, v. 21, p. 80.
Condemnation,
Excess condemnation, Power of, v. 21, p. 81.
Sale of excess land, v. 21, p. 81.
Contracts,
Arbitration clause in, v. 21, p. 90.
Coal purchase for product, v. 21, p. 80.
Liability on, v. 21, p. 84.
Employees,
Federal homes for, v. 22, p. 228.
Hatch Act, v. 22, p. 215.
Negligence, Liability for, v. 21, p. 84.
Social Security Act, Exemption from, v. 21, p. 80.
Funds, Investment of, v. 22, p. 216.
Illinois Municipal Budget Law, Applicability of, v. 21, p. 91.
Loan from city, Waiver of interest on, v. 21, p. 78.
Option to buy city land, v. 21, p. 80.
Projects,
Apartment, Furniture left by tenant, v. 21, p. 85.
Designation of location, v. 21, p. 90.
Garbage removal, By city, **v. 23, p. 293.**
Outside city, Status of residents, **v. 23, p. 292; v. 23, p. 650.**
Permit and inspection services, Charge for, v. 21, p. 90.
Permit for sidewalk construction, v. 21, p. 208.
Service charges, Computation of, v. 21, p. 90.
Service charges, In lieu of taxes, v. 21, p. 91.
Sewer inspection, **v. 23, p. 295.**
Site, City's consent for, v. 21, p. 85.
Water supply, Shut-off charges, **v. 23, p. 296.**
Purchase of city land, v. 21, p. 80.
Reports, Requirements for, v. 21, p. 85.
Service charges in lieu of taxes, Collection and distribution of, v. 21, p. 78; v. 21, p. 91.
Shelter rentals, Payment of, v. 21, p. 78.
Streets vacated by city, Reversionary interest in, v. 21, p. 84.
Taxes, Payments in lieu of, v. 21, p. 78; v. 21, p. 90; v. 21, p. 91.

CHICAGO HOUSING AUTHORITY—Continued
Tenants,
Abandonment of premises by, v. 21, p. 85.
Eligibility of, v. 21, p. 85.
Furniture left by, v. 21, p. 85.
Relief recipients, Eligibility of, v. 21, p. 85.
Vacation of street, Removal of improvements, v. 21, p. 90.

CHICAGO PARK DISTRICT
Boulevard, Altering status of, **v. 23, p. 660.**
City buildings, Removal from Park property, **v. 23, p. 316.**
47th Street, Jurisdiction over, v. 21, p. 103.
Michigan Avenue,
Drains, maintenance of, v. 21, p. 104.
Jurisdiction over, v. 21, p. 101.
Maintenance of, v. 21, p. 104.
Sidewalk, Maintenance of, **v. 23, p. 684.**
Viaduct, Repair of, v. 21, p. 104.
Parking facilities, Power to acquire, **v. 23, p. 708.**
Playground, Transferring to, **v. 23, p. 807.**
Tax delinquent property, Possession of, v. 21, p. 225.
Transfer of street for park purposes, v. 21, p. 185.
Underground parking facilities, Construction of, **v. 23, p. 91.**
Water supply to, Liability to city for cost of, **v. 23, p. 778.**

CHICAGO PLAN COMMISSION
City Planning Law, Amendment to, **v. 23, p. 114.**
Disbursement of monies from publication sales, v. 21, p. 39.
Housing project site, v. 21, p. 85.
Publications, Sale of, v. 21, p. 39.
Status of, v. 21, p. 42.

CHICAGO PORT AUTHORITY
Jurisdiction over Lake Calumet area, **v. 23, p. 21; v. 23, p. 121.**
Annuity and Benefit Funds, Semi-annual deductions for, **v. 23, p. 288.**
Appropriation ordinance, Amendment of, v. 21, p. 255.
Assistant Librarian, Civil service status of, v. 21, p. 38.
City property, Use of, v. 21, p. 255.
Directors, Bonds for, v. 21, p. 38.
Librarian, Civil service status of, v. 21, p. 38; v. 22, p. 169.
Newsstand at, Status of, **v. 23, p. 685.**
Pamphlets, Sale of, v. 22, p. 113.
Secretary, Civil service status of, v. 21, p. 38.

CHICAGO RAPID TRANSIT COMPANY
Compensation to city, Determination of, v. 21, p. 209.
Elevated Stations, Inspection of, v. 22, p. 483.
Transfers, Apportionment from, v. 21, p. 209.

CHICAGO RECREATION COMMISSION
Community fund, Custody of, v. 21, p. 38.
Play lots, Liability for injury at, v. 21, p. 243.
Status of, v. 21, p. 38.

CHICAGO REGIONAL PORT DISTRICT
See *Chicago Port Authority.*

CHICAGO RELIEF ADMINISTRATION
See also *Relief.*
Employables, Listing of, v. 21, p. 183.
Employees, Leave of absence for, v. 21, p. 59.
Furniture and equipment, v. 21, p. 182.
Status of, In military service, v. 21, p. 54.
Waste material sold by House of Correction, Credit for, v. 21, p. 240.

CHICAGO RIVER
See also *Bridges* and *Waterways.*
Dumping, Prohibition of, v. 21, p. 135.
Oil Tankers, Regulation of, **v. 23, p. 401.**

CHICAGO SERVICEMEN'S CENTER
Donations from Thrill Show, v. 21, p. 242.
Donations to, Status for tax purposes, v. 21, p. 100.

CHICAGO SURFACE LINES
Tracks, Relocation of, v. 21, p. 216.

CHICAGO TRANSIT AUTHORITY
Accidents, Investigation of, by police, v. 22, p. 48.
Advertising, Space on Vehicles, **v. 23, p. 750.**
Driveway permits, Necessity for, **v. 23, p. 733; v. 23, p. 734.**
Elevated lines, Logan Square Branch, old equipment on, **v. 23, p. 750.**
Elevated stations, Building regulations, v. 22, p. 483.
Expenses of, v. 22, p. 518.
Policemen carrying weapons, **v. 23, p. 728.**
Right of way,
City bridges, Maintenance of, **v. 23, p. 730; v. 23, p. 747.**
Maintenance of, v. 22, p. 488.
Paving strip along tracks, Maintenance of, **v. 23, p. 729.**
Poles, Relocation of, **v. 23, p. 744.**
Street compensation, Settlement of, **v. 23, p. 739.**
Tracks, Removal of, v. 22, p. 452; v. 22, p. 491; v. 22, p. 498.
Safety islands, Maintenance of, v. 22, p. 487; v. 22, p. 499.
Smoking on vehicles, Prohibition of, **v. 23, p. 738.**
Wheel tax, Subject to, v. 22, p. 493.

CHICAGO TUNNEL COMPANY
Restoration of tunnel, Reimbursement for, v. 21, p. 208.
Steam transmission, v. 22, p. 27.

CHICAGO UNION STATION COMPANY
Rights in Congress Street, v. 21, p. 272.

CHICAGO WELFARE ADMINISTRATION
See *Relief.*

CHILDREN, ABANDONMENT OF
Abandonment of, v. 22, p. 262.

CHIROPRACTORS
X-ray laboratory, Operation of, v. 21, p. 157.

CHRISTIAN SCIENTIST
Medical treatment, Compelling, v. 22, p. 59.

CHRISTMAS TREE
Sale, Licensing of, v. 21, p. 158.

CICERO AVENUE
Control over, v. 21, p. 192.

CIGARETTES AND CIGARETTE DEALERS
License,
City's power to, v. 21, p. 7.
Department store, Number required, v. 21, p. 159.
Fee, Refund of, v. 21, p. 163.
Hospitals, Status of, **v. 23, p. 571.**
Machines, Status of, **v. 23, p. 377; v. 23, p. 404; v. 23, p. 409.**
Private club, v. 22, p. 302.
Several locations, Requirements for, v. 21, p. 159.
Location, Near school, v. 22, p. 283.
Tax,
House of Correction, Sales at, **v. 23, p. 415.**
In general, **v. 23, p. 416.**
Revenue, Use of, **v. 23, p. 420.**
Wholesale tobacco house, License for, v. 22, p. 316.

CIGARS AND CIGAR STORES
Liquor sales in, Hours for, v. 21, p. 145.

CITY CLERK
Election petitions, Certification of, **v. 23, p. 92.**
Election records, Retention of, **v. 23, p. 89.**
Fish and game license fees, Ownership of, v. 21, p. 230; v. 22, p. 121.
Special assessments, Information to bondholders, v. 21, p. 304.

CITY COLLECTOR
Inspectors, Refusal to admit, **v. 23, p. 120.**

CITY COMPTROLLER
Appropriations, Power to amend estimates, v. 21, p. 225.
Check photostats, Validity of, **v. 23, p. 766.**
Checks of deceased employees, v. 21, p. 39.
Deputy of Comptroller, Signature of, v. 21, p. 40.
Housing Authority agreement, Making of, v. 21, p. 78.
Judgment monies, Withholding attorneys fees on, v. 21, p. 44.
Lease of airplane hangar space, v. 21, p. 250.
Private debt, Aid in collection of, v. 21, p. 40.
Salaries, Payment after deduction of, v. 21, p. 61.
Special assessments, Bonds, See *"Bonds"* under *"Special Assessments."*

CITY COUNCIL
Airport, Sub-lease by lessee, v. 21, p. 252.
Aircraft, Power to determine flight charges, v. 21, p. 7.
Annexation of unincorporated territory, v. 21, p. 3.
Appropriation ordinance, Amendment of, v. 21, p. 225.
Attorney's fees of city official, v. 22, p. 53.
Board of Education budget, Approval of, **v. 23, p. 3.**
Board of Health, Rules for meetings of, v. 21, p. 30.
Bridge bonds, Surplus account for, v. 22, p. 513.
Bridges, See that title.
Chicago Housing Authority, Jurisdiction over, **v. 23, p. 289.**
City property, Power to donate, v. 21, p. 7.
Civic center, Proposed site, v. 22, p. 580.
Contracts,
  Approval of, v. 22, p. 547.
  Extension of, v. 21, p. 265.
  Extras, Authorization of, v. 21, p. 267.
Cost of commission hearings, v. 22, p. 29.
Daylight saving time, Extension of, v. 21, p. 6.
Departmental duties, Transfer of, v. 22, p. 2.
Disabled veterans, Parking privileges, v. 22, p. 25.
Drivers' tests, Control over, v. 21, p. 201.
Driveway permits,
  Issuance of, v. 21, p. 192.
  Revocation of, v. 21, p. 155.
Duties, Departmental, Transferring, v. 22, p. 2.
Emergency Committee on Crime,
  Increasing Committee membership, **v. 23, p. 29.**
  Powers of, **v. 23, p. 23.**
  Subpoenas, **v. 23, p. 14; v. 23, p. 27.**
Employees in armed forces, provision for, v. 21, p. 54.
Fences, see that title.
Fire service outside city limits, Charges for, v. 21, p. 8.
Garage attendants, Duties of, v. 21, p. 202.

CITY COUNCIL—Continued
Inspection,
Locomotives, v. 22, p. 140.
Police records, v. 22, p. 35.
See *"Inspection."*
Junk dealers, Ordinance for, v. 22, p. 4; **v. 23, p. 16.**
Lake front ordinance, **v. 23, p. 1.**
Leases,
Airplane hangar space, v. 21, p. 250.
Dock facilities, v. 21, p. 250.
Legislative inquiries, Power to conduct, **v. 23, p. 14.**
Legislative Reference Bureau, v. 22, p. 14.
License fees, v. 22, p. 20.
Loans, Waive of interest on, v. 21, p. 78.
Microfilm, City records, **v. 23, p. 27.**
Milk Regulations, Enactment on, v. 21, p. 26.
Nuisances, Declaration of, v. 21, p. 167.
Option, Ogden Gas Company, **v. 23, p. 7.**
Pedestrian traffic, Power to regulate, v. 21, p. 201.
Police records, Inspection of, v. 22, p. 35.
Railroads, Requirement of headlight dimmers, v. 21, p. 204.
Relief plumbers, Certificates for, v. 21, p. 179.
Rentals of private property, Control over, v. 21, p. 5.
Salaries, Increase in, v. 22, p. 6.
Salaries, fixing of, v. 22, p. 30.
School levy, v. 22, p. 19.
Seal of City, **v. 23, p. 30.**
Smoking ordinance, In public places, v. 22, p. 286.
Statute of Limitations, Waiver of, v. 21, p. 248.
Subpoenas, Power to issue, **v. 23, p. 14; v. 23, p. 27.**
Taxicab ordinance, Power to repeal, **v. 23, p. 500.**
Taxicabs, See that title.
Television programs, Regulation of, **v. 23, p. 402.**
Tickets, See that title.
Tidelands case, Effect on filtration plant, **v. 23, p. 13.**
Waste containers, Advertising on, v. 22, p. 457.
Water, Sale to nonresidents, v. 21, p. 257. See also *Water.*

CITY PROPERTY
Airport, See under *Leases.*
Alcoholic beverages, Sale of, v. 21, p. 100; v. 21, p. 252.
Bathhouse, Status of, **v. 23, p. 807.**
Beer cooling equipment, Demonstration of, v. 21, p. 252.
Carnival site, Use of, v. 21, p. 255.
Chicago Public Library, Use of, v. 21, p. 255.
City Hall, Consignment of space in, **v. 23, p. 809.**
Condemned property, Use of, See *"Condemnation."*
Donation of, v. 21, p. 7.
Leasing of, See *"Leases."*
Mechanics Lien Act, Application of, v. 21, p. 249.
Pumping station, Ownership of, v. 21, p. 256.

CITY PROPERTY—Continued
Reid Murdoch Building, Purchase of, **v. 23, p. 816.**
Sale,
Judgments against city as part payment, v. 21, p. 251.
Method of, v. 21, p. 8.
Option to City Housing Authority, v. 21, p. 80.
Tax delinquent property, v. 21, p. 225.
Taxation of, O'Hare Field, DuPage County, **v. 23, p. 831.**
Trees, Care of, v. 22, p. 139.
Trucks, Riding on, v. 22, p. 128.

CITY FUNDS
Appropriations, See that title.
Breakwater, repairing, v. 22, p. 530.
Bridge Bonds, surplus account, v. 22, p. 513.
Bonds, See that title.
Division between two improvements, v. 21, p. 300.
Idle funds, Repayment of advances from, v. 21, p. 179.
Interest on, v. 21, p. 242.
Lien of Sub-contractor against, v. 21, p. 249.
Motor fuel tax fund, See under *State of Illinois.*
Relief funds, Custody of, v. 21, p. 182.
Special assessments, See under that title.
Special deposits, Use of, v. 21, p. 240.
Traction fund, See under that title.

CITY PUBLICATIONS
Sale, Agency for, v. 21, p. 39.

CITY TREASURER
Relief monies, Custody of, v. 21, p. 182.

CIVILIAN DEFENSE
Air raid sirens, Illinois Retailers Occupation Tax on, **v. 23, p. 756.**
Bomb shelters, Liability of owners, **v. 23, p. 405.**
Industries, Communications fund, v. 21, p. 242.
Liabilities of companies participating in, v. 21, p. 220.

CIVIL SERVICE
See also *Employees of City.*
Abandonment of position, **v. 23, p. 153.**
Age on application, v. 22, p. 158.
Alien doctors, Employment of, v. 22, p. 50.
Applications, Citizenship averment in, v. 21, p. 59.
Appointment of selective service registrant, v. 21, p. 55.
Blanketing, Laborers, **v. 23, p. 130; v. 23, p. 146.**
Certification,
Police Captains, **v. 23, p. 158.**
Policemen, From two lists, **v. 23, p. 182.**
Waiver of, **v. 23, p. 139.**

CIVIL SERVICE—Continued
Charges, Sufficiency of, **v. 23, p. 143.**
Discharge,
Cancellation of, **v. 23, p. 137**
Citizenship, Misrepresentation of, v. 21, p. 59.
Salary deductions for annuity during illegal, v. 21, p. 75.
Efficiency rating, Police Department, **v. 23, p. 155.**
Eligibility List,
Battalion Chiefs, Striking, **v. 23, p. 170.**
Citizenship as affecting status on, v. 21, p. 59.
Male and female names on one list, **v. 23, p. 132.**
Waiver of certification, **v. 23, p. 139.**
Examination,
Fees for, v. 21, p. 44.
Physicals, Effect of duty injury, **v. 23, p. 129.**
Promotional and original entrance, **v. 23, p. 139.**
Field nurses, Classification for, v. 21, p. 57.
Firemen,
Firemen's Arbitration Board, **v. 23, p. 161; v. 23, p. 187.**
Outside employment, v. 22, p. 132.
Refusal to answer alarm, **v. 23, p. 164.**
Residence requirement, **v. 23, p. 167.**
Grades, Transfer, **v. 23, p. 150.**
Hoisting engineers, Reinstatement by Court order, **v. 23, p. 147.**
Laborers, Blanketing of into Civil Service, **v. 23, p. 130.**
Layoffs, v. 22, p. 146.
Leave of absence,
Military service, v. 21, p. 70.
Reasons for, v. 21, p. 60.
Returning from, **v. 23, p. 138; v. 23, p. 148.**
Library employees, Status of, v. 21, p. 38; v. 22, p. 169.
Librarian, Examination for, v. 22, p. 169; **v. 23, p. 143.**
Military service,
Coast Guard, v. 22, p. 168.
End of World War II, v. 22, p. 161.
Furlough for, **v. 23, p. 177.**
Merchant Marine, v. 22, p. 146.
Preference for, v. 22, p. 152; **v. 23, p. 124; v. 23, p 125; v. 23, p. 133.**
Proof of, **v 23, p. 135.**
Resignation when in, v. 22, p. 160.
Returning from, v. 22, p. 150.
Rights when in, v. 21, p. 58.
Nurses, Registration requirements for, **v. 23, p. 172.**
Outside employment,
Firemen, v. 22, p. 132.
Physicians, v. 22, p. 77; v. 22, p. 82.
Policeman, Referee, **v. 23, p. 173.**
Physicians, v. 22, p. 77; v. 22, p. 82.

CIVIL SERVICE—Continued
Policemen,
Efficiency ratings, **v. 23, p. 155.**
Employment as referee, **v. 23, p. 173.**
Misconduct on furlough, **v. 23, p. 166; v. 23, p. 176.**
Retired officers, Crossing guards, **v. 23, p. 184.**
Special officers, **v. 23, p. 178.**
Probationary employees,
Blanketed employees, **v. 23, p. 146.**
Lunchroom attendant, **v. 23, p. 122.**
Resignations,
Cancellation of, **v. 23, p. 149.**
Insane employee, v. 22, p. 145; v. 22, p. 149; **v. 23, p. 152.**
Military service, When in, v. 22, p. 160.
Refusal to accept, v. 22, p. 149.
Reinstatement,
Demand by policeman, **v. 23, p. 129.**
Demand by policewoman, **v. 23, p. 132.**
Telegram as, v. 21, p. 59.
Withdrawal, v. 21, p. 57; v. 21, p. 60; v. 21, p. 144.
Salaries, See that title.
Selective service registrants, Status of, v. 21, p. 55.
Seniority rights, During military service, v. 21, p. 54.
Sick leave, Regulation of, v. 21, p. 60.
Sidewalk inspectors, Blanketing of, **v. 23, p. 159.**
Sufficiency of charges, **v. 23, p. 143.**
Suspension, Duration of, **v. 23, p. 137.**
Temporary appointees,
Citizenship of, v. 21, p. 60.
Field nurses as, v. 21, p. 57.
Firemen, v. 22, p. 164.
Policemen, v. 22, p. 164.
Temporary transfers between departments, Deductions during, v. 21, p. 70.
Vacation periods, Right to, v. 21, p. 62.

CIVIL SERVICE COMMISSION
Charges, after reinstatement, v. 21, p. 58.
Reassignment, Delay in, v. 21, p. 59.
Reinstatement,
Second charges after, v. 21, p. 58.
Review of findings, v. 21, p. 58.
Subpoena, Power of, **v. 23, p. 179.**

CLAIMS AGAINST CITY
Lifeguard examination, Injured in, **v. 23, p. 777.**
Permit revocation, Damages from, v. 21, p. 175.
Safeguards after accidents, Effect on, **v. 23, p. 789.**
Statute of Limitations, Waiver of, v. 21, p. 248.

CLAIMS OF CITY
Damage to city property,
Submarine cable, v. 21, p. 247.
Union Station Company, Van Buren Street viaduct repairs, **v. 23, p. 784.**

CLOCKS ON BUILDINGS
Removal by city, v. 21, p. 192.

CLOSING OUT SALES
License for, v. 21, p. 155; **v. 23, p. 407.**

CLUBS
Liquor sales, Zoning regulations, v. 21, p. 138.
Reduced fee licenses, See under *Liquor* and *Liquor Dealers.*

COAL
Bids outside of city, v. 22, p. 573.
Contract price, Effect of federal regulations on, v. 21, p. 264.
Emergencies, Seizing private supplies, v. 22, p. 104.
Marketing rules and regulations,
Effect on city purchases, v. 21, p. 270.
Effect on reserve, v. 21, p. 270.
Mine name and location, Information from railroad, v. 21, p. 203.
Price increase, Refund of, v. 21, p. 262.

COIN OPERATED MACHINES
See also *Gambling* and *Lotteries.*
"All Star Hockey Game," Status of, v. 22, p. 39.
"Anti-Aircraft Machine Gun," Prohibition of, v. 21, p. 132.
"Automatic Hostess," Prohibition of, v. 21, p. 135.
"Horoscope Machine," Amusement tax, v. 22, p. 362.
Milk dispensers, License for, v. 21, p. 116.
Radio, Amusement tax, v. 22, p. 365.
"Telequiz Machine," v. 22, p. 370.

COLD STORAGE PLANTS AND WAREHOUSES
License, Power to, v. 21, p. 161.

COMMONWEALTH EDISON COMPANY
Sidewalk construction, Permit for, v. 21, p. 208.

CONDEMNATION
Compensation for improvements, v. 21, p. 300.
Easement under right-of-way, Shoring expenses of, v. 21, p. 206.
Excess condemnation, Power of Housing Authority, v. 21, p. 81.
Leasing of condemned property, v. 21, p. 255.
Procedure, In general, v. 22, p. 578.
Use of property for temporary leasing, v. 21, p. 255.

CONGRESS STREET
Bond issue, Expense of, v. 22, p. 517.
Plans, Modification of, v. 21, p. 272.
Rentals, Condemned property, v. 22, p. 514; v. 22, p. 516.
Sewer inspection, Costs of, **v. 23, p. 881.**

CONSTITUTION
Free speech, Scope of, v. 21, p. 197.

CONTAGIOUS DISEASE HOSPITAL
Admission to, Court order for, v. 21, p. 32.
Venereal disease, Committing defendants for, v. 21, p. 32.

CONTRACTORS
See also *Contracts.*
Contract price, Retention of part of, v. 22, p. 577.
Exemption from Retailers Occupation Tax, **v. 23, p. 861.**
Private property, Easement in, v. 21, p. 300.
Public improvements, Prevailing wage law, Effect of, v. 21, p. 64.
Public work projects, Prevailing wages, Provisions, v. 21, p. 261.
Retailers Occupation Tax, v. 21, p. 259.
Specialized contractors, Liability of, v. 21, p. 259.
Subway equipment, Sale of, v. 21, p. 260.
Specialized contractors, Retailers Occupation Tax, Liability of, v. 21, p. 259.
Specifications, Compliance with, v. 21, p. 263.
State tax, Depletion of resources, **v. 23, p. 861.**
Tunnel service, Liability of loss for, v. 21, p. 268.
Workman's Compensation Liability, Security for, v. 21, p. 271.

CONTRACTS
See also *Contractors, Purchasing Agent.*
In general, v. 22, p. 555.
Additional work for,
Payments for, v. 21, p. 263; v. 21, p. 266.
Ratification of, v. 21, p. 269.
Arbitration clause, Legality of, v. 21, p. 90.
Bids,
Delay in rejection of, v. 21, p. 266.
Deposit, Recovery of, v. 21, p. 262.
Lowest bidder, Determination of, v. 21, p. 261.
Specifications, Variance from, v. 21, p. 263.
Withdrawal of, v. 21, p. 262.
Bond of Indemnity, v. 21, p. 269.
Chicago Housing Authority, Liability of, v. 21, p. 84.
City Council, Approval of, by, v. 22, p. 547.

CONTRACTS—Continued
Coal,
Freight charges, Tax on, v. 21, p. 271.
Marketing rules and regulations,
Effect on contract price, v. 21, p. 264; v. 21, p. 270.
Effect on reserve, v. 21, p. 270.
Out of state, Purchases, v. 22, p. 573.
Price, Adjustment of, v. 21, p. 264.
Refund of invalid increases, v. 21, p. 262.
Delays, Compensation when fault of city, v. 21, p. 265.
Delivery by consignor, Liability of theft, v. 21, p. 263.
Delivery, Method of, v. 21, p. 268.
Drugs, Retailers Occupation Tax on, **v. 23, p. 752.**
Electrical supply, Bridges, **v. 23, p. 860.**
Escalator clauses, v. 22, p. 566.
Excise tax, See under *United States.*
Expired, City hall electricity, **v. 23, p. 842.**
Extension, Continuation after fiscal year, v. 21, p. 265.
Extras,
Compensation for, v. 21, p. 266; v. 21, p. 267.
Liability when caused by specifications, v. 21, p. 263.
Material stolen, Building to be demolished, **v. 23, p. 850.**
Obstructions, Removal of, **v. 23, p. 865**
Private watch service, **v. 23, p. 852.**
Ratification of, v. 21, p. 269.
Relocation of wiring, **v. 23, p. 848.**
Salvageable material, Loss of, **v. 23, p. 858.**
Substitute materials, **v. 23, p. 843.**
Tax increase, **v. 23, p. 842; v. 23, p. 856.**
Wage increase, v. 22, p. 555.
War delay, **v. 23, p. 844.**
Fair employment provision in, v. 22, p. 559.
Federal excise tax, See *Excise Tax* under *United States.*
Federal fair labor standards, Effect on, **v. 23, p. 848.**
Freight charges,
Federal tax on, City liability for, v. 21, p. 271.
Retailers Occupation Tax on, v. 21, p. 260.
Garbage removal equipment, Five year, **v. 23, p. 861.**
Gasoline tax, Increase in, Effect of, **v. 23, p. 856.**
Interpretation of, v. 21, p. 268; v. 21, p. 269.
Leases, See also general headings *Leases* and *Airports.*
In general, v. 22, p. 554.
Airport,
Chicago Orchard, v. 22, p. 564.
Concessions, v. 22, p. 542.
Sublease at, v. 21, p. 252.
Municipal Tuberculosis Sanitarium, v. 22, p. 560.
Sale of, Effect of, v. 22, p. 543.
Loss, Effect of delivery on, v. 21, p. 263.
Maintenance bond, Waiver of, v. 21, p. 270.

CONTRACTS—Continued
Marketing rules and regulations, Effect on, v. 21, p. 264; v. 21, p. 270.
Omitted work, Payment for, v. 21, p. 267.
OPA provision in, v. 22, p. 566.
Partial contract under unit authorization, v. 21, p. 251.
Postage stamps, Purchase of, v. 22, p. 570.
Prevailing wage provision, Legality of, v. 21, p. 261.
Price, Effect of increase of market price, v. 21, p. 268.
Printing, Requirements of contracts for, v. 21, p. 270.
Purchasing agent, See that title.
Radio equipment, Fire Department leasing, **v. 23, p. 868.**
Real estate, Purchase of part of tract, v. 21, p. 251.
Retailer's Occupation Tax,
Air raid sirens, **v. 23, p. 756.**
In general, v. 22, p. 512; v. 22, p. 545; v. 22, p. 548; v. 22, p. 549; v. 22, p. 552.
Determination of, v. 21, p. 261.
Drugs, tax on, **v. 23, p. 752.**
Freight charges, Tax on, v. 21, p. 260.
House of Correction, Sales to, v. 22, p. 507.
Municipal Tuberculosis Sanitarium, Sales to, v. 22, p. 80.
Specialized contractors, Liability of, v. 21, p. 259.
Subway equipment, v. 21, p. 259; v. 21, p. 260.
Sewer construction, Removal of property from easement, **v. 23, p. 865.**
Signature requirements on, v. 21, p. 269.
Subway, See that title.
Termination, Work performed after, v. 21, p. 266.
Trucks, Reclassifying, **v. 23, p. 870.**
Wage scale changes, Effect of, v. 22, p. 555; **v. 23, p. 862.**
Workmen's Compensation Liability, v. 21, p. 271.

CORONER
See under *County of Cook.*

CORPORATION COUNSEL
Appeals, Cost of, v. 21, p. 50.
Defense of city employees, v. 21, p. 50.
Defense of former city official, v. 21, p. 44.
Lease of airplane hangar space, v. 21, p. 250.
Status of, v. 21, p. 41.

COUNTY OF COOK
Clerk, Right to birth and death records, v. 21, p. 29.
Collector, Withholding of tax monies, v. 21, p. 227.
Coroner,
Property of decedents, Custody of, v. 21, p. 17.
Search of premises of decedents, v. 21, p. 17.
Elections, Sharing expenses of, v. 21, p. 227.
House of Correction—County Jail wall, Repair of, **v. 21, p. 107.**

CRIMES AND CRIMINALS
See also *Records* under *Police, Department of.*
Misrepresentation of foods, v. 21, p. 116.

D

DAIRIES
See *Milk and Milk Products.*

DANCING
In Ice Cream Parlor, License for, v. 21, p. 160.

DAYLIGHT SAVING TIME
Extention of period, Authority for, v. 21, p. 6.

DAY NURSERIES
Building code, v. 22, p. 413.
Cribs and mattresses, Use of, **v. 23, p. 605.**
Definition of, **v. 23, p. 610.**
Inspection, Jurisdiction over, **v. 23, p. 603.**
Institutional units, **v. 23, p. 610.**
Operation of, by Board of Education, v. 22, p. 69.
Permit, Inspection for, v. 22, p. 68.
Private homes, Operation in, v. 22, p. 95.
Standards for, **v. 23, p. 615.**
Taverns, Located near, v. 22, p. 242.
Violations, Prosecution for, v **23, p. 616.**
Zoning, Requirements for, **v. 23, p. 647.**

DEAD BODIES
See *Burials* under *Health, Board of.*

DEATH
Certificates,
Copy to County Clerk, v. 21, p. 29.
Seal on, v. 21, p. 32.
Records, Inspection for publication, v. 21, p. 28.

DEATHS
Certificates of,
At County Morgue, v. 22, p. 78.
By undertaker's assistant, v. 22, p. 90.

DEBT OF CITY
Set off, Use of, v. 21, p. 249.

DEBT—Private
Aid in collection of, v. 21, p. 40.

DEDICATION OF STREETS AND ALLEYS
Acceptance by city, **v. 23, p. 663.**
Agreement between private parties, Effect of, v. 21, p. 191.
Boulevard, Altering status of, South Parkway, **v. 23, p. 660.**
Common law dedication, Duties when, v. 21, p. 186.
Easement, In lieu of, **v. 23, p. 662.**
Ordinance, Repeal of, **v. 23, p. 664.**
Park projects, Transfer for, v. 21, p. 185.
Plat, v. 22, p. 446; v. 22, p. 450; **v. 23, p. 661.**

DEPOSITARIES FOR CITY
Bids,
Average daily balances, Interest on, v. 21, p. 242.
Demand deposits, Interest on, v. 21, p. 242.
Deposits, Demand deposits, Interest on, v. 21, p. 242.

DISEASES
Communicable, Clothes and casket of decedent, v. 21, p. 134.
Tuberculosis cases, Forced removal to hospital, v. 21, p. 30.
Venereal, Treatment of minors, v. 21, p. 27.

DOGS
Biting dogs, Impounding of, v. 21, p. 28; **v. 23, p. 385.**
Dog Advisory Committee, Witnessing experiments, v. 22, p. 93; **v. 23, p. 50; v. 23, p. 52.**
Dog Pound Citizen's Committee, **v. 23, p 50; v. 23, p. 52.**
Impounding, v. 21 p. 28; **v. 23, p. 385.**

DRAFTEES
See *Selective Service Registrants* under *Military Service.*

DRIVEWAYS
Council order, v. 21, p. 192.
Permits,
For, v. 22, p. 309; **v. 23, p. 576;** C.T.A., **v. 23, p. 733; v. 23, p. 734.**
Parking lot, **v. 23, p. 672.**
Revocation of, v. 21, p. 155.
Use by new owner, v. 21, p. 160.

DUMPING
Illinois and Michigan canal, Use of, v. 22, p. 122.
Permits for, v. 22, p. 352.
Restrictions on, v. 21, p. 135.
Waste containers, Advertising on, v. 22, p. 457.
Revocation of order, Requisites of, v. 21, p. 192.
Streets, In general, **v. 23, p. 664; v. 23, p. 666.**
Surface space, Use by city, v. 21, p. 187.
Tax delinquent land, Acceptance of, v. 21, p. 226.
Utilities, Installation of, v. 21, p. 188.

DUTIES
Transferring to other departments, v. 22, p. 2.
DWELLINGS
See *Buildings*.

E

EASEMENTS
Modification of, v. 21, p. 272.
Sewer under right-of-way, v. 21, p. 206.
Temporary easement, Termination of, v. 21, p. 300.
Waterway, Easement to U. S. for, v. 21, p. 95.

ELECTION COMMISSIONERS, BOARD OF
Pamphlets, Cost of mailing, v. 21, p. 105.
Taxicab service expenditures, Exceeding appropriation for, **v. 23, p. 756.**

ELECTION COMMISSIONER'S ANNUITY AND BENEFIT FUND
Per diem employees, v. 22, p. 211.
Re-entry of annuitant, Different department, v. 22, p. 208.

ELECTIONS
Election petition, Certification of, **v. 23, p. 92.**
Expenses, Sharing of, v. 21, p. 227.
Pamphlets, Cost of mailing, v. 21, p. 105.
Petitions, Associate Judge Municipal Court, **v. 23, p. 107.**
Records, Retention by City Clerk, **v. 23, p. 89.**
Vacancies, Judicial, **v. 23, p. 112.**

ELECTRIC CURRENT AND EQUIPMENT
Electric mouse trap, v. 22, p. 270.
Inspection, Airline office equipment, v. 21, p. 214.
Signs, See *Illuminated Signs* under *Billboards and Signs*.

EMPLOYEES OF CITY
See also *Civil Service* and *Salaries*.
Appropriation ordinance, Employment pending passage of, v. 21, p. 225.
Board of Health, Personal liability of members, v. 21, p. 33.
Chicago Relief Administration, Status of, v. 21, p. 59.
Citizenship, Requirements, v. 21, p. 59.
Criminal record, Effect on employment, **v 23, p. 164; v. 23, p. 168.**
Crossing guards, Retired policemen as, **v. 23, p. 184.**
Debt, Refusal to pay, v. 22, p. 162.
Decedent, Pay check belonging to, v. 21, p. 39.
Defense by Corporation Counsel, v. 21, p. 44.
Emergency work by regular employees, v. 21, p. 64.

EMPLOYEES OF CITY—Continued
Federal funds, Paid by, v. 22, p. 63.
Federal income tax,
Collecting, v. 22, p. 226.
Lien for, v. 21, p. 64.
Federal tax on transportation, v. 21, p. 259.
Inventions of, v. 22, p. 52.
Leave of absence,
Defense work, v. 21, p. 60.
Disability, Returning from, **v. 23, p. 188.**
Military service, v. 21, p. 70.
Mentally ill, Resignation of, v. 21, p. 69.
Military service,
Pension deductions, v. 21, p. 70.
Rights when in, v. 21, p. 54; v. 21, p. 58.
Misconduct, While on furlough, **v. 23, p. 166; v. 23, p. 176.**
Nurses, Registration requirement, **v. 23, p. 172.**
Outside employment,
Firemen, v. 22, p. 132.
Physicians, v. 22, p. 77; v. 22, p. 82.
Overtime compensation, Right to, v. 21, p. 62; **v. 23, p. 201.**
Painters, Salaries of, v. 21, p. 66.
Power of attorney, Revocation of, v. 21, p. 61.
Prevailing wage law, Effect of, v. 21, p. 64; v. 21, p. 66.
Residence requirement,
Firemen, **v. 23, p. 167.**
Temporary and Civil Service employees, **v. 23, p. 173.**
Riding on outside of trucks, v. 22, p. 128.
Sick leave, v. 21, p. 60; v. 22, p. 171.
Special policemen, **v. 23, p. 178.**
Suspension of, **v. 23, p. 137.**
Temporaries,
Firemen, v. 22, p. 164.
Policemen, v. 22, p. 38.
Temporary transfer between departments, Pension deductions during, v. 21, p. 70.
Temporary employment of aliens, v. 21, p. 60.
Transportation expenses, Right to, v. 21, p. 32; **v. 23, p. 773.**
Vacation period, Right to, v. 21, p. 62.

EMPLOYMENT AGENCIES—Private
Regulation of, v. 21, p. 159.

EXIT LIGHTING
Single dwellings, Requirements for, v. 21, p. 166.

EXPLOSIVES
Police department, Federal license to transport, **v. 21, p. 98.**

F

FARMERS
Peddlers, License for, v. 21, p. 156.

FEDERAL EXCISE TAX
See under *United States.*

FEDERAL WORKS ADMINISTRATION
Loans to Medical Center Commission, v. 21, p. 107.

FEES
Birth certificates, v. 21, p. 33.
Civil service examinations, v. 21, p. 44.
Collection of, Settlement, v. 22, p. 20.
Fish and game license fees, v. 21, p. 230; v. 22, p. 121.

FENCES
Airport, Liability for, v. 22, p. 537.
Control of by ordinance, v. 22, p. 264.
Proposed ordinance, v. 22, p. 431.
River, Adjacent to, v. 22, p. 23.
Viewers, Law regarding, **v. 23, p. 384.**

FILLING STATIONS
License,
Airline, Company selling gasoline, Fee, v. 21, p. 160.

FINGERPRINTS
See under *Police Department.*

FIRE DEPARTMENT
Forcible entry by, v. 22, p. 119.
Jurisdiction, Buildings, v. 22, p. 408.
Service outside city, Charges for, v. 21, p. 8.
Thrill show, Proceeds, Donation of, v. 21, p. 242.

FIREMEN'S ANNUITY AND BENEFIT FUND
Application, Age stated on, v. 22, p. 184.
Assistant telegraph repairmen, v. 22, p. 178.
Chief Fire Marshal, Annuity for, **v. 23, p. 215.**
Deductions, Salary, v. 22, p. 189.
Disability benefits,
In general, v. 22, p. 182; v. 22, p. 191; **v. 23, p. 219.**
Expiration of, **v. 23, p. 162.**
Fixing of disability, v. 22, p. 181.
Fixing final annuity, v. 22, p. 180.
Leave of absence, v. 22, p. 193.
Fire telephone operator, Eligibility for membership, **v. 23, p. 212.**
Funds, Administration of, **v. 23, p. 213.**

FIREMEN'S ANNUITY AND BENEFIT FUND—Continued
Leave of absence, v. 22, p. 193.
Military service, Termination of, **v. 23, p. 210.**
New entrants, Classification of, **v. 23, p. 220.**
Parents' annuity, Reinstatement after resignation, Effect of, v. 21, p. 72.
Paying benefits, v. 22, p. 179.
Pension deductions, v. 22, p. 189.
Pensioner, Service credits to, v. 21, p. 72.
Prior service,
Credit from Firemen's Pension Fund, v. 21, p. 72.
Deductions for, Mistake in, v. 21, p. 72.
Re-employment, Fireman on pension, v. 22, p. 193.
Re-entry,
Different department, v. 22, p. 213.
Same department, **v. 23, p. 214.**
Refunding, Pension deductions, v. 21, p. 72; v. 22, p. 182; **v. 23, p. 217.**
Reinstatement after resignation, Effect of, v. 21, p. 72.
Resignation and reinstatement, Effect of, v. 22, p. 72.
Salary deductions,
Mistake in, v. 21, p. 72.
Prior service, Credit for, v. 21, p. 72.
Refund of, v. 21, p. 72; v. 22, p. 182; **v. 23, p. 217.**
Refund, Wife of discharged firemen, v. 21, p. 71.
Retirement, Payment for period of unlawful, v. 21, p. 61.
Widows' annuity,
Eligibility for, **v. 23, p. 216.**
Refund of, v. 21, p. 71; v. 21, p. 72; **v. 23, p. 209; v. 23, p. 211; v. 23, p. 218.**
Reinstatement after resignation, v. 21, p. 72.
Service credits, Rights during pension period, v. 21, p. 72.
Transferring, Pensions, v. 22, p. 187.
Widow, defined, v. 22, p. 184.

FIREMEN'S PENSION FUND
Salary deductions, Transfer to Firemen's Annuity and Benefit Fund, v. 21, p. 72.
Service credit, Transfer to Firemen's Annuity and Benefit Fund, v. 21, p. 72.

FIRE SALES
License, Period of, v. 21, p. 162.

FIRE WORKS
Shipment by Railway Express, **v. 23, p. 383.**

FLAMMABLE LIQUIDS AND MATERIALS
Buildings, Fire resistive requirements for, v. 21, p. 170.
Storage, Licensing of, v. 21, p. 159.
Tanks, Safety clearance for, v. 21, p. 134.
Transportation of, v. 22, p. 454; **v. 23, p. 674; v. 23, p. 715.**

FOODS, ESTABLISHMENTS AND SALES
See also *Meats and Poultry.*
Bakeries, Retail chain store license for, v. 21, p. 157.
Bread, Price of, v. 22, p. 221.
Dancing, Licensing of, v. 21, p. 160.
Dispenser's License, see *Licenses.*
Distributing plant, Classification of, v. 21, p. 119.
Dog food, Manufacture at uninspected plants, v. 21, p. 120.
Factory, License for in, v. 22, p. 237.
Horse meat,
In general **v. 23, p. 329.**
Labeling of, **v. 23, p. 332.**
Sale of, v. 21, p. 122.
Hot dog peddlers, Regulation of, **v. 23, p. 330; v. 23, p. 343.**

FOODS, ESTABLISHMENTS AND SALES
Ice cream, See that title.
Inspection beyond city limits, v. 21, p. 122.
Licensing, See under *Licenses.*
Liquor sales, Zoning regulations in, v. 21, p. 138.
Meat products, See *Meats* and *Poultry.*
Milk products, See *Milk* and *Milk Products.*
Peddlers, Regulation of, **v. 23, p. 341.**
Pool buying to fix prices, v. 21, p. 119.
Smoking, Accommodations for, v. 21, p. 120.
Storage to create scarcity, v. 21, p. 119.
Vegetable oils, Capacity of storage tanks, v. 21, p. 177.
Vending machines,
Gum, **v. 23, p. 334.**
In general, **v. 23, p. 347.**
Wholesale, Commissaries for retail sales, v. 21, p. 156.
Wholesale dealers, In general, **v 23, p. 341.**

FOREIGN FIRE INSURANCE COMPANIES
Re-insurance companies, Levy on, v. 21, p. 224.

FORTUNE TELLING
Restaurants, Prohibition in, v. 21, p. 133.

FORTY-SEVENTH STREET
Jurisdiction over, v. 21, p. 103.

FRATERNITIES
Milk, Containers for dispensing of, v. 21, p. 116.

FRAUDULENT SALES ACT
Closing out sales, Number allowed, v. 21, p. 155.

"FRIZZ"
Labeling containers of, v. 21, p. 117.

FRONTAGE CONSENTS
Aged, Home for, **v. 23, p. 630.**
Agent, Authority of, v. 21, p. 174.
Board of Health, Duties regarding, **v. 23, p. 632.**
Buildings, Definition of, v. 21, p. 173.
Change in use, v. 21, p. 173; v. 21, p. 174.
Comptroller, Power to sign, **v. 23, p. 630.**
Corporations, Signing for, v. 21, p. 174.
Existing, v. 22, p. 423.
Filling station, v. 22, p. 427.
Frontage requirement, Extent of, **v. 23, p. 634.**
Hospital, v. 22, p. 423; v. 22, p. 424.
Hotels, Business in, v. 22, p. 422.
Nursing home, **v. 23, p. 628; v. 23, p. 633.**
Ownership change, Effect of, v. 21, p. 173.
Parking lot, Private, v. 21, p. 174.
Signature by agent, Authority for, v. 21, p. 174.
Trailer camp, v. 21, p. 173.
Undertaking establishment, See *Undertakers* and *Undertaking Establishments.*
Withdrawal of, **v. 23, p. 636.**

FUNDS, CITY
Breakwater repairs, Use of, For, v. 22, p. 530.
Bonds,
Bridge, Surplus account, v. 22, p. 513.
Electric street lighting system, Approval of, **v. 23, p. 753.**
Expenses of issuing, v. 22, p. 517.
Chicago Transit Authority, Bills of, v. 22, p. 518.
Sidewalk repair, Revolving fund, **v. 23, p. 762.**

G

GAMBLING AND LOTTERIES
"All Star Hockey Game," v. 22, p. 39.
Amusement machine ordinance, v. 22, p. 258.
"Anti-aircraft Machine Gun," v. 21, p. 132.
"Auto Shoot" game, **v. 23, p. 561.**
"Bingo Score" Game, **v. 23, p. 370.**
Bowling Table, Status of, v. 21, p. 131.
"Commission" Betting Establishment, Legality of, **v. 23, p. 359.**
Destroying gambling equipment, v. 22, p. 45.
Federal gambling stamp, Effect of, **v. 23, p. 374.**
"Hollywood Movie Quiz," v. 21, p. 132.
Horoscope machine, v. 22, p. 362.
"Junior Bowling Alley," v. 21, p. 133.
"Movie Sweepstakes," **v. 23, p. 367.**
National emergency, As affecting, v. 21, p. 133.
Night club, Quiz show in, v. 22, p. 252.
"Numbers" games, **v. 23, p. 366.**

Pin games, "Junior Bowling Alley," As, v. 21, p. 133.
Quiz, Element of chance,
Quiz show, Night club, v. 22, p. 252.
Raffle, Automobile, v. 22, p. 256.
Salary for contestant, Effect of, v. 21, p. 131.
Slot machines,
Manufacture, Legality of, **v. 23, p. 361.**
Money in, Confiscated, v. 22, p. 252.
"Telequiz" machine, v. 22, p. 370.
Theatres, Jingle contest in, v. 22, p. 247.
"The Ghost Walks," v. 21, p. 133.
Toy dispensing machine, **v. 23, p. 372.**
Wire services, Status of, **v. 23, p. 363.**

GARAGES
See also *Parking.*
Attendants at driveways, Requirement of, v. 21, p. 202.
Basement, Classification of, v. 21, p. 166.
Building, Definition of, v. 21, p. 173.
Liabilities for automobiles and contents, v. 21, p. 3.
Roadway surface, Use of, v. 21, p. 193.
Sprinklers for basement, v. 21, p. 166.

GARBAGE
Containers for, Steel drums as, **v. 23, p. 396.**

GAS
Bottled, For heating purposes, **v. 23, p. 421.**
Distribution of, Safety regulations for, **v. 23, p. 390.**
Liquid, Status of manufacture, **v. 23, p. 413.**

GASOLINE TANKS
See *Flammable Liquids* and *Materials.*

H

HANDBILLS
See *Advertising.*

HEALTH, BOARD OF
Advisory committee, Power to appoint, v. 21, p. 31.
Advisory meetings, Proxy voting at, v. 22, p. 64.
Alien doctors, Appointment of, v. 22, p. 50.
Animals, Regulation of, v. 21, p. 135. Also see *Dogs.*
Arrest notices, Issuance of, v. 21, p. 28.
Arrest, Power of, v. 21, p. 26.
Births,
See also *Births.*
Certificates, Copy to county clerk, v. 21, p. 29.

HEALTH, BOARD OF—Continued
Building certificates, Signing of, v. 21, p. 26.
Burials,
Casket and clothes of decedent, v. 21, p. 134.
Out-of-city bodies, v. 21, p. 145.
Permits, Amputated human members, v. 21, p. 37.
Butter cream, Approval of, v. 21, p. 114.
Canned meat products, Inspection of, v. 21, p. 118.
Cemetery, Restrictions on, v. 21, p. 134.
Christian Scientist, Compelling treatment of, v. 22, p. 59.
Contagious diseases,
Controlling of, v. 22, p. 98.
Removal to hospital for, v. 21, p. 30.
Dairy inspectors, Travel expense for, **v. 23, p. 773.**
Day nurseries, See that Title.
Death certificates, v. 21, p. 29.
See also *Deaths.*
Dogs, See that Title.
Donations,
Board of Health, Acceptance of, **v. 23, p. 54.**
Municipal Tuberculosis Sanitarium, v. 22, p. 84.
Drainage, Jurisdiction over, v. 21, p. 29.
Federal funds, Employees paid by, v. 22, p. 63; **v. 23, p. 44; v. 23, p. 769.**
Ice Cream,
Frozen cream in, v. 21, p. 115.
Mix, Approval of distribution of, v. 21, p. 114.
Regulations, v. 22, p. 92.
Infants, Care of in private home, v. 22, p. 95.
Inspectors,
Autos privately owned, Maintenance of, v. 21, p. 32.
Dairy, Travel expenses for, **v. 23, p. 773.**
Deputizing to revoke permits, v. 21, p. 33.
Live poultry establishments, v. 21, p. 134; **v. 23, p. 642.**
Liquor stores, Sanitary requirements of, v. 21, p. 129.
Meats, See *Meats* and *Poultry.*
Meetings,
Minutes, v. 21, p. 30.
Rules for, v. 21, p. 30.
Voting at, v. 21, p. 31.
Members, Personal liability of, v. 21, p. 33.
Milk, See *Milk* and *Milk Products.*
Minors, Consent to treatment, v. 21, p. 27; v. 21, p. 34; **v. 22, p. 60.**
Mutual Care Home, Regulation of, **v. 23, p. 56.**
Packaging equipment for milk products, v. 21, p. 121.
Payrolls of transferees, v. 21, p. 226.
Permit, Temporary revocation of, **v. 23, p. 55.**
Physicians, Outside employment, v. 22, p. 77; v. 22, p. 82.
Power, Entering private property, v. 22, p. 76.
President, Endorsement of checks, v. 21, p. 29.
Public Health Service funds, **v. 23, p. 44; v. 23, p. 769.**

HEALTH, BOARD OF—Continued
Records,
Certified copies of, v. 21, p. 33; **v. 23, p. 45.**
County clerk, Sending to, v. 21, p. 29.
Death certificates, Certified copies of, **v. 23, p. 48.**
Illegitimate child, Recording parent's names of, v. 21, p. 27.
Public inspection of, v. 21, p. 28; v. 21, p. 34.
Resolution, Publication of, v. 21, p. 32; **v. 23, p. 49; v. 23, p. 54.**
Rules and regulations,
Adoption of, v. 22, p. 75.
Limitation of, v. 21, p. 30.
Power to prescribe, v. 21, p. 26.
Statute, Compatibility of, v. 21, p. 27.
School children, Faulty vision of, v. 22, p. 82.
Seal, Legality of, v. 21, p. 32.
Sick persons, Care of by city, v. 22, p. 49.
State public health laboratory, Jurisdiction over, v. 21, p. 107.
State regulations,
Adoption of, v. 22, p. 75.
Adoption of amendment, v. 21, p. 31.
Violations, Duty to report, v. 21, p. 28.
Stillbirth certificates, Copy to county clerk, v. 21, p. 29.
Subways, Jurisdiction over, v. 21, p. 29.
Trainee patients, Municipal Tuberculosis Sanitarium, v. 22, p. 66.
Transfer of duties, v. 21, p. 53.
Tuberculosis, See also *Municipal Tuberculosis Sanitarium.*
Open cases, Hospitalization of, v. 21, p. 30.
Patients, Compelling care for, v. 22, p. 259.
Undertakers, See that Title.
Vaccination, Responsibility for, v. 22, p. 87.
Venereal diseases, Treatment of minors for, v. 21, p. 27.
Venereal disease literature, Distribution of, **v. 23, p. 44.**
"Yami Yogurt," Distribution of, v. 21, p. 117.

HEATING
Ordinance, OPA regulations as affecting, v. 21, p. 99.

HOME OWNERS' LOAN CORPORATION
Buildings inspection fees, Liability for, v. 21, p. 91.

HOMES
Frontage consent, Change in ownership, v. 21, p. 73.

HORSES
Licensing of, And riders, v. 22, p. 13.

HOSPITALS
Cooling system for, v. 21, p. 167.
Frontage consents, v. 22, p. 89; v. 22, p. 423.
Ventilation, Requirements for, v. 21, p. 167.
Water charges, Exemptions from, v. 21, p. 41.

HOUSE NUMBERS
Erection by city, v. 21, p. 167.

HOUSE OF CORRECTION
Commitment,
Computation of sentence, **v. 23, p. 109.**
Duration of sentence, **v. 23, p. 90.**
Fourteen-year sentence, **v. 23, p. 95.**
Mittimi, Interpretation of, v. 21, p. 44.
Prisoners, Incarceration on several mittimi, v. 21, p. 44.
Sale of property of Chicago Relief Administration, v. 21, p. 240.
Vehicles, Responsibility for, **v. 23, p. 106.**
Wall, Repair of, v. 21, p. 107.

HOUSE OF CORRECTION EMPLOYEES' PENSION FUND
Certification after age 35, v. 22, p. 212.
Disability benefits,
After age 55, **v. 23, p. 263; v. 23, p. 267.**
In general, **v. 23, p. 270.**
Eligibility, **v. 23, p. 266; v. 23, p. 268.**
Fractional parts of month, Claim for pension, **v. 23, p. 260.**
Funds, Investment of, v. 21, p. 76.
Resignation, While on leave of absence, **v. 23, p. 261; v. 23, p. 265.**
Salary,
Deductions, Refund of, v. 21, p. 76.
For temporary service, **v. 23, p. 262.**
While on disability pension, **v. 23, p. 269.**
Surviving husband, Claim for annuity, **v. 23, p. 259.**
Trustees, Board of
Ex-Officio members, Rights of, **v. 23, p. 271.**
Powers of, **v. 23, p. 260.**
Replacement of member, v. 22, p. 110.
Voting for, While on leave of absence, **v. 23, p. 266.**

HOUSING
See also *Building; Chicago Housing Authority.*
City council, Powers of, v. 21, p. 5.
Creation of, v. 21, p. 53.
Lot requirements, Legality of, v. 21, p. 170.

HOUSING BOARD OF APPEALS
Creation of, v. 21, p. 53.

I

ICE CREAM
Concentrates, Use of, v. 21, p. 116.
Converted milk products, Use of, v. 21, p. 116.
Cream (frozen), Use of, v. 21, p. 115.
Freezers, Classification as factories, **v. 23, p. 348.**

ICE CREAM—Continued
Milk concentrates, Use of, v. 21, p. 116.
Mix,
Containers, Labeling of, v. 21, p. 117.
Distributions, Approval of, v. 21, p. 114.
Regulations, v. 22, p. 92; **v. 23, p. 348.**
Retail sales, License for, v. 21, p. 156.
Storage place, License for resale, v. 21, p. 156.
Vendors on public ways, License for, v. 21, p. 156; **v. 23, p. 341.**

ICE CREAM PARLORS
Dancing in, License for, v. 21, p. 160.

ILLINOIS AND MICHIGAN CANAL
Filling for highway, v. 21, p. 274.
Use of, highway purposes, **v. 23, p. 873.**

ILLINOIS COMMERCE COMMISSION
Railroads,
Easement for city sewer, v. 21, p. 206.
Jurisdiction over headlight dimmers, v. 21, p. 204.
Roosevelt road viaduct, Repairs to, v. 21, p. 207.
Viaduct repair, Allocating expense for, v. 21, p. 205; v. 21, p. 207.

ILLINOIS LIQUOR CONTROL COMMISSION
Jurisdiction over bar outside city, v. 21, p. 100.

ILLINOIS MUNICIPAL BUDGET LAW
Chicago Housing Authority, Status of, v. 21, p. 91.

ILLINOIS RETAILER'S OCCUPATION TAX
See *Retailer's Tax* under *Contracts.*

INCOME TAX
See under *United States.*

INDUSTRIES COMMUNICATIONS FUND
Administration of, v. 21, p. 242.

INJUNCTION
Ordinance enforcement, Scope of restraining order, v. 21, p. 118.

INSANE PERSONS
Building owned by, Demolition of, v. 21, p. 170.
Monies held by police custodian, Disposition of, v. 21, p. 11.

INSPECTIONS
Armament plan, Financed by government, v. 21, p. 100.
Billboards and signs, Fees delinquent, v. 21, p. 45.
Bottled gas plant, v. 22, p. 282.
Electric mousetrap, v. 22, p. 270.
Elevators,
Museum Science and Industry, v. 22, p. 273; **v. 23, p. 406.**
Fees,
Charitable organizations, Exemption from, v. 21, p. 159; v. 21, p. 165.
Chicago Housing Authority, Exemption from, v. 21, p. 90.
Hospitals, **v. 23, p. 571.**
Lien for, v. 21, p. 9.
Mechanical ventilation equipment, v. 21, p. 159.
Railroad Fair, **v. 23, p. 539.**
University of Illinois, Claim for exemption, **v. 23, p. 574.**
Milk from out of city, v. 21, p. 37.
Milk from out of state, v. 21, p. 34.
Refusal to admit inspectors, **v. 23, p. 120.**
Scales, From union stockyards, v. 21, p. 45.
Slaughter house outside city limits, v. 21, p. 122.
Tires on motor vehicles, v. 21, p. 202.

INSURANCE
Tax on reinsurance companies, v. 21, p. 224.

INTEREST
Depositories, Bids on, v. 21, p. 242.
Loan of city, Waiver on, v. 21, p. 78.
Special assessments, Waiver on, v. 21, p. 304.

ITINERANT MERCHANTS
Christmas trees, Licensing sale of, v. 21, p. 158.

INVENTIONS
City employee, Rights to, v. 22, p. 52.

J

JUDGMENTS
Attorneys fees, Withholding of, v. 21, p. 44.
Enforcing against city employee, v. 22, p. 10.
Payment,
Order of entry, v. 21, p. 242.
Priority date for, v. 21, p. 243.
Private, Aid in collection of, v. 21, p. 40.
Public benefit judgments, v. 21, p. 243.
Use in payment for city property, v. 21, p. 251.

JUNK DEALERS
Ordinance regulating, v. 22, p. 4; **v. 23, p. 16.**

K

KNIVES
Concealed, Carrying of, v. 21, p. 130.

L

LABORERS AND RETIREMENT BOARD EMPLOYEES ANNUITY AND BENEFIT FUND
Child's annuity, In general, **v. 23, p. 254.**
Disability, In general, **v. 23, p. 256.**
Eligibility,
In general, **v. 23, p. 251; v. 23, p. 254.**
Optional membership, **v. 23, p. 253.**
Membership, Layoff and delay affecting, v. 21, p. 59.
Name, Change of, **v. 23, p. 252; v. 23, p. 255.**
Salaries, Computation of, **v. 23, p. 247; v. 23, p. 248.**
Salary deduction,
Computation of salary, **v. 23, p. 247; v. 23, p. 248.**
Temporary appointees, **v. 23, p. 245.**
Widows' annuity,
In general, **v. 23, p. 258.**
Proof of marriage, **v. 23, p. 246; v. 23, p. 257.**
Vacated divorce decree, Effect of, **v. 23, p. 257.**

LAKE MICHIGAN
Annexation, Filled in portion, v. 22, p. 9.
Diversion of, v. 21, p. 96.
Lake front ordinance, **v. 23, p. 1.**
Reclaimed land, Zoning of, v. 21, p. 176.
Tidelands case, Effect on filtration plant, **v. 23, p. 13.**

LANDLORD AND TENANT
Furniture, Removal of, v. 21, p. 85.
Rentals, Control of, v. 21, p. 5.

LAW, DEPARTMENT OF
City employees, Defense of, v. 21, p. 44.
Corporation Counsel, Status of, v. 21, p. 41.

LEASES (CITY)
See also under *Contracts* and *Airports.*
Airplane hangar space, v. 21, p. 250.
Airport space, Sublease, v. 21, p. 252.
Alcoholic liquor, Demonstration of equipment, v. 21, p. 252.

LEASES (CITY)—Continued
Amendment, Authorization of, v. 21, p. 251.
Assignment restriction, v. 21, p. 252.
Boston Store, **v. 23, p. 813.**
Condemned property, Lease of, v. 21, p. 255.
Court room space, Reid Murdoch Building, **v. 23, p. 812.**
Dock facilities on Navy Pier, v. 21, p. 250.
Liquor bar permits, Issuance of, v. 21, p. 100.
Modification, Authorization of, v. 21, p. 251.
Mortgage of leasehold, Consent to, v. 21, p. 250.
Navy Pier,
Acceptance of rental without lease, **v. 23, p. 811.**
Dock facilities on, v. 21, p. 250.
Occupancy by parent corporation of lessee, v. 21, p. 252.
Taxes on leasehold estate, v. 21, p. 258.
Term of lease, v. 21, p. 250.

LIABILITY OF CITY
Accident, Safeguards taken after, **v. 23, p. 789.**
Alley vacation, Loss of outlet, v. 21, p. 191.
Automobiles, Removed from restricted parking areas, **v. 23, p. 786.**
Barricading of dangerous street, v. 21, p. 193.
Bathing beach, Loss of property at, v. 21 p. 249.
Blasting, Damage from, v. 21, p. 243.
Bridges,
Sanitary district,
Repair by, v. 21, p. 105; v. 21, p. 107.
Warning signals, v. 21, p. 111.
Condemnation proceedings, Improvements prior to, v. 21, p. 300.
Contracts, Freight charges, Tax on, v. 21, p. 271.
Drivers of city vehicles, v. 22, p. 540.
Excise tax on subway equipment, v. 21, p. 259.
Federal excise tax, v. 21, p. 258.
Federal tax on freight charges, Obligation for, v. 21, p. 271.
Fences, Airport, v. 21, p. 537.
House of Correction wall, Repair of, v. 21, p. 107.
Ice and snow, Accumulation on street, v. 21, p. 194.
Legal services for former official, v. 21, p. 48.
Life guards, Injured during examination, **v. 23, p. 777.**
Obstruction of private property, v. 21, p. 273; v. 21, p. 301.
OPM regulations, Effect of, v. 21, p. 112.
Play lots, Injuries at, v. 21, p. 243.
Private property, Easement in, v. 21, p. 300.
Public improvements, Obstruction of private property by, v. 21, p. 273; v. 21, p. 301.
Public utilities, Relocation of equipment, v. 21, p. 216.
Railroad, Construction damage to, v. 22, p. 532.
Sanitary district,
Bridges,
Obligation to repair, v. 21, p. 105; v. 21, p. 107.
Warning signals on, v. 21, p. 111.

LIABILITY OF CITY—Continued
Set off, Use of, v. 21, p. 249.
Sewers,
Construction, Drying up wells by, v. 21, p. 101.
Damage from, v. 22, p. 538.
Private sewers, Damage to, Trees on city parkway, v. **23, p. 778.**
Sidewalk supports and retaining walls, Repair of, v. 21, p. 301.
State highways, Injuries on, v. 21, p. 247.
Students, Injuries of, v. 22, p. 124.
Traffic signals, Faulty, v. 22, p. 535.
Vaccinations, Negligence in, v. 22, p. 87.
Thefts, Effect of delivery to consignee, v. 21, p. 263.
Water mains, Damage from, **v. 23, p. 782.**
WPA workers at Municipal Tuberculosis Sanitarium, v. 21, p. 247.

LICENSES
See also *Amusements* and *Amusements Tax Ordinance; Ordinances* and *Permits.*
Animals, In general, v. 22, p. 353.
Air rifles, Sale of, v. 21, p. 130.
Applications,
Civil rights question in, **v. 23, p. 555.**
Costs, Refund of, v. 21, p. 164.
Archery range, v. 22, p. 315.
Auctions,
Jewelry, **v. 23, p. 591.**
Radio program, **v. 23, p. 592.**
Automobile repair shop, **v. 23, p. 560.**
Bakeries, Retail chain stores, v. 21, p. 157.
Beauty shops, v. 22, p. 313.
Christmas trees, Sale of, v. 21, p. 158.
Cigarette dealers, See that title.
Closing out sales, v. 21, p. 155; v. 23, p. 407.
Coin operated machines, See *Amusements Tax Ordinance* and *Gambling.*
Cold storage warehouses, v. 21, p. 161.
Corporations,
Foreign, Order office in city, v. 22, p. 339.
Issuance when name changed, v. 21, p. 155.
Dancing in ice cream parlor, v. 21, p. 160.
Denial, Refund upon, v. 21, p. 163.
Deposit receipt, Operating with, v. 22, p. 288.
Drivers, See under *Motor Vehicles.*
Employment agencies, Power over, v. 21, p. 159.
Engineers, See *Civil Service.*
Fees,
Accepting when amount in dispute, v. 22, p. 20.
Exemptions, Hospitals, Cigarette dealers license, **v. 23, p. 571.**

LICENSES—Continued
Fish and game, v. 21, p. 230; v. 22, p. 121.
Lapsed, Mason contractors, v. 22, p. 323.
Refunds or rebates of,
Bicycle races, Status of, v. 21, p. 164.
Building permit, v. 22, p. 305.
Charitable institutions, v. 22, p. 354.
Chicago Railroad Fair, Electric permits, **v. 23, p. 539.**
Florists, Wholesale, **v. 23, p. 540.**
Government acquisition of property, v. 21, p. 164.
Invalid ordinance, Payment under, v. 21, p. 165.
Non-use of license, v. 21, p. 163.
Ordinance repeal, Rights after, v. 21, p. 163; v. 21, p. 165.
Unused period, v. 21, p. 163; v. 21, p. 164; v. 22, p. 355.
Fire sale, Period of, v. 21, p. 162.
Flammable liquids, See that title.
Florists,
Refund of, Wholesale, **v. 23, p. 540.**
Retail, v. 22, p. 321.
Wholesale, v. 22, p. 337.
Food dealers, Regulation of, **v. 23, p. 341.**
Food dispenser's license,
Factory, Cafeteria, v. 22, p. 237.
Federal Government, Building operated by, v. 22, p. 317.
North Park College Cafeteria, **v. 23, p. 335.**
Y.W.C.A. Cafeteria, **v. 23, p. 322.**
Food establishment, Wholesale, Classification of resident, distributing plant, v. 21, p. 119.
Food peddlers, in general, **v. 23, p. 341.**
Food vending machine license, **v. 23, p. 334; v. 23, p. 347.**
Food wholesalers, Regulation of, **v. 23, p. 341.**
Gasoline testing laboratory, Status of, **v. 23, p. 563.**
Going out of business sales, v. 21, p. 155; **v. 23, p. 407.**
Greenhouse operators, Outside city, **v. 23, p. 551.**
Gum machines, Food vending license for, **v. 23, p. 334.**
Hardware, Sale of in chain stores, v. 22, p. 341.
Horses, v. 22, p. 13; Horse show, v. 22, p. 329.
Hot dog peddlers, Regulation of, **v. 23, p. 330; v. 23, p. 341; v. 23, p. 343.**
Hotel, Laundries, **v. 23, p. 549.**
Ice cream parlors, Dancing in, v. 21, p. 160.
Ice manufacturing, Status of, **v. 23, p. 554.**
Inspections (See that title).
Insurance brokers, v. 22, p. 340.
Junk dealers, **v. 23, p. 16.**
Laboratories, Status of, **v. 23, p. 586.**
"Launderettes," v. 22, p. 324.
Laundries, Hotel, **v. 23, p. 549.**
Licensees, Military service, Effect of, **v. 23, p. 570.**
Liquidation sales, v. 21, p. 155; **v. 23, p. 407.**
Liquor, See that title.

LICENSES—Continued
Lumber yards, Status of, **v. 23, p. 564.**
Machine shops, Status of, **v. 23, p. 569.**
Magazine solicitors, v. 22, p. 327.
Massage parlors, **v. 23, p. 407.**
Military service as affecting renewal of, v. 21, p. 145; **v. 23, p. 570.**
Milk vending devices, v. 21, p. 116.
Motor vehicle dealer, Power over, v. 21, p. 154; **v. 23, p. 5.**
Motor vehicle repair shop, Status of, **v. 23, p. 560.**
Motor vehicles, See that title.
Movie projection machine operators, v. 22, p. 317.
Paint, Manufacturers of, **v. 23, p. 552.**
Parking lots, v. 21, p. 161; v. 22, p. 367; **v. 23, p. 585.**
Pawnbrokers, See that title.
Peddlers, See that title.
Perfume company, Drug license for, **v. 23, p. 584.**
Pet shops, Status of, **v. 23, p. 553.**
Photographers,
Blueprinters, **v. 23, p. 547.**
Itinerant, v. 22, p. 336.
Suppliers, v. 22, p. 343.
Plumbers,
In general, v. 22, p. 346.
Master, v. 22, p. 333.
Potato washing business, v. 22, p. 330.
Racial discrimination, Revocation for, v. 22, p. 129.
Radios, coin operated, v. 22, p. 365.
Real estate broker, Revocation of, v 21, p. 160.
Restaurants, See that title.
Revocation, Racial discrimination, v. 22, p. 129.
Scavengers, Rendering company, **v. 23, p. 544.**
Second-hand stores, Status of, **v. 23, p. 559.**
Shoe polish, Sale of, v. 21, p. 154.
Special policemen, v. 21, p. 162; v. 22, p. 350.
State, Fish and game fees, Ownership of, v. 21, p. 230; v. 22, p. 121.
Street cleaning business, Status of, **v. 23, p. 564.**
Talkie movie machine, v. 21, p. 161.
Tannery, Individual buildings, **v. 23, p. 548.**
Taxicabs, See that title.
Tear gas burglar alarm, v. 21, p. 154.
Telegraph instruments, **v. 23, p. 565.**
Ticket sellers, See *Tickets.*
Tobacco, Wholesale warehouse, v. 22, p. 316.
Travel ticket brokers, v. 22, p. 312.
Undertakers, See that title.
Vending license, Gum machines, **v. 23, p. 334.**

LIENS
Attorneys, See under that title.
Inspection services, Liens for fees, v. 21, p. 9.
Special assessment lien, Compromise of, v. 21, p. 304.

LIQUOR AND LIQUOR DEALERS
Airport, Sale at prohibited, **v. 23, p. 355.**
Churches,
Distance requirements for establishments selling liquor, v. 21, p. 138.
Rectory, **v. 23, p. 432.**
Cigar store selling liquor, Hours for, v. 21, p. 145.
City leased premises, Bar permits, Issuance of, v. 21, p. 100; **v. 23, p. 353.**
Control, Proposed ordinance, v. 22, p. 292.
County owned building, **v. 23, p. 353.**
Day nursery, Located near, v. 22, p. 242.
Dealers,
Distributors furnishing movies to retailers, v. 21, p. 128.
Toilet facilities, Requirement of, v. 21, p. 128.
Deposit receipts, Operating with, v. 22, p. 288.
Dry districts,
Annexation, Affect on, **v. 23, p. 349.**
Liquor manufactured in, v. 21, p. 129.
Repeal of, v. 21, p. 137.
Legality of business, v. 21, p. 137.
Licenses,
Applicant,
Prior petty larceny conviction, **v. 23, p. 436.**
Prior revocation of amusement license, **v. 23, p. 437.**
Brewery, Case sales by, **v. 23, p. 423.**
Cooking wine, Sale of, **v. 23, p. 429.**
Denial, Power over, v. 21, p. 137.
Exemptions and privileges, **v. 23, p. 426.**
Federal wager stamp, Ownership of, **v. 23, p. 434.**
Fee, Refund of, v. 21, p. 163; v. 21, p. 164.
Limiting by ordinance, v. 22, p. 238.
Private club, v. 22, p. 239.
Protest against, v. 21, p. 137.
Reduced fees, **v. 23, p. 427; v. 23, p. 428; v. 23, p. 433; v. 23, p. 441; v. 23, p. 443.**
Refunding unused portion, v. 22, p. 355.
Renewal when licensee in military service, v. 21, p. 145.
Revocation,
After expiration of license, **v. 23, p. 439.**
Dry district before annexation, v. 21, p. 137; **v. 23, p. 349.**
Power of, v. 21, p. 138.
Separate location, Requirements of, v. 21, p. 138.
State liquor control commission, Authority for, v. 21, p. 138.
Tavern,
Location,
Church, v. 21, p. 138; **v. 23, p. 430.**
Day nursery, v. 22, p. 242.
Rectory, **v. 23, p. 432.**
Other taverns in vicinity, **v. 23, p. 439.**

LIQUOR AND LIQUOR DEALERS—Continued
Trade Fairs, Distribution of sample drinks, **v. 23, p. 425.**
Trustees, Licenses to, **v. 23, p. 422.**
Local option election,
Affect of annexation on, **v. 23, p. 349.**
Operative when, v. 21, p. 129.
Minors,
Employment of, v. 21, p. 129; v. 21, p. 138.
Jam sessions for, No liquor served, **v. 23, p. 349.**
Misrepresentation of age, **v. 23, p. 355.**
Service bar, Sitting at, **v. 23, p. 352.**
"One-Ounce" law, Interpretation of, **v. 23, p. 351.**
Motion pictures, Shown in taverns, v. 21, p. 128; **v. 23, p. 459.**
Package liquor stores,
Female employees in, **v. 23, p. 435.**
Sanitary requirements for, v. 21, p. 128; v. 21, p. 129.
Schools, Distance from restaurants, etc., selling liquor, v. 21, p. 138.
Successor owner, License of, v. 22, p. 290.
Tavern, Location near day nursery, v. 22, p. 242.
Toilet facilities, v. 21, p. 128.
Wine, Distribution of samples, **v. 23, p. 354.**

LIQUOR CONTROL COMMISSIONER
Reinstatement of revoked license, Power of, v. 21, p. 145.

LITERATURE
Obscene, Repression of, v. 22, p. 276; **v. 23, p. 381.**

LOCAL IMPROVEMENTS
Attorney for Board of, v. 21, p. 41.
Compensation for, v. 21, p. 300.
Damage, Obstruction of private property as, v. 21, p. 273; v. 21, p. 301.

LOST, FOUND OR STOLEN PROPERTY
Money retrieved in owners presence, v. 21, p. 21.
Municipal bathing beach, Property lost at, v. 21, p. 249.
Special assessment bonds, Issuance of duplicate, v. 21, p. 305.

LOTTERIES
See *Gambling* and *Lotteries.*

LOUD SPEAKERS
See *Sound Amplifiers.*

M

MAPS, SUPERINTENDENT OF
Vacation plats, Recording of, v. 21, p. 185.

MAYOR
Driveway permits, Revocation of, v. 21, p. 155.
Licenses,
Garage, v. 22, p. 414.
Liquor,
Denial of, v. 21, p. 137.
Revocation of, v. 21, p. 137; v. 21, p. 138.
Real estate broker, Revocation of, v. 21, p. 160.
Reinstatement after revocation of, v. 21, p. 145.
Liquor establishments, Regulation of, v. 21, p. 138.
Plumbing board minutes, Approval of, v. 21, p. 40.
Police records, Inspection of by, v. 22, p. 35.

MEATS AND POULTRY
See also *Foods*.
Canned, Inspection and labeling of, v. 21, p. 118.
Chickens, See under *Animals*.
Dog food, Manufacture at uninspected plant, v. 21, p. 120.
Government inspection, v. 21, p. 122.
Horse meat, Sale of, v. 21, p. 122; **v. 23, p. 329; v. 23, p. 332.**
Poultry killing establishment,
Abatement of, v. 21, p. 134.
Zoning of, v. 21, p. 175; **v. 23, p. 642.**
Slaughter house outside city limits, Inspection of, v. 21, p. 122.

MECHANICS' LIENS
Statements from contractors on city work, v. 21, p. 249.
Subcontractor, Lien of, v. 21, p. 249.

MEDICAL CENTER COMMISSION
Loans by R.F.C. and F.W.A., v. 21, p. 107.
Member, Term of office, v. 21, p. 53.
Private property, Power to regulate use of, v. 21, p. 177.
Zoning regulations, Power to enact, v. 21, p. 177.

MICHIGAN AVENUE
Boulevard surface, Maintenance of, v. 21, p. 104.
Drains, Maintenance of, v. 21, p. 104.
Sidewalk, Maintenance of, v. 21, p. 104; **v. 23, p. 684.**
Viaduct, Repair of, v. 21, p. 104.

MILITARY SERVICE
Annuity rights during, v. 21, p. 77.
Civil service employees, See that title.
License renewal during, v. 21, p. 145.
Pension deductions during, v. 21, p. 70.
Rights while in, v. 21, p. 58.
Salary during, v. 21, p. 54.
Selective service registrants, Civil service status of, v. 21, p. 55.
Undertaker's license renewal during, v. 21, p. 147.
Use of word "Military," v. 22, p. 42.

MILK AND MILK PRODUCTS

Bottle caps, Labeling of, v. 21, p. 115.
Bottles, Amber colored, **v. 23, p. 323; v. 23, p. 325.**
"Butter cream," Distribution of, v. 21, p. 114.
Coin vending machines, License for, v. 21, p. 116.
Concentrates, Use in ice cream, v. 21, p. 116.
Containers,
- Amber colored, **v. 23, p. 323; v. 23, p. 325.**
- Labeling of, v. 21, p. 118.
- Original containers, Use in fraternities, v. 21, p. 116.
- Service from, **v. 23, p. 338.**
- Single-service containers, Legality of, v. 21, p. 117; v. 21, p. 118.
- Type of, v. 21, p. 118.

Converted milk products, Use of, v. 21, p. 116.
Cottage cheese, Packaging of, v. 21, p. 121.
Cream (frozen), Use in ice cream, v. 21, p. 115.
Cream substitutes,
- Classification of, **v. 23, p. 328.**
- Evaporated milk as, **v. 23, p. 326.**

Curd tension, Changing standards of, v. 21, p. 115.
Dairy inspectors, Travel expenses for, **v. 23, p. 773.**
Distributing plant outside city, Vehicle inspection fee for, v. 21, p. 114.
Enzyme modified milk, Change of, v. 21, p. 115.
"Golden Rich," Classification of, v. 21, p. 120.
"Golden-V," Regulation of, v. 21, p. 121.
"Grade-A,"
- Products not classified as, **v. 23, p. 332.**
- Regulations in general, **v. 23, p. 345.**

Handling of, Research into, **v. 23, p. 332.**
Homogenized,
- Milk, Legality of, v. 21, p. 115.
- Soft curd Vitamin D Milk, Legality of, v. 21, p. 115.

Ice Cream, See that title.
Inspection of source, Requirement for sale, v. 21, p. 117.
Inspection outside of city, v. 21, p. 37; **v. 23, p. 319.**
Inspection outside of state, v. 21, p. 34.
Labeling,
- Bottle caps, v. 21, p. 115.
- In general, **v. 23, p. 337.**
- Misrepresentation on, v. 21, p. 116.
- Vitamin "D" Guernsey Milk, v. 21, p. 115.

Minimum requirements, Determination of, v. 21, p. 119.
Mixing to obtain minimum requirements, v. 21, p. 119.
Paper containers, See also *Single-Service containers* under *Containers* under *Milk and Milk Products.*
Pasteurizing plant outside city, Vehicle inspection fee for, v. 21, p. 114.

MILK AND MILK PRODUCTS—Continued
Permits,
Restoration of, v. 21, p. 33.
Revocation of, v. 21, p. 33.
Sale in factory, v. 22, p. 72.
Temporary revocation of, **v. 23, p. 55.**
Regulations, Agency to prescribe, v. 21, p. 26.
Rules, Compatability with statute, v. 21, p. 27.
Sale,
Out of city, v. 21, p. 37.
Time limit on, v. 21, p. 118.
Uninspected source, Prohibition from, v. 21, p. 117.
Standardization of, v. 21, p. 117; v. 22, p. 74.
"Topping," Classification of, v. 21, p. 128.
"12%," Sale of, v. 21, p. 122.
Vehicles, Inspection fee for, v. 21, p. 114.
Vitamin "D" Guernsey milk, Labeling of, v. 21, p. 115.
Wax containers for, v. 21, p. 117.
"Whipped Cream," Designation as, v. 21, p. 121.
"Yami Yogurt," Distribution of, v. 21, p. 117.

MINORS
Consent of, For medical treatment, v. 21, p. 27; v. 21, p. 34; v. 22, p. 60.
Court, Personal affairs of in, v. 22, p. 285.
Employment in food shop selling liquor, v. 21, p. 138.
Medical and dental treatment, Consent for, v. 21, p. 34.
Misrepresenting age, **v. 23, p. 355.**
Taverns, v. 21, p. 129; v. 21, p. 138; **v. 23, p. 349; v. 23, p. 355.**
Venereal diseases, Treatment for, v. 21, p. 27.

MITTIMUS
Interpretation of, v. 21, p. 44.

MOTION PICTURES
Exhibition in tavern, v. 2, p. 128; **v. 23, p. 459.**
Exhibition of, Permit for, **v. 23, p. 575.**
Talkie-movie machines, License for, v. 21, p. 161.

MOTOR FUEL TAX FUND
See *Motor Fuel Tax Fund* under *State of Illinois.*

MOTOR VEHICLES
Army chauffeurs, **v. 23, p. 454.**
Automobiles,
Abandoned, v. 22, p. 48; **v. 23, p. 671.**
Emergency, (see under this section).
Ignition keys, Leaving in car, **v. 23, p. 716.**
Jagged fenders, Prohibition of, **v. 23, p. 676.**
Sale of on Sunday, **v. 23, p. 5.**

MOTOR VEHICLES—Continued
Chicago Transit Authority, v. 22, p. 48; v. 22, p. 493.
City owned, State Responsibility Act, v. 22, p. 231.
Defense plant corporation, v. 22, p. 297.
Delivery vehicles,
Owner's identification on, v. 21, p. 148.
U. S., Marking of, v. 21, p. 98.
Driver's license, Issuance to unlawfully convicted person, v. 21, p. 148.
Drivers, Testing of, v. 21, p. 201.
Emergency vehicles,
Operators of, Regulations for, **v. 23, p. 701.**
Red oscillating lights, **v. 23, p. 393.**
Red paint, Used on, **v. 23, p. 379.**
Warning equipment, **v. 23, p. 395.**
Federal Government,
Army, **v. 23, p. 454.**
Marking on, v. 21, p. 98.
Operated by, v. 22, p. 304.
Owned by, v. 22, p. 219.
Reserve Bank vehicles, **v. 23, p. 456.**
Fire apparatus, Special license for, **v. 23, p. 453.**
Government vehicles,
Army chauffeurs, Operator's license for, **v. 23, p. 454.**
Designation on, v. 21, p. 98.
Inspection,
Test, Non-compliance with, v. 21, p. 149.
Tires, v. 21, p. 202.
Interstate trucks, v. 22, p. 300.
Licensing by city, (Wheel tax).
Basis of, v. 21, p. 152.
Defense plant vehicles, v. 21, p. 164.
Driver's license, Qualifications for, v. 21, p. 148.
Exemption from, v. 21, p. 149.
Non-resident vehicles for hire, v. 21, p. 149.
Registration out of state, v. 21, p. 148.
Residence requirement, **v. 23, p. 452.**
Garaged outside city, **v. 23, p. 457.**
Tags, Free issuance of, v. 21, p. 149.
Temporary resident, Requirements for, v. 21, p. 148.
Trucks,
Interstate, Use of, v. 21, p. 150; v. 22, p. 300.
Lift trucks, Power driven, **v. 23, p. 455.**
Tow trucks, Requirement for, v. 21, p. 147.
Non-resident, Owned and operated,
In general, v. 22, p. 301.
Trucks, v. 22, p. 299; **v. 23, p. 449; v. 23, p. 451.**
Ownership designation on U. S. vehicles, v. 21, p. 98.
Parking of, See under *Parking.*

MOTOR VEHICLES—Continued
Public vehicles,
See also *Taxicabs* under this title.
Buses,
Out of city, Vehicle licenses for, **v. 23, p. 447.**
Parking zone use, By cabs prohibited, **v. 23, p. 508; v. 23, p. 518.**
Licenses,
Assignment of, v. 21, p. 147; v. 21, p. 150; **v. 23, p. 530; v. 23, p. 531.**
Bond, Cash in lieu of, **v. 23, p. 511.**
Failure to pay debts, Effect on, **v. 23, p. 533.**
Licensee in military service, **v. 23, p. 515.**
Partnership name, Use of, **v. 23, p. 523.**
Possession of narcotics, Effect on licensee, **v. 23, p. 531.**
Renewal of, New partners, **v. 23, p. 510.**
Revocation of, **v. 23, p. 517.**
Sale of license by estate, **v. 23, p. 525.**
Surrender of, Entering military service, **v. 23, p. 536.**
Transfer of, v. 21, p. 150; **v. 23, p. 528.**
Liveries,
License application, New corporation, **v. 23, p. 535.**
Meters in, **v. 23, p. 513.**
Radio dispatched, Legality of, **v. 23, p. 514.**
Station wagons, Use of, **v. 23, p. 534.**
Parmelee vehicles,
Drivers, Status of, **v. 23, p. 505.**
Insurance, Coverage of, **v. 23, p. 526.**
Seating capacity of, **v. 23, p. 510.**
Taxicabs,
Advertising, Use of bumper space for, **v. 23, p. 532.**
Agent, Operation by, **v. 23, p. 512.**
Bus parking zones, Use by cabs prohibited, **v. 23, p. 508; v. 23, p. 518;** assignment of space, **v. 23, p. 508.**
Certificate of title, Name on, **v. 23, p. 534.**
Coupon fare books, Legality of, **v. 23, p. 508.**
Jitney cabs, Operation of, **v. 23, p. 519.**
Licenses, See also *Public Vehicles* under this title.
Applicants, Screening, **v. 23, p. 503.**
Assignment of, v. 21, p. 147; v. 22, p. 531.
Previous armed robbery conviction, **v. 23, p. 522.**
Renewal, **v. 23, p. 510.**
Unlawful conviction, v. 21, p. 148.
O'Hare Field, Taxicab service to, **v. 23, p. 518.**
Ordinance regulating, **v. 23, p. 500.**
Out of town operators, **v. 23, p. 507; v. 23, p. 521.**
Ownership agreement, v. 22, p. 455.
Parking meter areas, Use by prohibited, **v. 23, p. 521.**
"Radio Dispatched," Use of phrase, **v. 23, p. 512.**
Refusal to take passenger, v. 22, p. 335.
Regulation of, In general, **v. 23, p. 536.**

MOTOR VEHICLES—Continued
Riding in front seat, Ordinance prohibiting, **v. 23, p. 504.**
"Roberts Cab Association," Use of phrase, **v. 23, p. 527.**
Speed indicator lights, Use of, **v. 23, p. 527.**
"Standard Rate Cab," Use of phrase, **v. 23, p. 524.**
Workmen's Compensation Insurance, Self-employed cabmen, **v. 23, p. 524.**
Operators of, Dishonorable discharge, Effect of, **v. 23, p. 445.**
Registered in another state, License when, v. 21, p. 148.
Stands on public ways, v. 21, p. 156.
Station wagons,
Classification for wheel tax, v. 21, p. 150.
School bus, **v. 23, p. 537.**
Use of as liveries, **v. 23, p. 534.**
Sticker, Requirement for temporary resident, v. 21, p. 148.
Trucks,
Gasoline, Regulation of, v. 22, p. 454; **v. 23, p. 674; v. 23, p. 715.**
Inspection of, v. 21, p. 200.
Interstate, City license for, v. 21, p. 150.
Lift trucks, Power driven, Status of, **v. 23, p. 455.**
Load capacity for license purposes, v. 21, p. 150.
Loading of, v. 21, p. 204; overloading, **v. 23, p. 670.**
Owner's identification on, v. 21, p. 148.
Testing of, v. 21, p. 198.
Tow trucks, License for, v. 21, p. 147.
Used cars, On lot, v. 22, p. 284.
Used parts dealers, Licensing of, v. 21, p. 154.
Wheel tax, See under *Licensing by City,* this title.

MULTIPLE DWELLING
Operation of, Classifying as a business, **v. 23, p. 606.**
Plumbing certificates, Signing of, v. 21, p. 26.

MUNICIPAL COURT
Arrest notices, Simulation of, v. 21, p. 28.
Costs, Recovery of, v. 21, p. 53.
Foreign consul, Jurisdiction over, v. 22, p. 230.
Judges,
Arrested persons, Ordering appearance of, v. 21, p. 104.
Release of arrested persons, v. 21, p. 104.
Vacancies, **v. 23, p. 112.**
Records, Destruction of, v. 21, p. 49.

MUNICIPAL COURT AND LAW DEPARTMENT EMPLOYEES' ANNUITY AND BENEFIT FUND
Annuities,
Age requirement, **v. 23, p. 286; v. 23, p. 287.**
Computation of, In general, **v. 23, p. 281.**
Funds, Investment in mortgages, **v. 23, p. 281.**
Military service, Rights of employees in, v. 21, p. 77.

MUNICIPAL COURT AND LAW DEPARTMENT EMPLOYEES' ANNUITY AND BENEFIT FUND—Continued
Physical examinations, v. 23, p. 273; v. 23, p. 277.
Re-entry into service, v. 23, p. 272.
Salary deductions,
Military service, Based on, v. 23, p. 283.
Past service, Based on, v. 23, p. 282.
Refund, In lieu of pension, v. 23, p. 285.
Transferring, v. 23, p. 284.
Widow's annuity, Refund of, v. 23, p. 280.
Widows' annuity,
Marriage after age of 65, Effect on, v. 23, p. 275.
Payment for fraction of month, v. 23, p. 279.

MUNICIPAL EMPLOYEES' ANNUITY AND BENEFIT FUND
Age and service pension, Payment to mentally ill employee, v. 21, p. 69 .
Alderman, Member of fund, v. 22, p. 177; v. 23, p. 206.
City contribution, Amount of, v. 21, p. 69.
City, Pension contributions of, v. 22, p. 172.
Laborers, Status of after blanketing, v. 23, p. 203.
Merchant Marine, Service in, v. 22, p. 175.
Officers and officials, Membership in fund, v. 23, p. 205.
Participation rights, Social security tax, Effect of, v. 21, p. 69.
Re-entry, In same department, v. 22, p. 207.
Refunds, To widow's estate, v. 23, p. 207.
Retirement board, Social Security Act, Effect of, v. 21, p. 69.
Salary deductions,
Liability for, v. 21, p. 69.
Military service,
Period of, v. 21, p. 70.
Temporary employees, v. 23, p. 202.
Right to make, v. 21, p. 69.
Salary, Computation of, v. 23, p. 205.
Transfer of employment, v. 21, p. 70.
Widow's annuity, v. 22, p. 174.

MUNICIPAL TUBERCULOSIS SANITARIUM
Board of Directors,
Compelling hospitalization of patients, v. 21, p. 30; v. 22, p. 259; v. 23, p. 83.
Contract power, v. 23, p. 67.
Donations to, v. 22, p. 84; v. 23, p. 72.
Library books, v. 23, p. 79.
Emergency calls, v. 23, p. 76.
Employees,
Hiring of, v. 23, p. 77.
Injuries, Liability for, v. 21, p. 247.
Purchase of meals, v. 23, p. 87.
Removal of, v. 23, p. 59.
Federal funds, Return of, v. 23, p. 58; v. 23, p. 61.

MUNICIPAL TUBERCULOSIS SANITARIUM—Continued
Fireman on pension, Employed by, v. 22, p. 213.
Information, Authority to release, **v. 23, p. 73.**
Leases, v. 22, p. 560.
Non-resident veterans, Admission of, v. 22, p. 71.
Nurses, Badges for, **v. 23, p. 87.**
Officers, Liability for employees' injuries, v. 21, p. 247.
Patients,
Abandoned property, **v. 23, p. 74; v. 23, p. 75.**
Employment of, **v. 23, p. 64.**
Forbidden articles, **v. 23, p. 57.**
Infant patient, Release of, **v. 23, p. 69.**
Personal funds, **v. 23, p. 65.**
Personal property, Responsibility for, **v. 23, p. 60.**
Psychopathic case, **v. 23, p. 83.**
Removal to another institution, v. 21, p. 30.
Residence requirement, **v. 23, p. 62; v. 23, p. 78.**
Trainee, Payment to, v. 22, p. 66.
Physicians, Outside employment of, v. 22, p. 77; v. 22, p. 82.
Private hospitals, Tuberculosis patients in, **v. 23, p. 85.**
Sales tax, Contracts involving, v. 22, p. 80.
State of Illinois, Payment for care of patients, **v. 23, p. 64.**
Surgery, Consents for, **v. 23, p. 63; v. 23, p. 68.**
Tax Anticipation Warrants, **v. 23, p. 767.**
Trainee patients, Payment to, v. 22, p. 66.
Vaccination, Responsibility for, v. 22, p. 87.
Veterans, Training program for, **v. 23, p. 81.**
Visitors, Searching of, **v. 23, p. 80.**
X-Ray negatives, Retention of, **v. 23, p. 71.**

N

NARCOTICS
Addicts, Prosecution of, **v. 23, p. 391.**

NAVIGABLE WATERS
See also *Chicago River.*
Calumet River, Title to underlying lands, v. 21, p. 105.
Illinois and Michigan Canal, Filling of, v. 21, p. 274; v. 22, p. 122.

NAVY PIER
Dock facilities, Lease of, v. 21, p. 250.
Rental, no lease, **v. 23, p. 811.**
Repairs, **v. 23, p. 772.**

NOISE ABATEMENT
See also *Sound Amplifiers* under *Streets* and *Alleys.*
In general, **v. 23, p. 681.**
Outdoor amplifying system, v. 22, p. 271.

NORWOOD TOWNSHIP
Water, Sale to residents of, v. 21, p. 257; v. 22, p. 1.

NUISANCES
Abatement when owner insane, v. 21, p. 170.
Animals, Keeping in city, v. 21, p. 135.
Buildings,
Abatement procedure, v. 21, p. 167; v. 21, p. 169; v. 21, p. 170.
Unsafe, Demolition of, v. 21, p. 171.
Unsightly condition, v. 21, p. 166.
Use constituting nuisance, v. 21, p. 172.
Live poultry establishment, v. 21, p. 134.
Trees, Dangerous, v. 21, p. 50.
Weeds and refuse, v. 21, p. 136; v. 21, p. 8.

O

OFFICE OF CIVILIAN DEFENSE
See *Civilian Defense.*

OFFICE OF PRICE ADMINISTRATION
Bread, Increase in size and price, v. 22, p. 221.
Contracts, Provisions in, v. 22, p. 566.
Liability of city to orders of, v. 21, p. 112.

OFFICIAL BONDS
Library directors, v. 21, p. 38.

OFFICIAL TIME
Daylight saving time, Extension of, v. 21, p. 6.

OFFICIALS
Attorney's fees of, Reimbursement, v. 22, p. 53.
Buildings, Responsibility for removal of, v. 22, p. 392.
Election contest, Expenses, Reimbursement, v. 22, p. 117.
Purchasing agent, Powers of, v. 22, p. 133.
Tenure of, v. 22, p. 26.
Terms, Duration of, v. 21, p. 53.
Transfer of duties, v. 21, p. 53.

OILS
Vegetable oils, Storage tanks for, v. 21, p. 177.

ORDINANCES
See also *Licenses.*
Automobiles, Prohibiting sale on Sunday, v. 23, p. 5.
Buildings, See *Code* under *Buildings.*
Contract, Exhaustion of authority, v. 21, p. 205.
Emergency war provisions as affecting, v. 21, p. 172.

ORDINANCES—Continued
Federal emergency regulations, Effect of, v. 21, p. 99.
Incorporation by reference, v. 21, p. 9.
Invalid, License refund when, v. 21, p. 165.
Junk dealers, Regulation of, v. 22, p. 4; **v. 23, p. 16.**
Lake front ordinance, **v. 23, p. 21.**
Packaged commodities, Regulation of, **v. 23, p. 387.**
Peddlers, **v. 23, p. 18.**
Permit ordinance, Expiration of, v. 21, p. 192.
Railroad, Contract ordinance, Effect of, v. 21, p. 205.
Repeal, License refund upon, v. 21, p. 163.
Retroactive effect of building code, v. 21, p. 171.
Zoning, Publication in pamphlet form, v. 21, p. 177.

P

PANDERING
Crime of, Punishment, v. 22, p. 263.

PARKING
Alleys, Commercial district, v. 21, p. 201.
Attendants, Requirement for, v. 21, p. 202.
Center parkway of street, Use of, **v. 23, p. 719.**
Disabled veterans, Privileges, v. 22, p. 25.
Doctors, Privileges for, **v. 23, p. 711.**
Facility bonds, See under *Bonds.*
Lots,
Bowling alley, Use of, v. 22, p. 398.
Charitable or religious institution, License for, v. 21, p. 161.
City owned, Power to acquire, v. 22, p. 7; **v. 23, p. 705.**
Driveway permit, Use by new owner, v. 21, p. 160.
License for, v. 22, p. 367; **v. 23, p. 585.**
Park district property, **v. 23, p. 708.**
Meters,
Advertising on, **v. 23, p. 694.**
Receipts from collection of, **v. 23, p. 772.**
Overnight parking,
Buses and trucks, **v. 23, p. 720.**
Charge for, **v. 23, p. 711.**
Trucks, Status of, **v. 23, p. 712.**
Regulations,
Automobiles, Removal from restricted areas, **v. 23, p. 786.**
Federal employees, **v. 23, p. 696.**
Foreign consuls, **v. 23, p. 698; v. 23, p. 701.**
In general, v. 21, p. 201.
Loop area, Deliveries in, **v. 23, p. 700.**
Sidewalk, Use of prohibited, **v. 23, p. 720.**
Snow removal ordinance, **v. 23, p. 714.**
Temporary cardboard signs, Validity of, **v. 23, p. 703.**

PARKS AND PLAYGROUNDS
Leasing of, By City, v. 22, p. 561.
Zoning of, v. 21, p. 176.

PAWNBROKERS
Licensing of, **v. 23, p. 579.**
Receipt, Requirements, v. 22, p. 307.
Typewriters, Federal ordering prohibiting transfer of, v. 21, p. 112.
Use of mails by, v. 22, p. 319.

PEDDLERS
License,
Door to door, **v. 23, p. 18.**
Farmers, v. 21, p. 156.
Ice cream venders, v. 21, p. 156; **v. 23, p. 341.**
Manufacturer peddler, v. 21, p. 154.
Shoe polish, v. 21, p. 154.

PEDESTRIANS
Protection at garage driveways, v. 21, p. 202.
Regulation of, v. 21, p. 201; **v. 23, p. 706; v. 23, p. 717.**

PENSIONS
See *Board of Election Commissioners Employees' Annuity and Benefit fund; Firemen's Annuity and Benefit Fund; Firemen's Pension Fund; House of Correction Employees' Pension Fund; Laborer's Annuity and Benefit Fund; Laborer's and Retirement Board Employees Annuity and Benefit Fund; Library Employees' Annuity and Benefit Fund; Municipal Court and Law Department Employees' Annuity and Benefit Fund; Municipal Employees' Annuity and Benefit Fund; Policemen's Annuity and Benefit Fund; Policemen's and Firemen's Death Benefit Fund; Police Pension Fund; Public Library Employees' Pension Fund.*
Military service,
Deductions during period of, v. 21, p. 70.
Preservation of rights during, v. 21, p. 58; v. 21, p. 77.
Temporary employees, **v. 23, p. 202.**

PEOPLE'S GAS LIGHT AND COKE COMPANY
Sidewalk construction, Permit for, v. 21, p. 208.

PERMITS
Also see *Licenses, Inspections.*
Air rifles, Purchase of, v. 21, p. 130.
Bar permits, City leased property, v. 21, p. 100.
Bridges over streets, Removal of, v. 21, p. 207.
Broadcasting records, Making of in streets, v. 21, p. 198.

PERMITS—Continued
Building,
See also *Buildings*.
City Property, **v. 23, p. 580.**
Damages caused by revocation of permit, v. 21, p. 175.
Defense plant corporation, v. 22, p. 305.
National emergency, Permits during, v. 21, p. 171.
Zoning amendment, Effect on, **v. 23, p. 588.**
Burial, Amputated human member, v. 21, p. 37.
Canopies,
Compensation for, **v. 23, p. 587; v. 23, p. 783.**
Removal of, **v. 23, p. 577.**
Chicago Housing Authority, Exemption from fees, v. 21, p. 90.
City property, Structures on, **v. 23, p. 580.**
Driveways,
Chicago Transit Authority, **v. 23, p. 733; v. 23, p. 734.**
Construction under old permit, v. 21, p. 160.
Duration of, v. 22, p. 309; **v. 23, p. 576.**
Pre-existing, **v. 23, p. 578.**
Revocation of, v. 21, p. 155.
Fees, See under *Title Inspections*.
Houses, Moving of, **v. 23, p. 583.**
Motion pictures, See that title.
Revocation,
Damages caused by, v. 21, p. 155.
Non-compliance with ordinances, v. 21, p. 175.
Sewers, Increase in, **v. 23, p. 568.**
Trap door, Requirements for, v. 21, p. 158.
Tunnels, Status of, **v. 23, p. 555.**
Vehicles as stands, v. 21, p. 156.
Water service, Connection thereto, **v. 23, p. 541.** (Also see *Water*).

PETERSON AVENUE
Curbing, Removal of, v. 21, p. 101.

PLAYGROUNDS
Funds, Expenditure of, v. 22, p. 561.
Injuries at, Liability for, v. 21, p. 243.
Maintenance of, **v. 23, p. 765.**
Purchase of tax forfeited property for, v. 21, p. 224; v. 21, p. 225.
Park District, Transferring to, **v. 23, p. 807.**

PLUMBERS
Journeyman Plumbers, Temporary certificates for, v. 21, p. 179.
License,
In general, **v. 23, p. 593.**
Territorial scope of, v. 21, p. 156.
Waiver of journeyman requirements, v. 21, p. 157.

PLUMBERS—Continued
Master plumbers, Board of Examiners,
Examination, Qualifications for, v. 21, p. 157.
License,
Fees, **v. 23, p. 573.**
Reciprocity of, **v. 23, p. 572.**
Statutory change, Effect of, **v. 23, p. 111.**
Waiver of requirements, v. 21, p. 157.

PLUMBING
Certificates, Signing of, v. 21, p. 26.
Emergency war standards for, v. 21, p. 172.
Fixtures, Definition of, **v. 23, p. 380.**
Inspection, Administration of, v. 21, p. 6.
Inspection fees, Payment by H.O.L.C., v. 21, p. 91.
Regulations, Waiver of, v. 21, p. 179.

PLUMBING EXAMINERS, BOARD OF
Certificates, Issuance to paupers, v. 21, p. 179.
Minutes, Approval of, v. 21, p. 40.
Regulations, Waiver of, v. 21, p. 179; v. 21, p. 179.
Requirements, Waiver of, v. 21, p. 157.

POLICE, COMMISSIONER OF
Active duty, Assignment when disability ceases, v. 21, p. 54.
Arrest record, Removal of, v. 21, p. 21.
Arrest statement, Destruction of, v. 21, p. 9.

POLICE, DEPARTMENT OF
Arrests,
By citizen, **v. 23, p. 43.**
Without warrant, **v. 23, p. 33; v. 23, p. 34.**
Automobiles, Abandoned, Sale of, v. 22, p. 48.
Awards, Distinguished service, Wage freezing order as affecting, v. 21, p. 68.
Building department, Aid to, v. 21, p. 10.
Chicago Transit Authority, Investigations, v. 22, p. 48.
Corpses, Transporting in squadrol, **v. 23, p. 42.**
Criminals,
Arrest statement, Destruction of, v. 21, p. 9.
Identification records, Destruction of, v. 21, p. 21.
Finger printing, **v. 23, p. 35.**
Custodian of property (Police custodian),
Decedent's property, Disposition of, v. 21, p. 10.
Duties of, **v. 23, p. 32.**
Insane's property, Disposition of, v. 21, p. 11.
Receiving money from, v. 22, p. 206.
Sale by, v. 22, p. 46.
Custody of alien's property, v. 22, p. 36.
Dogs, See that title.

POLICE, DEPARTMENT OF—Continued
Embezzled funds, Disposition of, v. 21, p. 16.
Explosives, Federal license to transport, v. 21, p. 98.
Fingerprinting prisoners, **v. 23, p. 35.**
Fingerprints, Acquittal as grounds for destruction of records of, v. 21, p. 21; v. 22, p. 41.
Fugitive, Power to arrest, v. 21, p. 15.
Gambling Equipment, Destroying, v. 22, p. 45.
Handbills, See *Advertising* and *Handbills.*
Insignia, Imitation of, v. 21, p. 10.
Merit badges, Federal tax, v. 22, p. 222.
Money, Disposition of embezzled funds, v. 21, p. 16.
National Guard prisoners, Holding, **v. 23, p. 40.**
Obscene literature, Suppressing, v. 22, p. 276; **v. 23, p. 381.**
Patrol trucks, Inspection of, v. 21, p. 200.
Personal effects of decedent, Custody of, v. 21, p. 17.
Personal injury litigation, Solicitation of, **v. 23, p. 413.**
Petitions, Soliciting on street, v. 22, p. 468.
Photographs, Return of, v. 21, p. 21.
Prisoners, Delousing of, v. 21, p. 16.
Private watch service, See that title.
Records,
Arrest statement, Destruction of, v. 21, p. 9.
Criminal, Identification and fingerprinting, Destruction of, v. 21, p. 21; **v. 23, p. 31; v. 23, p. 41.**
Furnishing copies of, **v. 23, p. 42.**
Inspection of, v. 22, p. 35.
Returning, v. 22, p. 44.
Subpoena of, v. 21, p. 11.
Release of property, v. 21, p. 10.
Resignation by telegram, v. 21, p. 59.
Returning property of accused, v. 22, p. 31.
Returning records on acquittal, v. 22, p. 44.
Search of premises of deceased persons, v. 21, p. 17.
Special police, See under title *Private Watch Service.*
Strikes aboard ship, Intervention with, v. 21, p. 11.
Tear gas fountain pen, Prohibiting sale of, v. 22, p. 243; **v. 23, p. 356.**
Temporary appointees, Age of, v. 22, p. 38.
Thrill show proceeds, Donation of, v. 21, p. 242.
Warrants, Arrests without, **v. 23, p. 33; v. 23, p. 34.**
Weapons, See that title.

POLICE MAGAZINES
See also *Advertising.*
Legality of, Police Journal "13-13," v. 21, p. 10.
Unofficial Police Digests, **v. 23, p. 37.**

POLICEMEN
Active duty, Assignment when disability ceases, **v. 21, p. 54.**
Misconduct on furlough, **v. 23, p. 166; v. 23, p. 176.**
Occupation in another business, v. 21, p. 16; **v. 23, p. 173.**

POLICEMEN—Continued
Reinstatement, Second charges after, v. 21, p. 58.
Resignation by telegram, v. 21, p. 59.
Retired crossing guards, **v. 23, p. 184.**

POLICEMEN'S ANNUITY AND BENEFIT FUND
Child's annuity,
Adopted children, v. 22, p. 203; **v. 23, p. 242;** subsequent adoption, **v. 23, p. 231.**
In general, **v. 23, p. 222;** v. 23, p. 225.
Payments for insane child, v. 21, p. 74.
City contribution, Computation during disability period, v. 21, p. 75.
Deductions,
Extra,
In general, **v. 23, p. 234;** v. 23, p. 244.
Refund of, **v. 23, p. 223.**
Illegal discharge, v. 21, p. 75.
Refund of, v. 21, p. 73; v. 22, p. 196; **v. 23, p. 222.**
Returning refund, **v. 23, p. 229.**
Transferring, v. 22, p. 198; **v. 23, p. 227.**
Waiving refund, v. 22, p. 202.
Widows' annuity, Refund of, **v. 23, p. 240.**
Disability benefit,
Duty disability, Temporary policeman, **v. 23, p. 225.**
Injured out of city limits, **v. 23, p. 237.**
To member in armed forces, v. 22, p. 194.
Discharge from force, Effect of, v. 22, p. 200.
Funds, Investment of, **v. 23, p. 242.**
Future entrant, Service credits for, v. 21, p. 74.
Legally dead, Disposal of funds when, v. 21, p. 73.
Ordinary disability benefits, Status upon recovery, v. 21, **p. 54.**
Present employee, Status of, **v. 23, p. 230.**
Receipts of police custodian sales, v. 22, p. 46.
Retirement board, Payment for insane child, v. 21, p. 74.
Service credits, periods while not in service, v. 21, p. 74.
Statutory change,
Effective date of H.B. 482, **v. 23, p. 243.**
Effective date of H.B. 554, **v. 23, p. 243.**
Temporary policemen, Deductions of, v. 22, p. 204.
Widows' annuity,
Common law marriage, Based on, **v. 23, p. 238.**
Disability annuity, Based on, **v. 23, p. 233; v. 23, p. 239.**
Divorce, Proof of, v. 21, p. 75.
In general, v. 22, p. 201.
Increasing, v. 22, p. 197.
Marriage,
Proof of, v. 21, p. 76.
Violation of divorce decree, v. 21, p. 74.
Payment for fractional month, v. 21, p. 71.
Vacated divorce decree, Effect of, **v. 23, p. 232.**

POLICEMEN'S AND FIREMEN'S DEATH BENEFIT FUND
Action over, Rights of city, v. 21, p. 70.

POULTRY
See *Meats* and *Poultry.*

POWER OF ATTORNEY
Revocation of, v. 21, p. 61.
Salary checks, Power to receive, v. 21, p. 61.

PREVAILING WAGE ACT
Scope of, v. 21, p. 64; v. 21, p. 66.

PRISONERS
See also *House of Correction.*
Alcoholics, Examination of, v. 21, p. 246.
Delousing of, v. 21, p. 16.
Incarceration, Cumulation of terms, v. 21, p. 44.

PRIVATE PROPERTY
Alley agreement in private conveyance, v. 21, p. 191.
Armament plant, Inspection of, v. 21, p. 100.
Barricade of, Temporary interference by, v. 21, p. 193.
Demolition of unsafe building, v. 21, p. 171.
Easement, Termination of, v. 21, p. 300.
Fire mains, Liability for breakage, v. 21, p. 274.
Lights on porches, v. 21, p. 170.
Nuisance, Abating when owner insane, v. 21, p. 170.
Parking lot for private use, Status of, v. 21, p. 174.
Trees, Removal of dangerous, v. 21, p. 50.
Unlicensed premises, Frequenting by owner, v. 21, p. 135.
Weeds, Expense of cutting, v. 21, p. 8.

PRIVATE WATCH SERVICE AND POLICE OFFICERS
Chicago Transit Authority, Armed officers, **v. 23, p. 728.**
Special police, In general, v. 21, p. 16; v. 21, p. 162; v. 22, p. 350; **v. 23, p. 178; v. 23, p. 728.**
Special protection, In general, v. 22, p. 466.

PUBLIC HEALTH, STATE DEPARTMENT OF
Laboratory, Jurisdiction over, v. 21, p. 107.
Milk (Enzyme Modified), Requirements for, v. 21, p. 115.

PUBLIC IMPROVEMENTS
See also *Airports, Subways, Superhighways.*
Bridge and subway project, Division of costs, v. 21, p. 300.
Damages,
Blasting, Liability for, v. 21, p. 243.
Obstruction of private property, v. 21, p. 273; v. 21, p. 301.
Motor fuel tax fund, Advance for private use, v. 21, p. 301.
Prevailing wage law, Effect of, v. 21, p. 64; v. 21, p. 66; v. 21, p. 66.

PUBLIC LIBRARY EMPLOYEES' PENSION FUND
Salary Deductions, Semi-monthly basis, **v. 23, p. 288.**

PUBLIC UTILITIES
Air raid warnings, Transmission of, v. 21, p. 220.
Assignment of rights in streets, v. 21, p. 217.
Equipment, Relocation of, v. 21, p. 208; v. 21, p. 301.
Office buildings, Electrical inspection of, v. 21, p. 214.
Public ways, Compensation for use of, v. 21, p. 214.
Relocation of appliances, v. 21, p. 208; v. 21, p. 301.
Streets,
Limitation on use, v. 21, p. 216.
Use by unauthorized companies, v. 21, p. 217.
Subway,
Equipment reconstructed for, v. 21, p. 208.
Interference, Allocation of expenses, v. 21, p. 230.

PUBLIC VEHICLE LICENSE COMMISSIONER
See also *Public Vehicles* under *Motor Vehicles.*
Motor vehicle inspection, Tires, Power to test, v. 21, p. 202.

PUBLIC WAYS
See *Sidewalks* and *Streets* and *Alleys.*

PUBLIC WORKS, COMMISSIONER OF
Contracts,
Bids containing wage scale, v. 21, p. 261.
Defective specifications, v. 21, p. 263.
Extension beyond fiscal year, v. 21, p. 265.
Interpretation of, v. 21, p. 268.
State road, Removal of curbing on, v. 21, p. 101.
Water charges, Exemption from, v. 21, p. 41.
Weeds, Destruction of, v. 21, p. 8.
WPA projects,
Agreements for, v. 21, p. 95.
Sponsor's contribution, Crediting for, v. 21, p. 95.

PURCHASING AGENT
Bids, Handling of, v. 22, p. 569.
Coal, Purchase of, v. 22, p. 573.
Contracts, In general, v. 22, p. 577.
Emergency purchases, **v. 23, p. 857.**
Federal construction permit, Necessity for, **v. 23, p. 857.**
Inventories, Duty to conduct, **v. 23, p. 867.**
Municipal Court, purchases of, **v. 23, p. 867.**
Postage stamps, Purchase of, v. 22, p. 570.
Powers of, In general, v. 22, p. 133.
Purchase records, Microfilming, **v. 23, p. 866.**
Trees, Sale of, **v. 23, p. 871.**
Trucks, Reclassifying, **v. 23, p. 870.**

R

RADIO AND TELEVISION
Broadcasting records, Making on streets, v. 21, p. 198.
Television, Control over, **v. 23, p. 402.**

RAILROADS
Bridges,
Maintenance of, v. 21, p. 203.
Over streets, Removal of, v. 21, p. 207.
Coal shipments, Disclosing information about, v. 21, p. 203.
Contract conditions, Failure of performance, v. 21, p. 203.
Crossing, Compensation for, **v. 23, p. 722.**
Damage to, By city, v. 22, p. 532.
Easements, Authority for, v. 21, p. 206.
Headlight dimmers, City control over, v. 21, p. 204.
Liability, Theft from car on switch track, v. 21, p. 263.
Locomotives, In general, v. 22, p. 486.
Maintenance agreement, Jurisdiction over, v. 21, p. 206.
Public ways, Obstruction of, v. 21, p. 204.
Right-of-way,
Forfeiture of, v. 21, p. 203.
Sewers on, v. 21, p. 206.
Sidewalks, Maintenance of, v. 21, p. 205.
Spur tracks, Construction of additional, v. 21, p. 205.
Streets, Use of, v. 21, p. 194.
Switch tracks,
Compensation for, **v. 23, p. 723; v. 23, p. 724; v. 23, p. 727.**
Expense of shoring, v. 21, p. 206.
Relocation, Salvage from, v. 21, p. 206.
Zoning, Status of, **v. 23, p. 643.**
Viaducts,
Approaches to, Maintenance of, **v. 23, p. 726.**
Clearance signs on, **v. 23, p. 725.**
Expense of repairing, v. 21, p. 205; v. 21, p. 206; v. 21, p. 207.
Lights in, v. 22, p. 485.
Van Buren Street, **v. 23, p. 784.**

RECONSTRUCTION FINANCE CORPORATION
Loans to Medical Center Commission, v. 21, p. 107.

RECORDS
Criminal, See under *Police Department.*
Destruction of city records, v. 21, p. 49.
Microfilming city records, **v. 23, p. 27; v. 23, p. 866.**
Municipal court, Destruction of records, v. 21, p. 49.
Relief, Confidential nature of, v. 21, p. 184.
Special assessments, Inspection of records, v. 21, p. 304.

RELIEF
Applicant with criminal record, v. 21, p. 184.
Application, False statements in, v. 21, p. 184.
Commissioner of Relief,
Donations, Acceptance of, **v. 23, p. 658.**
Milk, Authority to contract for, v. 21, p. 183.
Money due contractor, Payment of taxes on, v. 21, p. 182.
Monies, Receipt and disposition of, v. 21, p. 182.
Overpayments to relief clients, **v. 21, p. 183.**
County, Care of city paupers, v. 22, p. 441.
Employables, Listing of, v. 21, p. 183.
Employees, v. 21, p. 54; v. 22, p. 155; v. 22, p. 156.
Funds,
Prior county service, Credit for, **v. 23, p. 657.**
Repayment of advances, v. 21, p. 179.
Salaries, v. 22, p. 155; **v. 23, p. 654.**
Use of WPA project, v. 21, p. 178.
Housing projects, Eligibility of tenants, v. 21, p. 85.
Milk, Purchase of, v. 21, p. 183.
Overpayment, Recovery of, v. 21, p. 183.
Perjury, In application for, v. 21, p. 184.
Plumbers' certificates, Issuance of, v. 21, p. 179.
Plumbing regulations, Waiver of, v. 21, p. 179.
Records, v. 21, p. 184; v. 22, p. 443.
Repayment for treatment, v. 22, p. 444.
State fund, Allocation of monies from, v. 21, p. 179.
Tax levy for, v. 21, p. 178.
Treatment, Payment for, v. 22, p. 278; v. 22, p. 444.
Tuberculosis patients, Non residents, **v. 23, p. 649.**
Unclaimed goods, v. 22, p. 261.
Veterans, Chicago Housing Authority project, Outside city limits, **v. 23, p. 650.**
Wife, Duty to support husband, **v. 23, p. 652.**

RESTAURANTS
See also *Foods, Establishments* and *Sales.*
Factory, Operation in, v. 22, p. 237.
Fortune telling in, v. 21, p. 133.
Government building, Operation in, v. 22, p. 317.
Hotels, Operation in, v. 22, p. 432.
Liquors, Sale of, Zoning regulations for, v. 21, p. 138.

RETAILER'S OCCUPATION TAX
See under *Contracts.*

RIPARIAN RIGHTS
Illinois and Michigan Canal, v. 21, p. 274.

S

SALARIES
Assignment,
Honoring for back salary claims, v. 21, p. 62.
Wage, **v. 23, p. 189.**
Awards for distinguished service, Wage freezing order as affecting, v. 21, p. 68.
Back salary,
Assignment of claims to, v. 21, p. 62.
Set-offs, **v. 23, p. 191.**
Checks, Power of attorney for receiving, v. 21, p. 61.
Deductions for annuity, Payment after, v. 21, p. 61.
Emergency work by regular employees, v. 21, p. 64.
Extra compensation, **v. 23, p. 197.**
Firemen's Arbitration Board, **v. 23, p. 161; v. 23, p. 187.**
Fixing of, By city council, v. 22, p. 30.
Holiday work, **v. 23, p. 199.**
Increasing,
Effective date of, **v. 23, p. 193.**
Per diem employees, v. 22, p. 6.
Lien for federal taxes, v. 21, p. 64; **v. 23, p. 196.**
Overtime compensation, Right to, v. 21, p. 62; **v. 23, p. 201.**
Painters engaged in maintenance work, v. 21, p. 66.
Power of attorney to collect, Revocation of, v. 21, p. 61.
Prevailing wage law, Effect of, v. 21, p. 64; v. 21, p. 66.
Retirement, Back payment when unlawful, v. 21, p. 61.
Suspension period, Claim for, **v. 23, p. 193; v. 23, p. 194.**
Union welfare payments, Included in, **v. 23, p. 189.**
Vacation period, Earned prior to death, **v. 23, p. 198.**

SALES
Auctions, See that title.
Closing out sales, License for, v. 21, p. 155.
Federal tax, Sales to city, v. 21, p. 258.
Fire sale, License for, v. 21, p. 162.
Liquidation, v. 21, p. 155; **v. 23, p. 407.**

SALES, BY CITY
Increase in price of maps, v. 22, p. 112.
Increase in price of pamphlets, v. 22, p. 113.
Public library, Pamphlets, v. 22, p. 113.

SALES TAX
See *Retailer's Occupation Tax* under *Contracts.*

SANITARY DISTRICT
Bridges,
Bryn Mawr avenue bridge, Warning signals on, v. 21, p. 111.
Repair and maintenance of, v. 21, p. 105; v. 21, p. 107.
Warning signals on, v. 21, p. 111.
Water supply, Furnishing of, v. 21, p. 256.

SCHOOLS
Cigarettes, Sale, Of near, v. 22, p. 283.
Tax levy for, v. 22, p. 19.

SCREEN QUIZ
Legality of, v. 21, p. 130.

SEAL OF CITY
Birth and death certificates, Affixing on, v. 21, p. 32.
Use of, In general, **v. 23, p. 30.**
Use on advertisement, v. 21, p. 162.

SETOFF
City's debt, v. 21, p. 249.
Judgment against city, v. 21, p. 251.

SEWERS
Connections, Outside city, **v. 23, p. 820; v. 23, p. 822; v. 23, p. 825; v. 23, p. 829.**
Construction,
Bonds for, **v. 23, p. 792.**
Drying up wells, Liability for, v. 21, p. 101.
Motor fuel tax refund, Use for, v. 21, p. 241.
Permits, Increase in fees, **v. 23, p. 568.**
Railroad right-of-way, Interception of, v. 21, p. 206.
Private sewers, Damage by city, **v. 23, p. 778.**
Special deposits, Use of, v. 21, p. 240.
Unpaid sewer bills, **v. 23, p. 828.**
Partial payment, **v. 23, p. 830.**
Vacated streets, Cost of relocation in, v. 21, p. 191.

SHOE POLISH
Sale of, License for, v. 21, p. 154.

SIDEWALKS
See also *Streets* and *Alleys.*
Bank depositing, "Snorkel" system, **v. 23, p. 686.**
Cinder walks, Driveway over, v. 21, p. 192.
Driveways, Pedestrian protection at, v. 21, p. 202.
Encroachments, Stairways as, v. 21, p. 273.
Hand Bills, See *Advertising.*
Michigan Avenue, See that title.
Newsstand at Chicago Public Library, **v. 23, p. 685.**
Noise, Prohibition of, See *Sound Amplifiers.*
Obstructions,
In general, **v. 23, p. 680.**
Removal of, **v. 23, p. 106.**
Ornamental clock, Maintenance of, v. 21, p. 192.
Parking on prohibited, **v. 23, p. 720.**
Pedestrian, Rights of, v. 21, p. 201; v. 21, p. 302.

SIDEWALKS—Continued
Permit, Requirement by utilities, v. 21, p. 208.
Railroad structures, Maintenance beneath, v. 21, p. 272.
Repair,
Abutting owner, Liability of, **v. 23, p. 790.**
Revolving fund for, **v. 23, p. 762.**
Snow removal, Private property, **v. 23, p. 670.**
Stairways, Removal of, v. 21, p. 273.
State jurisdiction, Liability for injuries when under, v. 21, p. 247.
Subsidewalk space,
Abutting owner, Rights of, v. 21, p. 272.
Permit for use of, v. 21, p. 158.
Subway stairs, Use for, v. 21, p. 272.
Supports, Repair of, v. 21, p. 301.

SINGLE DWELLINGS
Exit lighting, Requirements for, v. 21, p. 166.

SMOKE INSPECTION AND ABATEMENT
Administration of, v. 21, p. 40; **v. 23, p. 399.**
Jurisdiction, Deputy smoke inspector, v. 22, p. 267.
Railroad locomotives, v. 22, p. 140; v. 22, p. 486.

SMOKING ORDINANCE
Provisions of, In general, v. 22, p. 286.

SNOW AND ICE
Accumulation, Liability of city for, v. 21, p. 194.

SOCIAL SECURITY ACT
Chicago Housing Authority employees, Exemption of, v. 21, p. 80.
Salary payments,
Municipal employees annuity and benefit fund, Effect on eligibility, v. 21, p. 69.
Retirement board members, Applicability to, v. 21, p. 69.

SOUND AMPLIFIERS
Prohibition, Validity of, v. 21, p. 197; **v. 23, p. 668; v. 23, p. 677; v. 23, p. 681.**
Airplanes, **v. 23, p. 684.**

SPECIAL ASSESSMENTS
Bonds,
Acceptance of, v. 21, p. 302.
Duplicates, Issuance of, v. 21, p. 305; v. 22, p. 582.
Foreclosure sales, v. 22, p. 583.
Information to bondholders, v. 21, p. 304; v. 21, p. 305.
Collections, Information concerning, v. 21, p. 304.
Compromise of lien, v. 21, p. 304.
Delinquent property, Forfeiture to state, v. 21, p. 303.

SPECIAL ASSESSMENTS—Continued
Funds, Distribution of, **v. 23, p. 768.**
Interest,
Payment of, v. 21, p. 302.
Waiver of, v. 21, p. 304.
Payment, Use of special assessment bonds for, v. 21, p. 302; v. 21, p. 303; v. 21, p. 303.
Penalties, Reduction of, v. 21, p. 304.
Records, Inspection of, v. 21, p. 304; v. 21, p. 305.
Second payments on, v. 21, p. 302.
Statute of limitations on payment of, v. 21, p. 302.
Surplus funds, Status of, v. 21, p. 304.
Tax deeds, Offer for, **v. 23, p. 777.**
Use for special assessment payments, v. 21, p. 303; v. 21, p. 303.

SPECIAL POLICEMEN
Licensing of, v. 21, p. 162; v. 22, p. 350; v. 22, p. 466.
Weapons, Carrying of, v. 21, p. 16; v. 21, p. 162; **v. 23, p. 178; v. 23, p. 728.**

SPRINKLERS
Garages below street level, v. 21, p. 166.

STAIRWAYS
Encroachment on sidewalk, Removal, v. 21, p. 273.

STANDS
Vehicles used as, v. 21, p. 156.

STATE OF ILLINOIS
Arterial highway, Maintenance of, v. 21, p. 192; v. 21, p. 193.
Cigarette dealers, Licensing of, v. 21, p. 7.
City liability, As affecting, v. 22, p. 540.
Financial Responsilibity Act, v. 22, p. 231.
Health regulations, Compliance with, v. 21, p. 28.
Highways,
Curbing, Removal of, v. 21, p. 101.
Injuries, Liability for, v. 21, p. 247.
State aid road, Control of, v. 21, p. 192.
Width on MFT projects, v. 21, p. 107.
Housing Authorities Act, Amendment of, v. 21, p. 90.
Illinois and Michigan Canal, See that title.
Liquor establishments, See *Liquor Dealers.*
Misrepresentation as offense against, v. 21, p. 116.
Motor fuel tax fund,
Arterial highway, Maintenance of, v. 21, p. 193.
Bridges, Maintenance of, **v. 23, p. 770; v. 23, p. 774.**
Investment of, **v. 23, p. 769.**
Private use of, v. 21, p. 301.
Street lighting, etc., Use to install, v. 21, p. 241.

STATE OF ILLINOIS—Continued
Streets paved by, Width of, v. 21, p. 107.
Uses, In general, v. 22, p. 509.
Utilities, Use to install, v. 21, p. 241.
Motor trucks, Testing of, v. 21, p. 198; v. 21, p. 200.
Plumber's license, Privileges in city, v. 21, p. 156.
Public health department manual, Adoption of, v. 21, p. 31.
Public health laboratory, Jurisdiction over, v. 21, p. 107.
Relief fund, Allocations from, v. 21, p. 179.
Resources, depletion tax exemption, **v. 23, p. 861.**
Sales Tax, See *Retailer's Tax* under *Contracts.*
Statutes,
Defective passage of, v. 21, p. 27.
Ordinances, Conflict with, v. 21, p. 27.

STATION WAGON
Classification for wheel tax, v. 21, p. 150.

STREET RAILWAYS
Tracks, Relocation of, v. 21, p. 216; v. 21, p. 217.

STATUTE OF LIMITATIONS
Waiver by city council, v. 21, p. 248.

STREETS AND ALLEYS
See also *Advertising* and *Sidewalks.*
Automobiles, See under *Motor Vehicles.*
Alley agreement,
Guard rail in, **v. 23, p. 688.**
In private warranty deed, v. 21, p. 191.
Arterial highway, Definition of, v. 21, p. 193.
Avenue "O," City's rights in, v. 21, p. 187.
Barricading of dangerous street, v. 21, p. 193.
Billboards, Removal of, v. 22, p. 473.
Boulevards, See *Boulevards.*
Bridges, See that Title.
Broadcasting records, Making of, v. 21, p. 198.
Buses, Control of, v. 22, p. 351; v. 22, p. 463; v. 22, p. 464; v. 22, p. 481.
Christiana Avenue, Status of, v. 21, p. 186.
Congress Street, See under *Superhighways.*
Dangerous conditions, Barricading of, v. 21, p. 193.
Dedication, See *Dedication of Streets and Alleys.*
Driveway, See under *Driveways.*
Elevated railway columns, Removal of, v. 21, p. 207.
Establishment by prescription, v. 21, p. 186.
47th Street, Jurisdiction over, v. 21, p. 103.
Gasoline trucks, Regulation of, **v. 23, p. 674; v. 23, p. 715.**
Handbills, See under *Advertising.*
Jurisdiction, Transfer to Park District, v. 21, p. 101.

STREETS AND ALLEYS—Continued
Lease space in, v. 21, p. 194.
Maintenance, Duty of city, v. 21, p. 186.
Michigan Avenue, See that Title.
Motor fuel tax funds, See *Motor Fuel Tax Funds* under *State of Illinois.*
Names, Change of, v. 21, p. 5; v. 21, p. 6.
Noise Abatement, See that title.
Obstructions, Removal of, v. 22, p. 451.
Parking, See that title.
Paving, By private individual, v. 22, p. 534.
Pedestrian, See under *Traffic.*
Peterson Avenue, Removal of curbing, v. 21, p. 101.
Plat, See under *Dedication.*
Private use, Lease for, v. 21, p. 194.
Public use, Right of, v. 21, p. 216.
Public utilities,
Compensation for use of, v. 21, p. 214.
Relocating appliances of, v. 21, p. 301; v. 22, p. 451; v. 22, p. 452.
Use, Limitation upon, v. 21, p. 216.
Railroad viaducts, See under *Railroads.*
Railroads, See that title.
Repairs, Vehicle tax funds, v. 21, p. 235.
Sawyer Avenue, Status of, v. 21, p. 186.
Scales, Alley, Fee for, v. 22, p. 218.
Search lights, Use of, **v. 23, p. 682.**
Signs,
Overhanging electric, v. 22, p. 473.
Removal of, v. 21, p. 45.
Snow removal, v. 22, p. 525; **v. 23, p. 670.**
Sound amplifiers,
Airplane, **v. 23, p. 684.**
In general, **v. 23, p. 668; v. 23, p. 677; v. 23, p. 681.**
Prohibition of, v. 21, p. 197.
Spaulding Avenue, Status of, v. 21, p. 186.
Speed limit, Regulation of, v. 21, p. 201.
State jurisdiction, Liability for injuries, v. 21, p. 247.
Street car tracks, See *Chicago Transit Authority.*
Subdivision land, Utilities in, v. 21, p. 188.
Subsurface space, Also see *Subsidewalk Space* under *Sidewalks.*
Control over, v. 21, p. 193.
State use of, v. 21, p. 187.
Title to, v. 21, p. 193.
Subways, See that title.
Superhighways, See that title.
Traffic, See that title.
Use of,
Automobiles, Jagged fenders, **v. 23, p. 676.**
Gasoline trucks, See *Flammable Liquids.*
Petitions, v. 22, p. 468.

STREETS AND ALLEYS—Continued
Private watch service, See that title.
Sound amplifiers, See that title.
Telegraph lines, v. 21, p. 214; v. 22, p. 461.
Trucks, Overloading of, **v. 23, p. 670.**
Vacation, See *Vacation* of *Streets* and *Alleys.*
Wacker Drive, Elevated railway columns, Removal of, v. 21, p. 207.
Western Avenue, Street car track relocation, v. 21, p. 216; v. 21, p. 217.
Width, Control of, v. 21, p. 107.

STREETS AND ELECTRICITY, COMMISSIONER OF
Driveway permits, Revocation of, v. 21, p. 155.
Relief clients, Assigning for work, v. 21, p. 183.

STRIKES
Control over, By city, v. 22, p. 269.
Seamen, Police intervention with, v. 21, p. 11.

SUBDIVISIONS
Control of, v. 21, p. 188.
Plat, Approval of, v. 21, p. 188.
Utilities, Installation of, v. 21, p. 188.

SUBMARINE CABLE
Damage, Liability for, v. 21, p. 247.
Damage to, v. 22, p. 223.

SUBWAYS
Contracts,
Delay by city, v. 21, p. 265.
Extra compensation under, v. 21, p. 266.
Interpretation of, v. 21, p. 268.
Omitted work, Payment for, v. 21, p. 267.
Reimbursement for city expenses, v. 21, p. 264.
Retailers' Occupation Tax on, See under *Contracts.*
Damage to city property, Liability of contractor, v. 21, p. 268.
Drainage in, v. 21, p. 29.
Judgments, Judgment tax fund, v. 22, p. 534.
Public utility equipment,
Relocating of, v. 21, p. 301.
Replacement costs for, v. 21, p. 208.
Revenue bonds, **v. 23, p. 792.**
Stair construction, Subsidewalk space for, v. 21, p. 272.
Title examination, Expense of, v. 21, p. 248.
Traction fund,
Municipal utilities, Use for moving, v. 21, p. 236.
Protective maintenance, Use for, v. 21, p. 240.
Water mains, Use to relocate, v. 21, p. 238.

SUBWAYS—Continued
Tunnel project, Expense of studying, v. 21, p. 229.
Tunnels, Liability for loss of service, v. 21, p. 268.
Water pipes, Relocation of, v. 21, p. 273.
Waterworks expenses, Payment of, v. 21, p. 230.

SUBWAYS, COMMISSIONER OF
Drainage, Jurisdiction over, v. 21, p. 29.
Employees, Overtime compensation for, v. 21, p. 62.
Stairways on sidewalk, Removal of, v. 21, p. 273.
Tunnel project, Expense of studying, v. 21, p. 229.

SUPERHIGHWAYS
Building along, Leasing of, v. 22, p. 514.
Congress Street, v. 21, p. 272; v. 22, p. 514; v. 22, p. 516; **v. 23, p. 881.**
Illinois and Michigan Canal, Use of, **v. 23, p. 873.**
In general, v. 22, p. 516.

SURETY BONDS
See under *Bonds.*

T

TANKS
Flammable liquids, See that title.
Vegetable oils, Storage of, v. 21, p. 177.

TAVERNS
See *Liquor Dealers.*

TAX ANTICIPATION WARRANTS
Forestry purposes, Validity of, **v. 23, p. 760.**
Issuance of, Legal expenses of, **v. 23, p. 761.**
Liens, Status of, v. 21, p. 227.
Municipal Tuberculosis Sanitarium, Status of, **v. 23, p. 767.**
Tax monies, Rights to, v. 21, p. 227.

TAXES
Air raid sirens, Illinois Retailers' Occupation Tax on, **v. 23, p. 756.**
City,
Charitable or religious institutions, Parking lot of, v. 21, p. 161.
Utility bills, Validity of, **v. 23, p. 758.**
Delinquent property,
Dedication of street, Acceptance of, v. 21, p. 226.
Foreclosure suits, Appointment of receiver in, v. 21, p. 169.
Possession of, v. 21, p. 225.
Tax deed, Offer of, **v. 23, p. 777.**
Federal, See *Taxes* under *United States.*

TAXES—Continued
Forfeited property, Purchase of, v. 21, p. 224.
Illinois Retailers' Occupation Tax, See *Contracts* and *Contractors.*
Leasehold estate on city property, v. 21, p. 258.
Levy for relief purposes, v. 21, p. 178.
Payment, Effect on vacation of street, v. 21, p. 186.
Real estate,
City property, DuPage County, **v. 23, p. 831.**
Delinquent, v. 22, p. 503.
Outstanding tax warrants, Overestimating, **v. 23, p. 752.**
Reinsurance companies, Levy on, v. 21, p. 224.
Sale, Purchase at, v. 21, p. 224.
Sales, See *Retailer's Tax* under *Contracts.*
School, Levy for, v. 22, p. 19.
Service charges for housing projects, v. 21, p. 78; v. 21, p. 90; v. 21, p. 91; **v. 23, p. 293; v. 23, p. 295; v. 23, p. 296.**

TAXICABS
See *Public Vehicles* and *Taxicabs* under *Motor Vehicles.*

TEAR GAS
Burglar alarm, License for, v. 21, p. 154.
Fountain pen, Legality of, v. 22, p. 243; **v. 23, p. 356.**

TELEGRAPH COMPANIES
Streets,
Assignment of rights in, v. 21, p. 217.
Compensation for use of, v. 21, p. 214.
Use by unauthorized companies, v. 21, p. 217.

TELEPHONES AND TELEPHONE COMPANIES
Streets,
Assignment of rights in, v. 21, p. 217.
Use by unauthorized companies, v. 21, p. 217.

TELEVISION
Programs, Control of, v. 22, p. 245; **v. 23, p. 402.**

THEATRES
Hollywood movie quiz, v. 21, p. 132.
Lotteries, Prohibition of, v. 21, p. 131.
Screen quiz, Prohibition of, v. 21, p. 130; v. 21, p. 133.

TICKET BROKERS
In general, v. 22, p. 458.
Travel tickets, v. 22, p. 312.

TOBACCO DEALERS
See *Cigarettes* and *Cigarette Dealers.*

TRACTION FUND
See also *Chicago Transit Authority.*
Expenditures, Classification of, v. 21, p. 236.
Subways,
Use in connection with, v. 21, p. 236; v. 21, p. 238; v. 21, p. 240.
Waterworks interference, Expense of, v. 21, p. 230.
Title examinations, Cost of, v. 21, p. 248.
Utilities, Use in moving, v. 21, p. 236.
Warrants, Chargeable against, v. 21, p. 236.
Water pipes,
Protective maintenance, Use of fund for, v. 21, p. 240.
Relocating, Use of fund for, v. 21, p. 273; v. 21, p. 238.

TRAFFIC
Crossing guards, Private employment of, **v. 23, p. 710.**
Driver's test, Legality of, v. 21, p. 201.
Garage driveway, Protection at, v. 21, p. 202.
Lights,
Advertising on, v. 22, p. 469.
Costs of, Motor fuel tax fund, v. 22, p. 505.
Faulty, Liability for, v. 22, p. 535; **v. 23, p. 704.**
Single-suspension type, Use of, v. 22, p. 479.
Loading near freight house, v. 21, p. 204.
Pedestrian, Regulation of, v. 21, p. 201; **v. 23, p. 706; v. 23, p. 717.**
Speed limits, Prima facie limit, Fixing of, v. 21, p. 201.
Vehicles,
Abandoned, Removal of, v. 22, p. 476.
Motor buses, v. 22, p. 481.
Regulations,
Federal employees, **v. 23, p. 696.**
Foreign consuls, Subject to, **v. 23, p. 698; v. 23, p. 701.**
In general, **v. 23, p. 701.**
Speed laws, In general, v. 22, p. 477.
Speed limit signs, v. 22, p. 476.
Violations, Summonses, Tie-on, v. 22, p. 475.

TRAILER CAMPS
Buildings, Definition of, v. 21, p. 173.
Frontage consents for, v. 21, p. 173.

TREES
Care of, On parkways, v. 22, p. 139.
Removal of,
Compensation for, City contract, **v. 23, p. 863.**
In general, v. 21, p. 50; **v. 23, p. 808.**
Sale of wood chips, **v. 23, p. 871.**

TRUCKS
See *Motor Vehicles.*

TUNNELS
See also *Chicago Tunnel Company.*
Plans, Expense of studying, v. 21, p. 229.

U

UNDERTAKERS AND UNDERTAKING ESTABLISHMENTS
Clothes and casket of decedent, Removal of, v. 21, p. 134.
Death certificates, Signing, v. 22, p. 90.
Frontage consents,
Boulevard, Location on, v. 21, p. 173; v. 22, p. 421.
In general, **v. 23, p. 635.**
Residence block, Location on, v. 21, p. 172.
Trolley bus line, Location on, v. 21, p. 175.
Licenses,
Application cards, Signing of, **v. 23, p. 496.**
Death of licensee, Effect of, v. 21, p. 146.
Military service, As affecting, v. 21, p. 147.
Multiple licenses, **v. 23, p. 488; v. 23, p. 495; v. 23, p. 497.**
Number for one place, v. 21, p. 145.
Renewal, Examination for, **v. 23, p. 490.**
Requirements, **v. 23, p. 498.**
Two licenses for one location, v. 21, p. 146.
Listing,
Deceased undertaker, v. 21, p. 146; **v. 23, p. 492.**
Firm name, Use of, **v. 23, p. 491.**
Non-resident undertaker, Authority of, v. 21, p. 145.
Operation when owner deceased, v. 21, p. 146.
Out-of-town body, Burial of, v. 21, p. 145.
Residence telephone, Listing of, **v. 23, p. 494.**

UNITED STATES
Airplane observation deck, Admission fees, Federal tax on, **v. 23, p. 298.**
Army service,
See *Military Service* under *Employees of City.*
Buildings,
Boiler inspection fees, **v. 23, p. 299.**
City jurisdiction over, v. 21, p. 98.
Lease for Army Signal Corps, City jurisdiction over, v. 21, p. 99.
Permits, Twin Towers housing project, **v. 23, p. 300.**
Taxation of, **v. 23, p. 301; v. 23, p. 304.**
Collector of Internal Revenue, Distraint warrant by, v. 21, p. 182.
Congress Street, Rights in, v. 21, p. 272.

UNITED STATES—Continued
Defense Plant Corporation,
Buildings financed by, City jurisdiction over, v. 21, p. 98.
Buildings of, City jurisdiction over, v. 21, p. 98.
Defense plants financed by, City jurisdiction over, v. 21, p. 98.
Dredging damage, Liability for, v. 22, p. 223.
Easement, Acceptance of, v. 21, p. 95.
Employees, Homes for, v. 22, p. 228.
Excise tax,
Auto parts, **v. 23, p. 755.**
City purchases, v. 21, p. 258.
Computing, v. 22, p. 361.
Increase in, Effect on contract, **v. 23, p. 842.**
Police merit badges, v. 22, p. 222.
Subway equipment, v. 21, p. 259.
Explosives, License to transport by police, v. 21, p. 98.
Federal Fair Labor Standards Act, Effect on city contracts, **v. 23, p. 848.**
Federal Health Funds, **v. 23, p. 769.**
Federal Housing Funds, Disbursement of, **v. 23, p. 5.**
Housing projects,
Sidewalk construction, Permit for, v. 21, p. 208.
Taxation of, v. 21, p. 78; v. 21, p. 90; v. 21, p. 91; **v. 23, p. 300; v. 23, p. 301; v. 23, p. 304.**
Illinois and Michigan Canal, See that title.
Income tax,
City employees, v. 21, p. 64; v. 22, p. 226.
Donations to Service Men's Center, Deduction for, v. 21, p. 100.
Lien for, v. 21, p. 64; v. 22, p. 226.
Marketing rules and regulations, Retroactive effect of, v. 21, p. 271.
Motor vehicle bearing name of, v. 21, p. 98.
Municipal Tuberculosis Sanitarium funds, Return of, **v. 23, p. 58; v. 23, p. 61.**
OPA
Regulations, Liability of city to, v. 21, p. 112.
Retroactive effect of, v. 21, p. 271.
Public Health Service funds, **v. 23, p. 44; v. 23, p. 769.**
Revenue Law re: Freight charges, Effect on city, contracts v. 21, p. 271.
Selective Service Act, See *Selective Service Registrants* under *Military Service.*
Taxes,
Excise tax on, See that title this section.
Distraint warrant for, v. 21, p. 182.
Excise taxes, See that title this section.
Social security tax, Payment affecting annuity fund rights, v. 21, p. 69.
Transportation tax, Application to city employees, v. 21, p. 259.
Typewriters, Transfer of possession by pawnbrokers, v. 21, p. 112.
Vehicle tax, Liability for, v. 22, p. 219.

V

VACATION OF STREETS AND ALLEYS
See also *Dedication.*
Boulevard, Altering status of South Parkway, **v. 23, p. 660.**
Chicago Housing Authority, Removal of improvements in vacated area, v. 21, p. 90.
Ingress and egress, Liability for loss of, v. 21, p. 191.
Ordinance, Reservation re: Water mains, v. 21, p. 191.
Park purposes, Vacation for, v. 21, p. 185.
Partial vacation, Liability for, v. 21, p. 185.
Philadelphia place, Recording of instrument, v. 21, p. 191.
Recording by Bureau of Maps, v. 21, p. 185.
Recording of instruments, Effective date of, v. 21, p. 191.
Removal of unwanted improvements, v. 21, p. 90.
Repeal of, **v. 23, p. 664.**
Reversionary interest, Acquisition by Housing Authority, v. 21, p. 84.
Sewers, Cost of relocation, v. 21, p. 191.
Taxes, Effect of payment of, v. 21, p. 186.
Turning area, Construction in lieu of outlet, v. 21, p. 191.
Water mains,
Cost of relocation, v. 21, p. 191.
Reservation for operation, v. 21, p. 191.

VACCINATION
Responsibility of city, Negligence, v. 22, p. 87.

VEHICLES
See *Motor Vehicles.*

VEHICLE TAX FUND
Authorized uses, In general, v. 22, p. 528.
Chicago Transit Authority, Subject to, v. 22, p. 493.
Snow removal, Costs of, v. 22, p. 525.
Street repair, Use for WPA improved street, v. 21, p. 235.
Traffic lights, Costs of, v. 22, p. 505.
Trees, Care of, v. 22, p. 139.

VENEREAL DISEASES
Hospitalization, Court order for, v. 21, p. 32.
Literature, Distribution of, **v. 23, p. 44.**
Minors, Treatment of, v. 21, p. 27.

VENTILATION
Cooling system for hospital delivery room, Requirements, v. 21, p. 167.
Dry cleaning establishments, Systems for, **v. 23, p. 599.**
Mechanical equipment for, Inspection of, **v. 23, p. 602.**

VIADUCTS
See *Railroads.*

VOTING MACHINES
Bonds, Status of, **v. 23, p. 790.**
Payment for, **v. 23, p. 768.**

W

WARRANTS
Fugitive warrant, Obtaining by police, v. 21, p. 15.
Tax anticipation warrants, See that title.
Traction fund, Chargeable against, v. 21, p. 236.

WATCHMEN
See *Private Watch Service.*

WATER
Charges,
Charitable organizations, Exemptions for, v. 21, p. 41.
Chicago Park District, **v. 23, p. 778.**
Connection fees, **v. 23, p. 541.**
Hospitals, v. 21, p. 41.
Receipts for, Retention of, **v. 23, p. 773.**
Unpaid, Liability of new owner, **v. 23, p. 828.**
Filtration plant,
Legality of, **v. 23, p. 817; v. 23, p. 819.**
Tidelands case, Effect of, **v. 23, p. 13.**
Fluoridation, Legality of, **v. 23, p. 397.**
Funds,
Expenditures, Approval of, **v. 23, p. 759; v. 23, p. 763.**
Property, Donation of, v. 21, p. 7.
Mains,
Beyond city limits, v. 21, p. 257.
Breakage of, v. 21, p. 274; **v. 23, p. 782.**
Deposit covering several certificates, v. 21, p. 257.
Extensions, Refunds on, v. 21, p. 258.
Installation by motor fuel tax fund, v. 21, p. 241.
Protection during subway construction, Cost of, v. 21, p. 240.
Refund on separate certificates, v. 21, p. 257.
Relocation of utility equipment for installation of, v. 21, p. 216.
Vacated streets, Relocation costs, v. 21, p. 191.
Pipes, Relocation for subway, v. 21, p. 273.
Prudential building, Duty to furnish, **v. 23, p. 826.**
Pumping station, Ownership of, v. 21, p. 256.
Supply,
Beyond city limits, See *Non-residents* below.
Municipal Tuberculosis Sanitarium, **v. 23, p. 824.**
Depriving tenants of, v. 22, p. 280.
Douglas airport, v. 22, p. 225.

WATER—Continued
Industrial districts, Furnishing to, v. 21, p. 256.
Non-residents, Furnishing to, v. 21, p. 257; v. 22, p. 1; v. 22, p. 125.
O'Hare Field, v. 22, p. 280.
Other municipalities, Furnishing to, v. 21, p. 256.
Park District, Claim against, **v. 23, p. 778.**
Rates, v. 22, p. 524.
Sanitary District, v. 21, p. 256.
Tanks, In general, v. 22, p. 411.
Waterworks system, Expenses of subway interference, v. 21, p. 230.

WATERWAYS
Bridges, See that title.
Calumet River, See that title.
Chicago River, See that title.
Dredging, Damages, From, v. 22, p. 223.
Easement for, v. 21, p. 95.
Illinois and Michigan Canal, See that title.

WEAPONS
Air rifles,
Regulation governing, v. 21, p. 130.
Sale of, v. 22, p. 244.
Concealed weapons, Prohibition of, v. 21, p. 130.
Knives, Restrictions on carrying, v. 21, p. 130.
Sale of, Recording, v. 22, p. 244; **v. 23, p. 357.**
Special police, See that title.
Tear gas fountain pen, Sale of, v. 22, p. 243; **v. 23, p. 356.**

WEEDS
Cutting,
Expense of, v. 21, p. 8.
No lien for, **v. 23, p. 411.**
Destruction of, v. 21, p. 136; **v. 23, p. 398.**
Nuisance, Classification as, v. 21, p. 136.

WEIGHTS AND MEASURES
Cattle, Weighing, Union Stock Yards, v. 21, p. 45.
Coal, Fraudulent substitution of, v. 21, p. 203.
Inspection, Scales, Union Stock Yards, v. 21, p. 45.
Purchases outside city, Coal, v. 22, p. 344.
Weight certificates, Arlington Heights, v. 22, p. 232.

WELFARE
See *Relief.*

WELFARE ADMINISTRATION, COMMISSIONER OF
See *Relief.*

WESTERN AVENUE
Street car tracks, Relocation of, v. 21, p. 216; v. 21, p. 217.

WHEEL TAX
See *Vehicle Tax Fund* and *Licensing* under *Motor Vehicles.*

WOLF LAKE
Level, Control of, v. 21, p. 187.

WORDS AND PHRASES
"Arterial highway street," v. 21, p. 193.
"Premises," v. 21, p. 29.
"Renewing," v. 21, p. 203.
"Team tracks," v. 21, p. 134.
"Tow truck," v. 21, p. 147.

WORKMEN'S COMPENSATION ACT
Compliance with Act by contractors, v. 21, p. 271.
Deposit of securities under, v. 21, p. 271.

WORKS PROJECT ADMINISTRATION
Agreements, Execution of, v. 21, p. 95.
Projects,
Costs, Liability for, v. 21, p. 95.
Relief expenditures for, v. 21, p. 178.
Sponsor's contribution, Credit for regular employees, v. 21, p. 95.
Street car tracks, Relocation of, v. 21, p. 216.
Street improvements, Funds for repair of, v. 21, p. 235.
Workers, Liability for injuries of, v. 21, p. 247.

X

X-RAY LABORATORY
Operation of, v. 21, p. 157.

Z

ZONING
Addition to building, **v. 23, p. 645.**
Beauty shop, In home, v. 22, p. 440.
Board of Appeals,
Conformity decision, Reversal of, v. 21, p. 176.
Decision of, v. 22, p. 434.
Revised zoning ordinance, Effect on action of board, v. 21, p. 177.
Cemetery, Within city limits, v. 22, p. 438.
Corner lot, Definition of, **v. 23, p. 639.**
Day nursery, Requirements for, **v. 23, p. 647.**
Districts, Effect of change in, v. 21, p. 176.

ZONING—Continued
Fences, Proposed ordinance, v. 22, p. 431.
Frontage consents, See that title.
Hotel, Restaurant in, v. 22, p. 432.
Laboratory, Commercial district, **v. 23, p. 643.**
Liquid gas, Manufacture of, **v. 23, p. 413.**
Liquor sales in clubs, restaurants, etc., v. 21, p. 138.
Live poultry establishments, Status of, **v. 23, p. 642.**
Lots,
Division of, **v. 23, p. 641.**
Requirements for dwellings, v. 21, p. 170.
Zoning of, **v. 23, p. 641.**
Medical center commission, Power of, v. 21, p. 177.
Motion picture film, Storage of, **v. 23, p. 638.**
Off street parking, Requirement for, **v. 23, p. 646; v. 23, p. 648.**
Ordinance,
Amendment,
Building permit, Effect on, **v. 23, p. 588.**
Procedure for, v. 21, p. 176.
Publication of, v. 21, p. 177.
Scope of, p. 21, p. 176.
Revision, Effect on pending variation ordinances, v. 21, p. 177.
Parking lot,
Bowling alley, v. 22, p. 398.
Drive-in restaurant, **v. 23, p. 640.**
Park land, v. 21, p. 176.
Placards, Public halls, v. 22, p. 428.
Posters, Regulations, v. 22, p. 310.
Poultry killing establishments, Classifications of, v. 21, p. 175; **v. 23, p. 642.**
Reclaimed land, Use for park purposes, v. 21, p. 176.
Residences, Exclusion of, v. 22, p. 436.
Storage houses, Parcel delivery, v. 22, p. 412.
Switch tracks, As a permitted use, **v. 23, p. 643.**
Tanks for storage of vegetable oils, v. 21, p. 177.
Trailers, Location of, v. 22, p. 420.
Vacation of streets, Zoning conditioned upon, **v. 23, p. 641.**
Woodworking shop, **v. 23, p. 638.**